AN

# EXAMINATION

OF THE

# BRITISH DOCTRINE

WHICH SUBJECTS TO CAPTURE

## A NEUTRAL TRADE

NOT OPEN IN TIME OF PEACE.

---

THE SECOND EDITION.

CONTAINING

*A Letter from the Minister Plenipotentiary of the United States, to Lord Mulgrave, late Secretary of State for Foreign Affairs.*

---

AMERICA, PRINTED.

LONDON,

REPRINTED FOR J. JOHNSON, ST. PAUL'S CHURCHYARD,
AND
W. J. & J. RICHARDSON, ROYAL EXCHANGE.
1806.

Ellerton and Byworth, Printers, Johnson's Court, Fleet Street.

# EXAMINATION

OF THE

# BRITISH DOCTRINE

WHICH SUBJECTS TO CAPTURE A NEUTRAL TRADE NOT OPEN IN TIME OF PEACE.

IN times of peace, among all nations, their commercial intercourse is under no other restrictions than what may be imposed by their respective laws, or their mutual compacts. No one or more nations can justly controul the commerce between any two or more of the others.

When war happens between any two or more nations, a question arises, in what respect it can affect the commerce of nations not engaged in the war?

Between the nations not engaged in the war, it is evident that the commerce cannot be affected at all by a war between others.

As a nation not engaged in the war remains in the same relations of amity and of commercial pursuits with each of the belligerent nations as existed prior to the war, it would seem that the war could not affect the intercourse between the neutral and either of the belligerent nations; and that the neutral nation might treat and trade with

either or both the belligerent nations, with the same freedom as if no war had arisen between them. This, as the general rule, is sufficiently established.

But inasmuch as the trade of a neutral nation with a belligerent nation might, in certain special cases, affect the safety of its antagonist, usage, founded on the principle of necessity, has admitted a few exceptions to the general rule.

Thus, all instruments of war, going into the hands of one belligerent nation, may be intercepted on the high seas by its adversary.

In like manner, a neutral trade with a place actually besieged is liable to be interrupted by the besiegers.

It is maintained also on one side, though strongly contested on the other, that the property of a nation at war, in a neutral ship, may be seized and condemned by the enemy of that nation.

To these exceptions Great Britain has undertaken to add another, as important as it is new. She asserts a right to intercept the trade of neutrals with her enemies in all cases where the trade, as it respects the ship, the cargo, or even the individual port of destination, was not as free before the war as it is made during the war.

In applying this doctrine, the British government and courts have not as yet extended it beyond the trade of neutrals on the coasts and with the colonies of enemies. But it is manifest that this limitation is founded in considerations of expediency only; and that the doctrine is necessarily applicable to every other branch of neutral commerce with a belligerent nation, which was not open to the same nation in time of peace. It might indeed with equal reason be extended farther. It might be applied to the case of a trade legally permitted to foreign nations in time of peace, but not

*actually* carried on by them in time of peace; because in time of peace actually carried on by the nation itself; and which is taken up by foreign nations in time of war only in consequence of the war, which, by increasing the risk or by finding other employment for the vessels and seamen of the nation itself, invites neutral traders into the deserted channels. In both cases the neutral intervention may be said to result from the pressure of the war; and in both cases the effect is the same to the belligerent; since, in both, neutrals carry on for him a trade auxiliary to his prosperity and his revenue, which he could no longer carry on for himself; and which at the same time, by liberating his naval faculties for the purposes of war, enable him to carry on the war with more vigour and effect. These inferences cannot be impaired by any sound distinction between a trade of foreigners with colonies, and a trade of foreigners with the ports of the mother country. Colonies, more especially when they are altogether subject to the same authority which governs the parent state, are integral parts of the same dominion or empire. A trade, therefore, between a colonial port and a port of the parent or principal state, is precisely of the same nature with a trade between one and another port of the latter: and a trade between a colony and a foreign port is, in like manner, precisely the same with the trade between a foreign port and the parent country; which is only a more considerable, as a colony may be a less considerable, part of the same country or empire. Previous to the late political union of Ireland with Great Britain, the relation between those two islands was strictly analogous to the relation between Great Britain and the West Indies. Was any difference ever entertained between a coasting trade from a British to a British port, and a trade from a British to an Irish port?

or between a trade from a foreign port to an Irish port, and a trade from a foreign to a British port? In the nature of things, and in the eye of foreign nations, the cases were the same. If any difference existed, it was merely circumstantial, such as may be incident to all cases essentially the same; or merely municipal, such as may result from those regulations of trade which all sovereigns have an acknowledged right to make. It would not be unfair, therefore, in examining the doctrine asserted by Great Britain, to view it in the whole extent of which it is susceptible. But the latitude in which it is avowed, and carried into operation, sufficiently demands the serious attention of all nations; but more than any, that of the United States, whose commerce more than any is the victim to this belligerent pretension. To prepare the way for this examination, several remarks are to be premised.

First. The general rule being, that the trade between a neutral and belligerent nation is as free as if the latter were at peace with all nations, and the cases in which it is not as free being exceptions to the general rule, the exceptions, according to a received maxim of interpretation, are to be taken strictly against those claiming the benefit of the exceptions, and favourably for those claiming the benefit of the general rule.

Secondly. The exceptions being founded on a principle of necessity, in opposition to ordinary right, the necessity ought to be evident and urgent. In proportion as the necessity may be doubtful, and still more in proportion as the sacrifice of neutral interests would exceed the advantage to the belligerent, the exception fails.

Thirdly. The progress of the law of nations, under the influence of science and humanity, is mitigating the evils of war, and diminishing the motives to it, by favouring the rights of those re-

maining at peace, rather than of those who enter into war. Not only are the laws of war tempered between the parties at war, but much also in relation to those at peace.

Repeating, then, that every belligerent right to controul neutral commerce must, as an exception to the general freedom of commerce, be positively and strictly proved; and the more strictly, as the exceptions are in a course of restriction rather than extension; the question is ready for examination, whether it be a part of the law of nations, that a trade ordinarily shut in time of peace, and opened to neutrals in time of war, on account of the war, is liable, as much as a trade in contraband of war or with a blockaded port, to capture and condemnation.

It will not be overlooked, that the principle, as thus laid down, does not extend to any of the cases where a new trade, though opened during a war, is not opened *on account* of the war, but on considerations which would produce the same measure if no war existed: from which follows another important observation; that taking into view the probable occurrence of such considerations, the still greater probability of a mixture of such with considerations derived from the war, the impossibility of distinguishing the proportion of these different ingredients in the mixture, with the evident disadvantage of rendering more complicated, instead of simplifying, a rule of conduct between independent nations, to be expounded and enforced by one of the parties themselves, it would seem to require no great effort of candour to acknowledge the powerful objection in practice to such a principle, were it really embraced by the most specious theory. To

But without dwelling on this view of the subject, however just in itself, the principle in question will be tried:

First—by the writings most generally received as the depositories and oracles of the law of nations:

Secondly—by the evidence of treaties:

Thirdly—by the judgement of nations, other than Great Britain:

Fourthly—by the conduct of Great Britain herself:

Fifthly—by the reasoning employed in favour of the principle.

First. The written authorities on this subject.

It cannot be necessary to examine the historical fragments which have been gleaned by modern authors, as evidence of the usage and tenets of the civilised nations of antiquity. The great change which has taken place in the state of manners, in the maxims of war, and in the course of commerce, make it pretty certain, that either nothing would be found relating to the question, or nothing sufficiently applicable to deserve attention in deciding it. There is but little hazard in saying, that in none of the learned collections is a single fact presented, which countenances the British pretension, or even shows that a single ancient nation asserted or acted on it.

On a cursory review of the naval laws of Rhodes, of Oleron, of Wisbuy, and of the Hanse towns, they appear to be perfectly barren of information. They are confined to subjects within the law-merchant, taking no notice of questions between nations: and are no further binding on particular nations, than as they may be respectively adopted into their municipal codes.

The ancient compilation under the title of Consolado del Mare, a work of great authority with British jurists, has two chapters which treat particularly of captures and re-captures. They do not, however, touch any cases but those where either

the ship or the cargo, in whole or in part, might be enemies' property; and consequently are inapplicable to the case under examination *.

Descending to more modern times, the first authority which offers itself, is the work of Albericus Gentilis.

He was the immediate precursor of Grotius, and has the merit of preparing the way for the great work supplied by the genius and erudition of the latter. Gentilis being so soon eclipsed by a superior authority, is but little known beyond a few occasional citations, which, as far as they may not coincide with the doctrines of Grotius, are, for the most part, superceded by them.

Grotius is not unjustly considered as, in some respects, the father of the modern code of nations. Great, however, as his authority deservedly may be, it yields, in a variety of instances, to that of later jurists; who to all the lights furnished by this luminary, have added those derived from their own sources, and from the improvements made in the intercourse and happiness of nations.

On the relations between belligerent and neutral nations, Grotius has but a single, and that a short chapter (B. III. C. xvii.) with three short sections, S. 5. C. i. of the same book with a note, and S. 10. C. ii. B. II. and S. 6. C. vi. B. III. with a note †. The chapter begins with the following paragraph:

* Azuni has given a very learned account of these ancient compilations, particularly of the Consolado del Mare, which he considers as a work of the Pisans, during the period of their maritime prosperity.

† The extracts in the text are from the English edition and translation of Grotius, which is in general loose, and sometimes erroneous. They were inserted before there was an opportunity of comparing them with the original.

" Supervacuum videri posset, agere nos de his qui extra bellum sunt positi, quando in hos satis constet nullum esse jus bellicum.

"It may seem needless for us to treat of those that are not engaged in war, when *it is manifest that the right of war cannot affect them:* but because, upon occasion of war, many things are done against them *on pretence of necessity*, it may be proper here briefly to repeat what we have already mentioned before *, that the necessity must be *really extreme*, to give any right to another's goods: that it is requisite that the proprietor be not himself in the like necessity. When real necessity urges us to take, we should then take no more than what it requires; that is, if the bare keeping of it be enough, we ought to leave the use of it to the proprietor; and if the use be necessary, we ought not to consume it; and if we cannot help consuming it, we ought to return the full value of it."

Having illustrated this exemption of neutral property from the effect of war between others, with the sole exception of cases of extreme necessity, by a train of examples he proceeds to lay down the duty of neutrals towards the belligerent parties, as follows:

"On the other side, it is the duty of those who are not engaged in the war, to sit still and do nothing that may strengthen him that prosecutes *an ill cause*, or hinder the motions of him that *hath justice* on his side, as we have said before [C. i. of this B. S. 5]: But in a *dubious cause*, to behave them-

Sed quia occasione belli multa in eos, finitimos præsertim, patrari solent prætexta necessitate, repetendum hic breviter quod diximus alibi, necessitatem ut jus aliquod det in rem alienam, summam esse debere: requiri præterea ut ipso domino par necessitas non subsit: etiam ubi de necessitate constat, non ultra sumendum quam exigit: id est si custodia sufficiat, non sumendum usum; si usus, non sumendum abusum: si abusu sit opus, restituendum tamen rei pretium."

* B. II. C. ii. S. 10, in which the same precise sentiment is contained as is here repeated.

selves alike to both parties; as in suffering them to pass through their country, in supplying them with provisions, and in not relieving the besieged." In illustration of the impartiality here enjoined, a number of instances are specified in the sequel of the chapter and the notes.

The fifth section of chapter I. above referred to, makes up the whole of what Grotius teaches on this branch of the subject. As it is more definite and particular than the other extracts, the insertion of it, though of greater length, will be proper.

"* Here also there used to arise another ques- "stion, what we may lawfully do to those who are

* Sed et questio incidere solet quid liceat in eos qui hostes non sunt, aut dici nolunt, sed hostibus res aliquas subministrant. Nam et olim et nuper de ea re acriter certatum scimus, cum alii belli rigorem, alii commerciorum libertatem defenderent. Primum distinguendum inter res ipsas. Sunt enim quæ in bello tantum usum habent, ut arma: sunt quæ in bello nullum habent usum, ut quæ voluptati inserviunt: sunt quæ et in bello et extra bellum usum habent, ut pecunia, commeatus, naves, et quæ navibus adsunt. In primo genere verum est dictum Amalasuinthæ ad Justinianum, in hostium esse partibus qui ad bellum necessaria hosti administrat. Secundum genus quærelam non habet.

In tertio illo genere usus ancipitis, distinguendus erit belli status. Nam si tueri me non possum nisi quæ mittuntur intercipiam, necessitas ut alibi exposuimus jus dabit, sed sub onere restitutionis, nisi causa alia accedat. Quod si juris mei executionem rerum subvectio impedierit, idque scire potuerit qui advexit, ut si oppidum obsessum tenebam, si portus clausos, et jam deditio aut pax expectabatur, tenebitur ille mihi de damno culpa dato, ut qui debitorem carceri exemit, aut fugam ejus in meam fraudem instruxit: et ad damni dati modum res quoque ejus capi, et dominium earum debiti consequendi causa quæri poterit. Si damnum nondum dederit, sed dari voluerit, jus erit, rerum retentione, eum cogere ut de futuro caveat obsidibus, pignoribus aut alio modo. Quod si preterea evidentissima sit hostis mei in me injustitia, et ille eum in bello iniquissimo confirmet, jam non tantum civiliter tenebitur de damno, sed et criminaliter, ut is qui judici immunerati reum manifestum eximit: atque eo nomine licebit in eum statuere quod delicto convenit secundum ea quæ de pœnis diximus: quare intra modum etiam spoliari poterit.

" not our enemies, nor are willing to be thought " so, and yet supply our enemies with certain " things. There have been formerly, and still " are, great disputes about this matter, some con- " tending for the rigours [of the laws *] of war, and " others for a freedom of commerce.

" But first we must distinguish between the " things themselves. For there are some things " which are of use only in war, as arms, &c. " Some that are of no use in war, as those that serve " only for pleasure; and lastly, there are some " things that are useful both in peace and war, as " money, provisions, ships, and naval stores. Con- " cerning the first (things useful only in war) it is " true what Amalasuintha said to the emperor " Justinian; he is to be reputed as siding with the " enemy, who supplies him with things necessary " for war. As to the second sort of things (for " pleasure only, of which sort he gives examples " from Seneca) there is no just cause of com- " plaint.

" As to the third sort of things (that are useful " at all times), we must distinguish the present " state of the war. For if I cannot *defend myself* " without interrupting those things that are sent to " my enemy, *necessity* † (as I said before) will

* The original is " belli rigorem," *rigour of war.*

† The note here of Barbeyrac, himself a respectable authority, is interesting both as it corroborates the liberal spirit of Grotius in favour of neutral commerce, and as it explains the ideas not only of Barbeyrac but of Cocceius, another respectable jurist, in relation to blockades. The note is as follows (see p. 519, note 5). " Our author [Grotius] here supposes the case of being reduced to the last extremity; and then his decision is well founded, whatever Mr. Cocceius says—Desert. de Jur. Bel. in Amicos, sect. 12—wherein he only criticises our author in regard to what he advances elsewhere, *that in case of necessity, the effects become common.* It is true, it suffers, that at such time the goods

"give me a good right to them, but upon condi-
"tion of restitution, unless I have just cause to the
"contrary. But if the supply sent hinder the
"execution of my designs, and the sender might
"have known as much; as if I have besieged a
"town or blocked up a port, and thereupon I quick-
"ly expect a surrender, or a peace; that sender is
"obliged to make me satisfaction for the damage
"that I suffer upon his account, as much as he
"that shall take a prisoner out of custody that was
"committed for a just debt, or helps him to make
"his escape, in order to cheat me; and propor-
"tionably to my loss I may seize on his goods and
"take them as my own, for recovering what he
"owes me. If he did not actually do me any da-
"mage, but only designed it, then have I a right,
"by detaining those supplies, to oblige him to give
"me security for the future, by pledges, hostages,
"or the like. But further, if the wrongs done to
"me by the enemy be openly unjust, and he, by
"those supplies, puts him in a condition to main-
"tain his unjust war, then shall he not only be ob-
"liged to repair my loss, but also be treated as a
"

of another may be used without even the proprietor's consent. But as to the following cases, that lawyer has reason, in my opinion, to say—that provided that in furnishing corn, for instance, to an enemy besieged and pressed by another, it is not done with design to deliver him from that unhappy extremity, and the party is ready to sell the same goods also to the other enemy, the *state of neutrality and liberty of commerce* leave the besieger no room for complaint. I add, that there is the more reason for this if the seller had been accustomed to traffic in the same goods with the besieged before the war." This last remark of Barbeyrac, as meant by him, is just. The primary duty of a neutral is impartiality; and the circumstance of an antecedent and habitual trade to the same place, would be the strongest, though not the only evidence, that the continuance of it proceeded from the ordinary motives of mercantile gain, and not from an unlawful partiality towards one of the nations at war.

"criminal, as one that rescues a notorious convict "out of the hands of justice; and in this case it "shall be lawful for me to deal with him agreeably "to his offence, according to those rules which we "have set down for punishments; and for that pur- "pose I may deprive him even of his goods."

The following extracts explain the principles of Grotius on the cases where the property of an enemy is found ia a neutral ship, or neutral property in a belligerent ship.

In a note to s. 5. c. i. b. III. Grotius cites the Consolado del Mare for the doctrine that enemies' property might be taken in neutral ships, but that the ship of an enemy did not affect the neutral cargo, nor the cargo of an enemy the neutral ship. The residue of this long note recites and disapproves the attempts of Great Britain, France, and other nations, to prohibit altogether the trade of neutrals with their enemies.

"s. 6. c. vi. b. III*. Wherefore the common saying, that goods found in our enemies' ships are reputed theirs, is not so to be understood, as if it were a constant and invariable law of the right of nations; but a maxim, the sense of which amounts only to this, that it is commonly presumed, in such a case, the whole belongs to one and the same master; a presumption however, which, by evident proofs to the contrary, may be taken off. And so it was formerly adjudged in Holland, in a full assembly of the sovereign court during the war with the

* Quare quod dici solet, hostiles censeri res in hostium navibus repertas, non ita accipi debet quasi certa sit juris gentium lex, sed ut præsumptionem quandam indicet, quæ tamen validis in contrarium probationibus possit elidi. Atque ita in Hollandia nostra jam olim, anno scilicet 1338, flagrante cum Ansiaticis bello frequenti senatu judicatum, et ex judicato in legem transiisse comperi.

Hanse towns in 1338, and from thence hath passed into a law."

In a note to this section, Grotius adds*, "neither do the ships of friends become lawful prize on the account of the enemies' goods, unless it is done by the consent of the owner of the ship;" referring in this case to the authority of several writers, and the practice of several nations.

The spirit of these passages, taken all together, can leave no doubt as to the side on which the authority of Grotius is to be placed.

In the first place, he expressly limits the general right of war against the property of neutrals to cases of that evident and *extreme necessity* which must always make a law for itself whenever it exists, but which can never be applied to the cases falling within the belligerent claim asserted by Great Britain.

In the next place, he particularly limits to the case of a necessity of self-defence the right of intercepting neutral supplies, even to a blockaded or besieged place; and makes it a condition, moreover, that a surrender of the place, or a peace, be quickly expected as the effect of the blockade.

In the third place it is to be observed, that as in these passages Grotius has taken express notice of the several questions of contraband, of blockades, and of the carriage of enemies' property, which formed all his exceptions to the freedom of neutral commerce; his silence with respect to the British exception, is an abundant proof that this last had either never been then asserted, or that he considered it so manifestly groundless as not to merit notice.

This is, in fact, the material inference to be drawn from the review here taken of this celebrated

* Sed neque amicorum naves in prædam veniunt, ob res hostiles, nisi ex consensu id factum sit dominorum navis.

jurist; and for the sake of this inference principally, the review has been made thus full and minute; for it must be admitted, that in general his ideas are much less precise and satisfactory than those which are to be found in succeeding authorities. In distinguishing wars by their justice or injustice, on which neutrals have no right to decide; in not distinguishing between supplies, as they may be sold only or sent; or as they may be sent by a government, or by private persons; nor sufficiently distinguishing between the right of a belligerent to prevent supplies by intercepting them, and the right to do so by punishing the offenders: he gives a proof that his work is more to be admired for the novelty and magnitude of the undertaking, than for the accuracy of its doctrines and definitions.

Puffendorf, who may next be consulted, contents himself with a simple reference to Grotius on the question—"How they are to be dealt with who supply the enemy with what he wants."

In a note by Barbeyrac on this reference to Grotius, he himself refers to a letter from Puffendorf to Groningius, as conveying the judgement of Puffendorf with respect to the question "whether we may hinder neutral nations from trading during the war with the enemy." Groningius, it seems, having consulted Puffendorf on a treatise he had planned upon "free navigation," received the following answer; which, having undergone much discussion, and, as found in the English translation, seeming to glance at the British principle of intercepting a commerce opened to neutrals in time of war, is copied at full length, and receives an attention which would not otherwise be bestowed on it.

"The work, sir, that you have in view, relating to the *liberty of navigation*, excites my curiosity. It is a curious subject, and what no

person as yet, that I know of, has particularly handled. I very much however fear, if I may judge from your letter, that you will find people who will dispute your notions. The question is, certainly, one of those which have not yet been settled upon any clear or undeniable principles; so as to afford a general rule to mankind. In all the examples brought upon this subject, there is a mixture of *right* and *fact*. Each nation usually allows or forbids the maritime commerce of neutral people with its enemy, either according as it is its interest to preserve the friendship of those people, or it finds itself strong enough to obtain from them what it requires. For example; the English and Dutch may say, without absurdity, that it is lawful for them to do all the ill they can to the French, with whom they are at war; and consequently to employ the method the most proper to weaken them, which is to traverse and ruin their trade. They say it is not reasonable that neutral nations should enrich themselves at their expense; and, by engrossing to themselves a commerce which the English and Dutch want, furnish the French with money to continue the war. This seems the rather just, because England and Holland commonly favour the trade of neutral nations, by suffering them to transport and sell in foreign markets merchandises of their own growth and manufacture. In short, they say that they are willing *to leave them the trade they usually carry on in time of peace; but they cannot see them take advantage of the war, to extend their commerce to the prejudice of England and Holland.* But as this matter of trade and navigation does not so much depend upon rules founded on a general law, as upon conventions made between particular nations; so, in order to form a solid judgement of the point in question, we ought previously to examine what treaties subsist

between the northern crowns and England and Holland; and whether these last powers have offered the former just and reasonable conditions. On the other hand, nevertheless, if the northern princes can *maintain their trade* with France, *by sending strong convoys* with their fleets, *I* see nothing *to blame* in it, provided their vessels do not carry contraband goods. The laws of humanity and equity between nations do not extend so far as to require, *without any apparent necessity*, that one people should give up its profit in favour of another. But as the avarice of merchants is so great that for the smallest gain they make no scruple of exceeding the just bounds of commerce; so nations that are at war may certainly visit neutral ships, and, if they find prohibited goods on board, have a full right to confiscate them. Besides, I am no way surprised that the northern crowns have a greater regard to the general interest of Europe, than to the complaints of some greedy merchants, who care not how matters go, provided they can satisfy their thirst of gain. These princes wisely judge that it is not at all convenient for them to take precipitate measures, while other nations unite all their forces to reduce within bounds an insolent and exorbitant power, which threatens Europe with slavery, and the protestant religion with destruction. This being the interest of the northern crowns, it is neither just nor necessary that, for a present advantage, they should interrupt so salutary a design, especially as they are at no expense in the affair, and run no hazard," &c.

Without knowing more of the plan of "free navigation" espoused by Groningius, it is not easy to understand precisely the sentiments of Puffendorf on the subject. It deserves to be remarked, however, that, in the argument on the belligerent side, he states not what *he thought*, but what *they*

*said.* On the neutral side he expresses his own opinion: "On the other hand, nevertheless, if the northern princes can maintain their trade by sending strong convoys with their fleets, *I see* nothing to blame in it, provided their vessels do not carry *contraband goods.*"

But what is most material to be observed, is, that the expression, "that they (the belligerent nations) *are willing to leave them* (the neutrals) *the trade they usually carry on in time of peace; but that they cannot see them take advantage of the war to extend their commerce to the prejudice of England and Holland,*" cannot possibly refer to the British distinction between a trade usually permitted in peace, and a trade permitted only in war. Such a construction, by no means countenanced either by the general tenor of the letter, or the commercial history of the period, is absolutely precluded by the preceding sentence. They say, "qu'il n'est pas just que les peuples neutres s'enrichissent à leurs depens, et en attirant à eux un commerce *interrompu pour l'Angleterre et la Holland,* fournissent à la France des secours," &c. The *English translation* of this sentence is equivocal, if not false. The true meaning of it is, that it was not deemed just that neutrals should enrich themselves by entering into a commerce interrupted, for England and Holland, by the war. The commerce in question, therefore, was not a commerce opened to neutrals during the war; but a commerce which England and Holland had carried on with France previous to the war, which the war had shut against them, and which they did not like to see transferred to commercial competitors remaining at peace *.

* It is not amiss to remark, that the sentiments in this letter, so far as they favour the rights of neutral commerce, have the

Puffendorf, then, not derogating in this explanation of his sentiments, from his reference to Grotius for the law of nations concerning neutral rights and duties, but rather strengthening the neutral rights asserted by Grotius, must be placed in the same scale in which Grotius has been placed.

Bynkershoek is the authority next in order of time. He treats the subject of belligerent and neutral relations with more attention, and explains his ideas with more precision, than any of his predecessors.

His ninth chapter is professedly on the question,* "what neutrals may or may not do, during a war between other nations?" After stating, hypothetically, an unlimited claim, on the neutral side, to trade with belligerents, in every thing, as if there was no war, rejecting the distinction made by Grotius between a just and unjust war, and urging the duty of impartiality towards those engaged in it, he proceeds to observe,† "that the enemies of our

greater weight, as the writer, though a Saxon by birth, was a privy counsellor to the elector of Brandenburg, and that the letter was written at Berlin, whilst Prussia was of the belligerent party against France. Ompteda. p. 270.

Sir William Scott, supposing him to have been a Swede, endeavoured, in the case of the Swedish convoy, to draw from that circumstance a peculiar emphasis to the concluding part of the letter, which, by grounding a prohibition of all trade with France on the extraordinary nature of the war, seemed to favour one of the grounds of which the judge was willing to avail himself in his decision of that case. It is a little singular, however, that, in consulting this document, he should have overlooked an express recognition by this illustrious authority, not three sentences preceding his quotation, of the neutral right to protect a trade *by force of convoy;* which was the precise question to be decided in the case.

* De his [non hostibus], quæritur quid facere vel non facere possunt, inter duos hostes.

† Amicorum nostrorum hostes befariam considerandos esse, vel ut amicos nostros, vel ut amicorum nostrorum hostes. Si ut amicos consideres, recte nobis iis adesse liceret, ope, consilio, eosque

" friends are to be viewed in a two-fold character;
" either as our friends, or the enemies of our
" friends. If you consider them as friends, it would
" be lawful to aid them with our counsel, and to suc-
" cour them with military forces, with arms, and with
" all other things whatsoever useful in war. But,
" inasmuch as they are the enemies of our friends,
" that cannot lawfully be done by us; because we
" should, in so doing, prefer one to another in the
" war, contrary to the equality of friendship, which
" is of primary obligation. It is better to pre-
" serve friendship with both, than, by favouring one
" in the war, to renounce tacitly the friendship of
" the other.

" And, indeed, what I have just said is taught
" not only by reason, but also by the usage received

juvare, milite auxiliari, armis, et quibuscunque aliis, quibus in bello opus habent. Quatenus autem amicorum nostrorum hostes sunt, id nobis facere non licet, quia sic alterum alteri in bello præferremus, quod vetat æqualitas, amicitiæ, cui in primis studendum est. Prestat cum utroque amicitiam conservare, quam alteri in bello favere, et sic alterius amicitiæ tacite renunciare. Et sane id quod modo dicebam, non tantum ratio docet, sed et usus inter omnes fere gentes receptus. Quamvis enim libera sint cum amicorum nostrorum hostibus commercia, usu tamen placuit, ut *capite proximo* latius ostendam, ne alterutrum his rebus juvemus, quibus bellum contra amicos nostros instruatur et foveatur. Non licet igitur alterutri advehere ea, quibus in bello gerando opus habet, ut sunt tormenta, arma et quorum præcipuus in bello usus, milites; quin et milites variis gentium pactis excepti sunt; excepta quandoque et navium materia, si quam maxime ea indigeat hostis ad extruendas naves, quibus contra amicos nostros uteretur. Excepta sæpe et cibaria, quando ab amicis nostris obsidione premuntur hostes, aut alias fame laborant. Optimo jure interdictum est, ne quid eorum hostibus subministremus, quia his rebus nos ipsi quodammodo videremur amicis nostris bellum facere. Igitur si hostes simpliciter consideremus ut amicos, recte cum iis commercia exercemus, et merces quascunque ad eos mittimus; Si consideremus ut amicorum nostrorum hostes, excipiuntur merces, quibus in bello amicis nostris noceatur, et hæc ratio priorem vincit; quomodocunque enim alteri contra alterum succurramus, bello nos interponimus, quod salva amicitia non licet.

" among almost all nations. For although the com-
" merce with the enemy of our friends be free, it is
" agreeable to usage, as in the next chapter I shall
" show more at large, that we should assist neither
" one nor other with those things which may fur-
" nish and foment the war against our friends. It is
" not lawful, therefore, to carry to either, those
" things which are needful in making war; as are
" cannon, arms, and what are of principal use in
" war, soldiers; who are also excepted by vari-
" ous treaties between nations; materials for ships
" are also sometimes excepted, where an enemy is
" in absolute want of them for building ships to
" be employed against our friends. Provisions
" even are often excepted, when an enemy is
" pressed by the siege of our friends, or is other-
" wise labouring under the want of food. On the
" best ground, therefore, are we interdicted to sup-
" ply any of these things to belligerents; because
" by these things we should, in a manner, appear to
" make war ourselves on our friends. If, there-
" fore, we consider belligerents simply in the light
" of friends, we may rightfully carry on commerce
" with them, and send them merchandises of what-
" ever kind; if we consider them as the enemies of
" our friends, merchandises are to be excepted,
" which, in war, might annoy our friends: and this
" consideration prevails over the former one; for
" in whatever manner we succour one against the
" other, we take part in the war, which would be
" incompatible with the preservation of friend-
" ship."

Thus far the doctrine of this jurist cannot be mistaken. He lays it down as a general rule, that the trade of neutrals with the nations at war, provided it be impartial, is as if there were no war; but that certain articles, as instruments of war, form an exception to this general rule; to which he

suggests, as a further exception, the case of a siege, or of a similar pressure of famine. It cannot be pretended that there is either a single general expression, or particular allusion, that can be tortured into an exception of any trade, merely for the British reason, that it was not open to neutrals before, as well as during the war.

The residue of the chapter is chiefly employed in discussing the legality and construction of treaties of succour and subsidy, between a nation at peace and nations at war; after which he proceeds to the tenth chapter, in which he treats of the list of contraband, with several questions incident to it. His doctrine here, the same precisely as in the preceding chapter, is laid down in the following words:* "The rule, confirmed almost invariably "by treaties, is, that neutrals are not to carry con- "traband articles to our enemies. If they carry "them, and are intercepted, they incur a forfeiture. "But with the exception of these articles, *they* "*trade freely* both backward and forward; and "carry, with impunity, *all other articles* whatever "to the enemy."

That under the term contraband, he could mean to class so vague and novel a description of trade, as that which distinguishes between commercial regulations as existing before the war, and as made in the course of the war, is rendered the more impossible, by the definition given of contraband:† "Hence by contraband are to be

* Regula est pactis fere perpetuis probata, ne non hostes, ad hostes nostros, vehant "*contrabande goederen.*" Si vehant, et deprehendantur, in commissum cadant: exceptis autem his, libere utrimque mercantur, et quæcunque alia ad hostes vehunt impune.

† Ex his fere intelligo, contrabanda dici, quæ, uti sunt, bello apta esse possunt, nec quicquam interesse, an et extra bellum usum præbeant. Ea sunt belli instrumenta, quæ non et extra bellum præbeant usum sui.

understood things which in *their actual state* are *adapted to war;* without considering whether apart from war they may also be of use; there being few instruments of war which may not be used for other purposes." For this he gives as a just reason, that "if you prohibit every material out of which any thing may be formed for warlike use, great would be the catalogue of prohibited articles; since there is scarcely any material out of which something at least, adapted to war, may not be fabricated *."

In the ensuing chapter, he treats of the case of sieges and blockades, as an exception to the freedom of neutral commerce.

In the 12th chapter, he examines the question, "Whether the contraband character of a part of the cargo can affect the residue of the cargo or the ship;" with several other questions incident to such mixt cases.

Chapter XIII. relates to neutral property in the ships of an enemy; which he exempts from confiscation. His positions on this subject show how much the turn of his judgement must have been adverse to any such restrictions on neutral commerce as that instituted by Great Britain †. "Ac-

* Si omnem materiam prohibeas, ex qua quid bello aptari possit, ingens esse catalogus rerum prohibitarum, quia nulla fere materia est, ex qua non saltem aliquid, bello aptum, facile fabricemus.

† Ex ratione, utique, ejusmodi jus defendi non poterit; nam cur mihi non liceat uti nave amici mei, quanquam tui hostis, ad transvehendas merces meas? Si pacta non intercedant licet mihi, ut supra dicebam, cum hoste tuo commercia frequentare; quod si liceat, licebit quoque cum eo quoscunque contractus celebrare, emere, vendere, locare, conducere, atque ita porro. Quare, si ejus navem operamque conduxerim, ut res meas trans mare vehat, versatus sum in re omni jure licita. Tibi, qua hosti licebit navem ejus occupare, sed quo jure res meas, id est amici tui, occupabis? Si nempe probem res meas esse; alioquin Grotio adsentior, ex præsumptione quodam pro rebus hostilibus esse habenda quæ in navi hostili inveniuntur.

cording to reason, a right of that sort [to confiscate neutral property in a belligerent vessel] cannot be defended: for why may I not be allowed to use the ship of my friend, though your enemy, in transporting my merchandise? When treaties do not prohibit, I have a right, as I said above, to carry on commerce with your enemy; and if this be lawful, it is also lawful to enter into any contracts whatever with him: to buy, to sell, to let, to hire, &c. Wherefore, if I shall have engaged his ship and his service to transport my effects by sea, it was a transaction on every principle lawful. You, as his enemy, may take his ship; but with what right can you take what belongs to me, that is, to your friend?—if, indeed, I prove them to be mine; otherwise I agree with Grotius, that there is some room for presuming things found in the ship of an enemy to be enemy's property."

Finally, in his fourteenth chapter he treats the case of enemies' effects in neutral vessels; deciding with Grotius and others, that the neutrality of the ship does not protect the cargo from capture and condemnation. He consequently makes this case also an exception to the general freedom of neutral commerce, in favour of belligerent privileges.

From this distinct and full view of the sentiments of Bynkershoek, it is clear, that the whole weight of his authority is opposed to the principle advanced by Great Britain. He is the first writer who seems to have entered into a critical and systematic exposition of the law of nations, on the subject of maritime commerce between neutral and belligerent nations; and the plan which he adopted was well calculated to do justice to the subject. Instead of undertaking, after the example of Grotius and Puffendorf, an entire code of public law, he selected, for a more thorough discussion, the particular questions which were deemed most im-

portant, and most frequent in the transactions and intercourse of modern nations. Among these, he very properly classed the question of neutral commerce, and bestowed on it the formal investigation which we have seen. He begins with the general question, how far a war between two nations can affect the rights, particularly the commercial rights, of a nation at peace with both; deciding, in favour of neutral nations, that their commerce remains free, as a general rule; and, in favour of belligerent nations, that in certain cases exceptions to that general freedom are prescribed by the principle of self-defence. He goes on then to examine the several cases which had been allowed or claimed as exceptions. He establishes the belligerent right to intercept articles on the list of contraband. He establishes also the right to control supplies to places besieged or blockaded. He concurs in the doctrine, that the flag of a friend does not protect the property of an enemy. He discusses the claim, maintained by some, to confiscate the property of a friend under the flag of an enemy, which he disproves. He discusses, moreover, several other minor questions, which were incident to the main subject. He appears, in short, to have taken a comprehensive view of the commercial relations between neutral and belligerent nations; and to have omitted no question, belonging to those relations, which was of sufficient importance to deserve his attention. And yet it appears that he has not even glanced at the question, "Whether a neutral commerce, in articles not contraband, nor going to a besieged or blockaded place, was unlawful, for the reason that the belligerent party had been induced by the war to new-model its commercial regulations." Does it not necessarily and undeniably follow, either that no such pretension had, at that period, ever been started, or that it had re-

ceived no countenance which could entitle it to notice? It is impossible to conceive that a question of such magnitude could be otherwise passed over by a pen which dwelt with such minute attention on questions less nearly allied to the main subject.

The authority of Bynkershoek, in this case, ought to have the greater weight with Great Britain, because, in other cases, so much weight is claimed for it, by the champions of her favourite doctrines.

The reputation which Vattel enjoys in Great Britain, greater perhaps than he enjoys any where else, requires that he should be particularly consulted on this subject. The work of Vattel unquestionably possesses great merit; not so much, indeed, for the originality of his plan, or his matter, which he admits to have been derived from Wolfe; as for the agreeable dress which he has given to the dry treatise of his prototype, and for the liberal spirit which has, in many instances, improved the doctrines of all his predecessors. Vattel is, however, justly charged with failing too much in the merit of a careful discrimination; and sometimes with delivering maxims, which he either could not reconcile, or does not take the pains to explain. In the chapter on neutrality (B. III. C. vii.) he might perhaps have been more exact in his definitions, and more lucid in the order of his ideas. His meaning, nevertheless, is, on the whole, sufficiently clear, and arranges him beyond all controversy with Grotius, Puffendorf, and Bynkershoek, in opposition to the doctrine under consideration.

As the basis of the true doctrine, on the subject of neutral commerce, he lays down these principles:

That a neutral nation is bound to an exact impartiality:

That this impartiality relates solely to the war:

That it includes two obligations: the first forbidding succours in troops not stipulated before the war, arms, ammunition, or any thing of *direct use* in the war; the second requiring, that, in whatever does not relate to the war, one of the parties must not be refused, *on account of its present quarrel*, what is granted to the other. He observes "that this does not trespass on the liberty of the neutral nation in negotiations, connexions of friendship, or its trade, to govern itself by what is most advantageous to the state. When this consideration induces it to *preferences in things* of which every one has the free disposal, it only makes use of its right, and is *not chargeable* with partiality. But to refuse any one of these things to one of the parties, purely as being at war with the other, and for favouring the latter, would be departing from an exact neutrality."

Having laid this foundation, and recommended to nations intending, as they have a right, to remain neutral, that they should secure their neutrality by treaties for the purpose, he proceeds to state more particularly;

1st. "That whatever a nation does in use of its own rights, and *solely with a view to its own good*, without partiality, *without a design* of *favouring one power to the prejudice of another*, cannot, in general, be considered as contrary to neutrality; and *becomes such* only upon *particular occasions*, when it cannot take place without injury to one of the parties, who has then a particular right to oppose it. *Thus*, the besieger has a right to prohibit access to the place besieged. Exclusively *of this kind of cases*, the quarrels of another cannot deprive me of the free disposal of my rights in the pursuit of measures

which I judge advantageous to my country."— Hence he infers a right to permit, in certain cases, levies of troops to one of the parties, and to deny it to the other, where there may be good reason for the distinction; and where it is the custom, as among the Swiss, to grant levies; and, consequently, where the custom would of itself be a proof that the grant was not the effect of partiality in relation to the war. He asserts, in like manner, for the sovereign, as well as private citizens, in the habit of lending money at interest, the right to lend it to one of the parties at war, "who may possess their confidence, without lending it to the other;" observing, that "whilst it appears that this nation lends out its money purposely for improving it by interest, it is at liberty to dispose of it according to its own discretion, and I have no reason to complain. But if the loan be manifestly for enabling the enemy to attack me, this would be concurring in the war against me." He applies the same remark to the case of troops furnished to an enemy, by the state itself, at its own expense; and of money lent without interest: adding at the same time, as a further instance of neutral rights, that if a nation trades in arms, timber, ships, military stores, &c., I cannot take it amiss that it sells such things to my enemy, provided it does not refuse to sell them to me also. It carries on its trade without any design of injuring me, and in continuing it the same as if I was not engaged in war, that nation gives me no just cause of complaint.

Making, thus, impartiality the test of lawfulness in the conduct of neutrals, and the mere pursuit of their own interest, without a design to injure any of the belligerents, the test of impartiality, he enters more particularly on the discussion of the active trade which neutral nations carry on with those at war.

" It is certain," he says, " that, as they [neutrals] have no part in my quarrel, they are under no obligation to abandon their trade that they may avoid furnishing my enemy with the means of making war. Should they make it a point* not to sell to me any of these articles, whilst they take measures for transporting great quantities of them to my enemy, with *a manifest intention of favouring him*, such *a partiality* would exclude them from the neutrality they enjoyed. But if they simply pursue their commerce [suivre tout uniment leur commerce†] they do not *thereby declare themselves* against my interest; they only exercise a right which they are under no obligation of sacrificing to me."

The *general* freedom of neutral commerce being thus asserted, the writer goes on to lay down the exceptions which war makes to it.

" On the other hand, whenever I am at war with a nation, both my safety and welfare prompt me to deprive it as much as possible of every thing which may enable it to resist or hurt me. *Here the law of necessity shows its force.* If this law warrants me on occasion to seize what belongs to another, shall it not likewise warrant me to stop *every thing relative to war* which neutral nations

* Si elles affectoient," &c.

† The translation, " continue their customary trade," which might be construed to favour the British principle, is evidently erroneous. That which is substituted conveys the true meaning. It is curious that the two authors, Puffendorf and Vattel, who have alone appeared to speak a language any-wise favourable to the doctrine in question, should owe the appearance to English mistranslations. It would be uncandid, nevertheless, to insinuate a design in the case; the more so as the translation of Puffendorf was prior to the origin of the British pretension; but the error of translations may have strengthened the pretension which it countenances.

are carrying to my enemy. Even if I should, by taking such measures, render all these neutral nations my enemies, I had better run the hazard than suffer him who is actually at war to be thus freely supplied to the great increase of his power. It is therefore very proper and very suitable to the law of nations, which disapproves of multiplying the causes of war, not to consider those seizures of the goods of neutral nations as acts of hostility. When I have notified to them my declaration of war against such or such a people, if they will afterwards run the risk of supplying them *with things relative to war*, let them not complain if their goods fall into my hands; for I do not declare war against them because they attempted to carry *such* goods. They suffer indeed by a war in which they have no concern; but it is accidentally. I do not oppose their right: I only make use of my own; and if our rights clash, and reciprocally injure each other, it flows from the effect of inevitable necessity," &c.

"But that *limits* may be set to these inconveniences; that the commerce of neutral nations may subsist in all the freedom which the laws of war will admit; there are rules to be observed, and on which *Europe seems to be generally agreed.*"

What are the rules which fix these limits?

"The first is carefully to distinguish common goods, which have *no relation to war*, from those *peculiarly subservient to it.* In the trade of the former, neutral nations are to enjoy *an entire liberty*: the parties at war cannot with any reason deny it, or hinder the importation of such goods into the enemy's country," &c. He observes that the goods here referred to, as having relation to war, are those called contraband, of which he gives a description; proceeding thence to show how far they are subject to confiscation, and to infer from the

right of confiscation the right of search on the high seas.

He next mentions, as a limit to the freedom of neutral commerce, that the effects of an enemy found in a neutral ship are subject to capture; deciding otherwise as to neutral effects on board an enemy's ship, which some nations had been in the practice of capturing.

He specifies, as his last limit or exception to the general freedom of neutral commerce, the belligerent right to prohibit all commerce with a place besieged or blockaded; closing the discussion of this particular subject with an emphatic deduction in these words—" A neutral nation continues, with the two parties at war, in the *several relations* which *nature* has placed between nations. It is ready to perform towards them both all the duties of humanity reciprocally due from nation to nation. It is *in every thing* not *directly relating to war* to give them *all the assistance in its power*, and of which they may stand in need. But this assistance is to be given with impartiality; that is, in not refusing to one of the parties any thing on account of his being at war with the other. This does not hinder a neutral state having particular connexions of friendship and good neighbourhood with one of the parties at war, from granting him *in whatever does* not relate *to military transactions* the preference due to friends: much more may he without giving offence continue to him, for instance in commerce, such indulgences as have been stipulated in their treaties," &c.

We see then that the authority of Vattel coincides perfectly with the preceding authorities, more especially that of Bynkershoek, in establishing the general freedom of neutral commerce, with the exception of things relating to the war, and in limiting this exception to the several cases of supplying

the enemy with military contraband, of trading with places besieged or blockaded, and of carrying enemy's property.

Perhaps this author, not remarkable, as already intimated, for well defined ideas, has in no particular branch of his work left less room for mistaking or perverting his meaning.

It would be improper not to add Martens to the authorities who ought to be heard on this question. Martens was a professor of law in a Hanoverian university, with a salary from the king of Great Britain as elector of Hanover, and has distinguished himself by several publications, which demonstrate his critical judgement of the law of nations, and the extent of his researches in order to verify and elucidate it. His SUMMARY of this law is a work which was received by the public with a due portion of that respect which constituted his predecessors authentic depositaries and expositors of the code by which the society of nations ought to be governed. We find him accordingly on the same shelf already with Grotius, Puffendorf, Bynkershoek, and Vattel. In Great Britain indeed, notwithstanding his being a subject of her sovereign, and a professor under his patronage, the doctrine he teaches on the question whether free ships make free cargoes, has drawn on him the censure of the zealous advocates for the side taken by Great Britain on that question. In opposing, however, a favourite doctrine of that nation, under the relation in which he stood to it, he gave a proof of integrity and independence, which justly inspire the greater esteem for his character, at the same time that they give the greater weight to his opinions. Even there, however, his censors have done justice to his eminent talents, and been ready to avail themselves of his authority in cases where it supported British principles and interests.

On the present subject the authority of Martens is clear and full.

He speaks first of neutral commerce according to the universal law of nations, and next of the modern law of nations with respect to neutral commerce, and its freedom, as acknowledged by the powers of Europe.

The first he lays down as follows:—"The right that a nation enjoys in time of peace of selling and carrying all sorts of merchandise to every nation *who chooses to trade* with it, it enjoys also in time of war, provided that it remains neuter." He admits at the same time that *necessity* may authorise a power at war to hinder the conveyance of *warlike stores* to its enemies, so far as to sequester them till the end of the war, or to take them at their full value for his own use.* He admits again, that the power at war may prohibit all commerce with such places "as he is able to keep so blocked up as to prevent any foreigner from entering." But he maintains, that, "since a belligerent power cannot exercise hostilities in a neutral place, nor confiscate property belonging to neutral subjects, such power ought not to confiscate the goods of an enemy found in a neutral vessel navigating on a free or neutral sea, nor neutral goods found in the vessel of an enemy: provided, however, in both cases, that these goods are not warlike stores."

In explaining what he styles the modern law of nations with respect to neutral commerce, and its liberty as *acknowledged* by the powers of Europe, he states it "as generally acknowledged, that a neutral power ought not to transport to either of the belligerent powers merchandises *unequivocally intended* for warlike purposes; that treaties have at

* This rule corresponds with the sentiments of Grotius.

some times swelled out this list with articles not evidently and unequivocally intended for such purposes; at others have expressly declared these not to be contraband, and that this last ought to be presumed to be the case between powers having no treaties on the subject."

"With respect to merchandises which are not contraband," he says, "it is generally acknowledged by the powers of Europe, that neutral powers have a right to transport them to the enemy *, *except* it be to places blockaded, with which all commerce is prohibited."

These two exceptions, namely, contraband of war and the case of blockaded or besieged places, are the only ones which he allows against the freedom of neutral commerce. For with respect to enemy's property in neutral ships, he considers the new principle, which identifies the cargo with the vessel and thereby avoids the disputes and embarrassments arising from the old principle, as having been sufficiently established to take the place of the old one in the law of nations.

The authority of Martens, then, unequivocally and undeniably concurs with that of his great predecessors, in deciding that the commerce between neutral and belligerent nations, with a very few

* Martens in a note observes, that "some powers have, *but in vain*, attempted to forbid neutral nations to carry on commerce with their enemies," of which he mentions the instance of the Dutch in 1666, and the joint instance of England and Holland in 1689. "In both these instances, it is well known the attempt was to intercept all trade with France, and not the trade only which was or might be opened by France during the war;" a distinction to which he was invited by the occasion either to have noticed, if he had thought it worthy of notice, as among the *vain attempts* of some powers to forbid neutral commerce, or to have inserted it in the text as an exception to the freedom of neutral commerce, if he had so viewed it, along with the other exceptions of contraband and blockaded places.

exceptions, is *entirely free*, and that these exceptions do not include any such pretension as that of Great Britain, to prohibit a trade otherwise lawful, merely because it might have been laid open to neutrals in consequence of the war.

It would have been easy to add to the authorities here selected, other respectable jurists within the same period; as well as a phalanx of authorities of later date, both in the south and the north of Europe; but the testimony of Grotius, of Puffendorf, of Bynkershoek, of Vattel, and of Martens, is more than sufficient for the occasion. They are the luminaries and oracles to whom the appeal is generally made by nations who prefer an appeal to law rather than to power; an appeal which is made by no nation more readily than by Great Britain, when she has sufficient confidence in the justice of her cause.

Two feeble objections may be thought to claim attention, on this branch of the investigation.

First. In describing the general freedom of neutral commerce with a nation at war, the writers who have been reviewed, being strangers to the distinction now introduced between the legal regulations of the latter in time of war and those in time of peace, have sometimes used expressions which, though they do not favour, do not necessarily exclude such a distinction. Thus Bynkershoek, speaking of the neutral trade of the Belgians with the French, who were at war with the Spaniards, says that it was of right as free as before the war *. The freedom of neutral commerce is laid down, in similar phrases, by other jurists, both before and after Bynkershoek. Many of the more modern

* Liberum quartumcunque rerum commercium, quemadmodum, cum nondum bellum esset. Lib. I. C. x.

writers, not apprised of the misconstruction which might be attempted on their phraseology, have also described the general freedom of neutral commerce in time of war, by a reference to the freedom which it enjoyed in time of peace.

The obvious and decisive answer to these criticisms is, that the freedom of commerce between two nations in time of peace does not refer to the actual footing on which it happened to be placed by the mutual regulations of the parties, a continuance of which would, on a subject so fluctuating as that of commerce, be often inconvenient, sometimes absurd; but to the right which the parties have to regulate their commerce, from time to time, as their mutual interest may suggest, or, to adopt the language of Vattel, to the relations in which *nature* has placed independent nations.

This construction is not only the most obvious and rational in itself, but is enforced by several additional reflexions.

It is most consistent, and sometimes alone consistent, with other passages in the same authors. An example may be seen in Bynkershoek, B. I. C. ix. where the expressions "ut ante bellum constabat," and "ut cum pax esset inter eos," &c. are evidently meant to comprehend every right, as well as the existing state of commerce between the neutral *and belligerent* parties previous to the war.

As there is no evidence that the distinction was known at the dates of the elder writers, it would be absurd to suppose them alluding to a state of things which had never existed, rather than to a state of things which was familiar in practice. And with respect to the more modern writers, to most of whom the distinction appears to have been equally unknown, the absurdity of the supposition is doubled by its inconsistency with the whole te-

nor and complexion of their doctrines and reasonings in behalf of neutral rights. Many of them are, in fact, champions for the principles of the armed neutrality; one of which is, that neutrals may trade freely with and between any of the ports of an enemy not blockaded.

Finally—as all the writers on the general subject of neutral commerce discuss the several other exceptions to its rights which have at any time been claimed by belligerent nations, it would be absurd to suppose that an exception more extensive than any of them should be pretermitted. Their silence alone, therefore, is an unanswerable proof, that the exception now contended for could not be known, or could not be recognised, by those writers.

A second objection may be, that the practice of opening colonies to neutral trade had not been introduced at the dates of these publications, particularly the more early of them.

The fact on which this objection relies, might be disproved by a mass of historical testimony. Two authorities will be sufficient: the first showing that Spain, represented as the most rigid in her colonial monopoly, began to relax it as early as 1669, even during peace: the second, that France had adopted the same policy, in time of war, as early as the year 1705.

The first is from Long's History of Jamaica, vol. i. p. 598.

"In 1669, Spain, for *want of ships and sailors* "of her own, began openly to hire Dutch shipping "to sail *to the Indies*, though formerly so careful "to exclude all foreigners from thence. And so "great was the supply of Dutch manufactures to "Spain, &c. that all the merchandise brought "from the Spanish West Indies was not sufficient

"to make returns for them; so that the Dutch "carried home the balance in money." The date of this Spanish relaxation of the colonial monopoly was prior to the work of Puffendorf, which was published in 1672; and two-thirds of a century prior to that of Bynkershoek, which was published in 1737, and which entered so systematically into the question of neutral rights of commerce.

The other will be found in a Note of Robinson, in his Appendix to vol. iv., page 17, of his Admiralty Reports. It is there stated, with his authority for the fact, that about the year 1705, it being then a time of war, friendly nations were admitted into the trade of the French colonies, as a better mode of supplying their wants, and getting away their productions, than that of convoys. It is added, that the first vessels thus introduced having been captured, the French minister returned to the old, as the only efficacious expedient.

The reporter would conclude, from the capture of the neutral vessels, that a neutral trade with colonies was then held to be illegal. But it would be manifestly wrong to resort to an explanation not warranted by any ideas otherwise known to exist at that period; especially when it is so easy to suppose that the capture was directed against the *French property* on board the neutral vessels. — That the property was French is the more to be presumed, as the Dutch, the only nation whose capital might have neutralised the property, were parties to the war. Had they indeed been neutral, their treaties with Great Britain would have protected the trade in their vessels, on the twofold ground that it was lawful to trade, without restriction, with and between the ports of an enemy; and that the freedom of the ship protected the cargo.

The true inference on the subject is, that the neutral carriers were Danes, or of some other nation who had no such treaties with Great Britain, and whose capitals did not neutralise the cargoes of French produce.

# TREATIES

All writers on the law of nations, as well didactic as polemic, avail themselves, whenever they can, of the authority of *treaties.*

Treaties may be considered under several relations to the law of nations, according to the several questions to be decided by them.

They may be considered as simply repeating or affirming the general law: they may be considered as making exceptions to the general law, which are to be a particular law between the parties themselves: they may be considered as explanatory of the law of nations on points where its meaning is otherwise obscure or unsettled; in which case they are, first, a law between the parties themselves, and next, a sanction to the general law, according to the reasonableness of the explanation, and the number and character of the parties to it: lastly, Treaties may be considered as constituting a voluntary or positive law of nations.

Whether the stipulations in a treaty are to be considered as an affirmance, or an exception, or an explanation, may sometimes appear on the face of the treaty: sometimes being naked stipulations, their character must be determined by resorting to other evidences of the law of nations. In other words, the question concerning the treaty must be decided by the law, not the question concerning the law by the treaty.*

* In the report by sir G. Lee, doctor Paul, sir D. Ryder, and Mr. Murray, afterwards lord Mansfield, in the case produced by the Silesia loan, the argument drawn from treaties, on the que-

In the present case, it has been shown, from the sources generally allowed to be the most authentic, that the law of nations is violated by the principle asserted by Great Britain. It is a just inference, therefore, that every article in treaties contradicting that principle, is an affirmance and direct proof of the general law; and that any stipulation of the principle would, as an exception to the general law, be an indirect proof of it.

But supposing, for a moment, the present case to belong to that class in which the great oracles of the law of nations are obscure, or at variance among themselves; and in which, moreover, the practice of nations, not being uniform, is an unsatisfactory guide; and consequently, that the evidence of treaties was necessary in order to ascertain the law; still, it will be found that the result of an appeal to that evidence is conclusive against the British pretension. It may be confidently affirmed, that on no point ever drawn into question, the evidence of treaties was more uniform, more extensive, or more satisfactory.

stion whether free ships make free goods, is not very worthy of the celebrated authors, or of the celebrity of the document. Two treaties, stipulating that free ships do not make free goods, are cited as direct proofs on the negative side of the question; and six, stipulating that free ships do make free goods, as exceptions proving still more strongly the negative side of the question. It could not have been less fair, to consider the six as declaratory of the law, and the two as exceptions to it. But in either case, the inference presupposes, instead of proving the point in question. As far as the point was to be considered as not otherwise proved, and as requiring the evidence of treaties to remove the uncertainty, the inference ought to have been reversed. The six witnesses ought to have out-weighed the two, and it was incumbent on the reporters, instead of simply referring to the treaties as a confirmation of their opinion, to have considered them as presenting an ostensible objection, which was to be answered.

Nay more; it may be affirmed that the treaties applicable to this case may fairly be considered in their relation to the law of nations last noticed; that is, as *constituting* a law of themselves. If, in any case, treaties can be sufficiently general, sufficiently uniform, and of sufficient duration, to attest that general and settled concurrence of nations in a principle or rule of conduct among themselves which amounts to the establishment of a general law; such an effect cannot reasonably be refused to the number and character of the treaties which are applicable to the present case.

That treaties may amount to a law of nations, follows from the very definition of that law; which consists of those rules of conduct which reason deduces, as consonant to justice and common good, from the nature of the society existing among independent nations; with such definitions and modifications as may be established by general consent.

One evidence of general consent is general usage, which *implies* general consent.

Can treaties which *express* consent be an inferior evidence, where nothing on the face of the treaties, nor in any collateral authority on the law of nations, is found to impair the evidence?

Treaties may indeed in one point of view be considered as a higher authority than usage, when they have a generality and continuance equal to the generality and continuance which give to usage the authority of law; because all treaties involve a usage commensurate with the sphere in which they are obligatory. Whilst usage, therefore, implies consent; treaties imply the usage, at the same time that they express the consent of the parties to them*.

* Bynkershoek derives the law of nations from reason and usage [ex ratione et usu], and founds usage on the evidence

But there is another point of view in which the influence of treaties, those at least of peace and of commerce, in modifying and defining the rules of public law applicable to periods of war, ought, in preference to the influence of mere practice, to be promoted by all governments which respect justice and humanity, and by all jurists who aspire to the authority of commentators on that subject.

The law of nations, as derived from mere usage or practice during those periods, is evidenced for the most part by *ex parte* ordinances, issued by belligerent governments in the midst of the passions or policy of war; and by judicial decisions, also *ex parte*, and biassed more or less by the same causes, if not by the interest also which weighty individuals, or perhaps bodies of individuals, have in widening the field of predatory wealth.

Treaties are formed under very different circumstances. Those of peace imply that the hostile passions and pursuits have spent their force, and that a mutual spirit of liberality and accommodation have taken their place. Treaties of commerce again are necessarily founded in principles of reciprocal justice and interest, wholly at variance with the violent spirit of war: whilst in the negotiation of treaties of both kinds the respective efforts and interests of the parties form those mutual checks, require those mutual concessions, and involve those mutual appeals to a moral standard of right, which are most likely to make both parties converge to a just and reasonable conclusion. Nor is a sense of character without its effect on such occasions. Nations would not stipulate in the face

of treaties and decrees [pactis et edictis]. He therefore makes treaties a legitimate source of the law of nations, and constantly adduces them to illustrate and verify his doctrines. Quest. Jur. Pub. Lib. I. C. x.

of the world things which each of them would separately do in pursuit of its selfish objects.

It will accordingly be found, as might be expected, that the violent and cruel maxims of war,—those still remaining, as well as those from time to time exploded,—have had their origin and their continuance in the *separate* usages of belligerent nations, not in treaties; whilst on the other hand it will be found, that the reformation of those abuses has been the gradual work of treaties; that the spirit of treaties is, with few if any exceptions, at all times more just, more rational, and more benevolent, than the spirit of the law derived from practice only; and consequently that all further meliorations of the code of public law are to be expected from the former, not the latter source; and consequently, again, that all enlightened friends to the happiness of nations ought to favour the influence of treaties on the great code by which their intercourse is to be regulated.

The authority of every treaty is to be considered as opposed to the principle asserted by Great Britain, where it either stipulates a general freedom of neutral commerce with a specification of exceptions to it, and an omission of this British exception; or where it stipulates not only a neutral right generally to a *free trade* with belligerent nations, but particularly a right to trade freely *to and between the ports* of such nations. These stipulations, by the force of the terms, necessarily comprehend the coasting and colonial trades, as well as other branches of commerce.

It would be a waste of time to bestow it on the treaties of a remote period, partaking too little of the civilisation and spirit of more modern times to edify them by its examples. It will be sufficient to commence this review with the treaty of Westphalia in 1648, which forms an important epoch in

the commercial and political history of Europe, and to remark, as the result of some inquiry into antecedent treaties, that they contain nothing which can give the least countenance to the principle under examination.

It will be sufficient also to limit the review of treaties, where Great Britain was not a party, to those of most importance, either for the tenor of the stipulations, or for the particular parties to them, with marginal references to others of analogous import; remarking again generally, that these others are all, either negatively or positively, authorities against Great Britain.

As a more convenient distribution also, the first review will stop with the epoch of the armed neutrality. The relation which the treaties subsequent to that event have to the subject, will be noticed by itself.

*Examples to which Great Britain is not a party.*

By a treaty concerning navigation and commerce in 1650, preceded by a particular article on the same subject concluded in 1648, it is stipulated between the United Provinces and Spain, "that the subjects and inhabitants of the United Provinces (and those of Spain reciprocally) may sail and trade with *all freedom* and safety *in all* the kingdoms, states, and countries, which are or shall be in peace, amity, or neutrality, with the states of the said United Provinces; and that they shall not be disquieted or molested in this liberty by the ships or subjects of the king of Spain, upon *the account of hostilities* which may exist, or may happen afterwards, between the said king of Spain and the aforesaid kingdoms, countries, and states, or any of them that may be in amity

or neutrality with the said lords the states as above *."

This liberty, in relation to France, was to extend to all sorts of merchandise which might be carried thither before she was at war with Spain; *even contraband of war* †, not proceeding from the states of Spain herself, and capable of being used against the Spanish dominions.

With respect to other countries at peace with the United Provinces, and at war with Spain, the enumerated articles of contraband were not to be carried to them by the United Provinces, but all articles not contraband were to be freely carried, with the exception only of cities and places invested or blockaded.

The Pyrenean treaty, between France and Spain in 1659, established so close a friendship between the two nations, that they were mutually restrained from giving, either of them, to those attacking the other, any assistance in men, money, or victuals, or with passage through his dominions. Yet it is stipulated in Art. x.—xvi. which are reciprocal, that the French shall have liberty to trade *to all parts whatsoever*, though they should be in a war with his catholic majesty, excepting Portugal ‡, whilst it continued in the condition it then

* Dumont, tom. vi. part i. p. 570.

† This is not a solitary instance of such a stipulation: another is found in the treaty of 1661, between the United Provinces and Portugal; where it was made a general right of the neutral party to carry contraband to countries at war with the other party. Dum. vol. vi. p. 2, 368.—Azuni refers to other instances: a treaty between Edward IV. and the duke of Burgundy in 1468; England and Portugal, 1642 and 1654; Spain and the Hanse towns, 1647. Azun. vol. ii. p. 145 of the French translation.

‡ Portugal was at that time engaged in a war with Spain for the establishment of her independence, which was viewed by Spain as a rebellious war, and which France was willing, it seems, so far to regard in the same light as to acquiesce in this exception.

was in; all merchandise may be transported to other countries in war with Spain, as was allowed *before the said war*, excepting * such as proceed from the Spanish dominions, and as may be serviceable against the catholic king or his dominions, and contraband goods. By contraband goods are understood all sorts of arms and warlike stores; but corn and all manner of provision, and goods not being arms and warlike stores, are not reputed contraband, and they may be carried to places in war with Spain, excepting to Portugal and blockaded places. The French vessels, passing from the ports of Spain to any port in enmity with that crown, shall not be in any way retarded or molested, after producing their passes, specifying their lading †.

It here appears, that the parties were at liberty, when neutral, to trade to all parts of a belligerent country, not blockaded, and in all merchandises not contraband.

The expressions "as was allowed before the said war," in this and in the preceding examples, clearly fall within the observations made on the like expressions used by the writers on the law of nations. They are merely a mode of describing the indefinite right to trade as if no war had arisen, and consequently to enter into any new channels of trade which might be opened to them.

In a treaty in 1662, between France and the United Provinces, it is stipulated, Arts. xxvi., xxvii., &c. that the parties reciprocally are to trade and navigate with all freedom and safety to countries respectively at war with one and at peace with the other, without any exceptions made by the

* This exception might have been made by Spain herself, as a municipal regulation.

† Dum. tom. vi. part ii. p. 266.

treaty other than a trade in contraband or to a place blockaded *.

The treaty between France and the United Provinces, Arts. xxvii.—xxix. as incorporated with the treaty of Breda in 1667, between the latter power and England, declares that the subjects of either party may sail and traffic in *all countries* at *any time*, in peace with one and at war with the other; and this transportation and traffic shall extend to *all articles* not contraband, and to *all places* not blockaded †.

In a treaty in 1672, between France and Sweden, Arts. xxiii.—xxix. are of corresponding import ‡.

A treaty in 1675, between Sweden and the United Provinces, contains like stipulations in the three first and following articles §.

A declaration made in 1676, by Spain and the United Provinces, confirming the treaty of 1650, stipulates the right of either party to trade with the enemy of the other, as well directly as between enemies' ports, whether the ports belong to the same or different enemies, contraband goods and places blockaded being excepted ‖.

In Art. xiii. &c. of another treaty, in 1678, between France and the United Provinces, the same points are again stipulated ¶.

The thirteenth Art. of another treaty in 1679, between Sweden and the United Provinces, contains a like stipulation ††.

* Dumont, tom. vi. part ii. p. 414.

† Chalmers's Collect. Treaties, vol. i. p. 154. Dumont, tom. vii. part i. p. 49.

‡ Dumont, tom. vii. part i. p. 169.

§ Id. ibid. p. 317.

‖ Id. ibid. p. 325.

¶ Id. ibid. p. 359.

†† Id. ibid. p. 434.

So again the like stipulation is contained in Art. xiii. of another treaty in 1679, between France and the United Provinces *.

In a treaty in 1701, between Denmark and the United Provinces, the stipulations import an uninterrupted commerce of the neutral with an enemy of the other party, with the usual exception of contraband †.

The like stipulation is found in a treaty of 1716, Article viii., between France and the Hanse Towns ‡.

A treaty, Art. vi., between the emperor Charles VI. and Philip V. of Spain, May 1, 1725, is of like import §.

The same is the language of a treaty in 1752, between Naples and Holland ‖.

A treaty, Art. xvi., in 1767, between France and Hamburg, and another between France and the duke of Mecklenburg in 1779, maintain the same doctrine ¶.

To these authorities, derived from the conventional law of Europe, against the British principle under investigation ††, might be added, if it were necessary, references to other treaties of the like tenor.

* Dumont, tom. vii. part i. p. 359.

† Ibid. tom. viii. part i. p. 35.

‡ Azuni, vol. ii. p. 130.

§ Dumont, tom. viii. part ii. p. 115. Azuni, vol. ii. p. 124.

‖ Azuni, vol. ii. p. 131.

¶ Martens's Treaties, vol. i. p. 255; vol. ii. p. 38.

†† The list, however, would not extend to the period between 1738 and 1761; no *general* collection of treaties to which Great Britain is not a party, during that period, being at hand. The chasm is of the less moment, as the British treaties of that period embrace most of the other maritime nations of Europe.

*Treaties to which England first, and then Great Britain, was a party.*

By a treaty with Sweden, in 1654, and another in 1656, confirming and explaining the former, it is stipulated, Arts. ii.—iv. that it shall be lawful for the subjects of either of the confederates to trade with the enemies of the other; and, without impediment, to carry to them, except to places blockaded or besieged, any goods whatsoever, not contraband, of which a specification is inserted. Provision is also made for the efficacy of passports in certain cases, and against the abuse of them for covering enemies' property *.

The weight of these examples is not diminished by the name of Cromwell, under whose authority the treaties were concluded in behalf of England. In foreign transactions, as well as at home, his character was distinguished by a vigour not likely to relinquish or impair rights, in which his country, as a warlike and maritime power, was interested.

On the other hand, it adds weight to the examples, that they are treaties of *alliance*, containing mutual engagements of friendship and assistance; and, consequently, the less apt to indulge the parties in an intercourse with the enemies of each other, beyond the degree required by the law of nations. This observation is applicable to all the succeeding examples, where the treaties are of the same kind.

On the restoration of Charles II. a treaty of *alliance* was concluded with Sweden in 1661, the 11th article of which, in pursuance of those above copied from the treaties of 1654 and 1656, stipulates

* Chalmers, vol. i. p. 32, 33.

anew, that neither party shall be impeded in carrying to the enemies of the other any merchandise whatever, with the exceptions only of articles of contraband, and of ports or places besieged *.

In a treaty with Spain, May 13, 1667, the articles xxi.—xxvi. import, that the subjects of each shall trade freely in all kingdoms, estates, and countries at war with the other, in all merchandises not contraband; with no other exception of places but those besieged or blockaded †.

In July 1667, a treaty was concluded with the United Provinces, of which Art. iii. provisionally adopts certain articles from the treaty of Breda, between the United Provinces and France, on the subject of maritime commerce, until a fuller treaty could be perfected between the parties. The articles adopted, in relation to the trade between the subjects of one of the parties and the enemies of the other, declare, that the trade shall extend, without impediment, to all articles not contraband, and to all places not besieged or blockaded ‡.

In February 1667-8, the same parties, then under a perpetual defensive alliance, by virtue of a treaty of 21st July 1667, and in a league moreover with Sweden by the triple league of 1668, resumed the subject of maritime and commercial affairs, and repeated, in the first article of their treaty, the precise stipulations adopted provisionally from the treaty between France and the United Provinces §.

A treaty with Denmark, in 1669, stipulates, that they may trade each with the enemies of the other,

* Chalm. vol. i. p. 52.
† 2 Chalm. 17—19.
‡ Chalm. vol. i. p. 154.
§ Chalm. vol. i. p. 163.

in all articles not contraband, and to all places not blockaded, without any other exceptions*.

On the 11th July 1670, another treaty of *alliance* was concluded with Denmark, the sixteenth article of which declares, that "neither of the parties shall be impeded in furnishing to the enemies of the other any merchandises whatever; excepting only articles of contraband, as described in the treaty, and ports and places besieged by the other†".

It is worthy of notice in this treaty, and the remark is applicable to others, that the fifth article having stipulated a right mutually to trade in the kingdoms, provinces, marts, towns, ports, and rivers of each other, it was immediately provided in the next article, that *prohibited ports and colonies* should be excepted. If it had been conceived that such ports or colonies of enemies were not to be traded with, under the general right to trade with enemies acknowledged in the sixteenth article, it is manifest that they would have been as carefully excepted in this as in the other case, out of the meaning of general terms equally comprehending them. This treaty proves also, that, as early as 1670, colonies began to fall under attention in making treaties.

In a marine treaty of December 1, 1674, with the United Provinces, stating in the title that it was "to be observed throughout *all and every the countries and ports of the world* by sea and land," it is stipulated again, in Art. i., to be "lawful for all and every the subjects of the most serene and mighty prince the king of Great Britain, with *all freedom* and safety, to sail, trade, and exercise any manner of traffic *in all those kingdoms, countries*,

* Dum. tom. vii. part i. p. 126.
† Chalm. vol. i. p. 85.

*and estates*, which are, or any time hereafter shall be, in peace, amity, or neutrality with his said majesty; so that they shall not be any ways hindered or molested in their navigation or trade, by the military forces, nor by the ships of war, or any kind of vessels whatsoever, belonging either to the high and mighty states general of the United Netherlands, or to their subjects, upon occasion or pretence of any hostility or difference which now is or shall hereafter happen between the said lords the states general, and any princes or people whatsoever, in peace, amity, or neutrality with his said majesty;" and so reciprocally.

Art. ii. "Nor shall this freedom of navigation and commerce be infringed by occasion or cause of any war, in any kind of merchandises, but shall extend to all commodities which may be carried in time of peace, those only excepted which follow in the next article, and are comprehended under the name of contraband."

Art. iii. enumerates the articles of contraband.

Art. iv. contains a negative list, which, with *all* other articles not expressly included in the list of contraband, may be *freely* transported and carried to *places under the obedience of enemies**, except

* That this treaty stipulated the rights of neutrals in the extent which it is cited to prove, is acknowledged by the British government, in the letter of secretary Fox, of May 4, 1782, to M. Semolin, the Russian minister at London, in which this treaty is referred to as the basis of a reconciliation with Holland, and as "a treaty by which the principles of the armed neutrality are established *in their widest extent.*" The first article in the armed neutrality asserts the neutral right in question, and on that ground has been always combated by British writers and in parliamentary discussions. In the debate in the house of commons on the treaty of 1786, with France, Mr. Fox took an occasion to remark, that what was then done had "the *unanimous consent* of his majesty's council."

only towns or places besieged, environed, or invested *.

This recital has been made the more minute, because it is necessary, in order to understand the whole force of the explanatory declaration between the parties bearing the same date; a document so peculiarly important in the present discussion, that its contents will be recited with equal exactness.

This document, after stating "that some difficulty had arisen concerning the interpretation of certain articles, as well in the treaty marine concluded this first day of December 1674 as in that which was concluded the 17th February 1667-8, between his majesty of Great Britain on the one part, and the states general, &c. on the other part," proceeds to state, "that sir William Temple, &c., on one part, with eight commissioners on the other, have declared, and do by these presents declare, that the true meaning and intention of the said articles is, and ought to be, that ships and vessels belonging to the subjects of either of the parties, can and might, from the time that the said articles were concluded, not only pass, traffic, and trade, from a neutral port or place to a place in enmity with the other party, or from a place in enmity to a neutral place, but also from a port or place in enmity to a port or place in enmity with the other party, whether the said places belong to one and the same prince or state, or to several princes or states, with whom the other party is in war. And we declare that this is the true and genuine sense and meaning of the said articles; pursuant whereunto we understand that the said articles are to be observed and executed on all occasions, on the part of his said majesty, and

* Chalm. vol. i. p. 177, 179.

the said states general, and their respective subjects; yet so that this declaration shall not be alleged by either party for matters which happened before the conclusion of the late peace in the month of February 1673-4 *."

Prior to the peace, neither of them could claim the rights of neutrality against the other.

This declaratory stipulation has been said to be peculiarly important. It is so for several reasons:

1st. Because it determines the right of the neutral party, so far as may depend on the belligerent party, to trade not only between its own ports and those of the enemies of the belligerent party, without any exception of colonies, but between any other neutral port and enemies' ports, without exception of colonial ports of the enemy; and moreover, not only between the ports, colonial as well as others, of one enemy and another enemy, but between the different ports of the same enemy; and consequently between one port and another of the principal country; between these and the ports of its colonies; between the ports of one colony and another; and even to carry on the coasting trade of any particular colony.

2d. Because it fixes the meaning not only of the articles in the two specified treaties, but has the same effect on all other stipulations by Great Britain expressed in the same on equivalent terms; one or other of which are used in most, if not all, her treaties on this subject.

3d. Because it made a part of the treaties explained, that free ships should make free goods; and consequently the coasting and colonial trade, when combined with that neutral advantage, was the less likely to be acknowledged, if not considered as clearly belonging to the neutral party.

* Chalm. v. i. p. 189.

4th. Because the explanatory article was the result of the *solicitation** of England *herself*, and she actually claimed and enjoyed the benefit of the article, she being at the time in peace, and the Dutch in war with France †.

In the treaty with France, February 24, 1677, articles i, ii, and iii, import that each party may trade freely with the enemies of the other with the same merchandise as in time of peace, contraband goods only excepted; and that all merchandises not contraband "are free to be carried from any port in neutrality to the port of an enemy, and from one port of an enemy to another; towns besieged, blocked up, or invested, only excepted ‡."

In 1689, England entered into the convention with Holland, prohibiting *all* neutral commerce with France, then the enemy of both §. In consequence of the counter treaty of Sweden and Denmark, for defending their neutral rights against this violent measure, satisfaction was made, according to Vattel, for the ships taken from them; without the slightest evidence, as far as can be traced, that any attempt was made by either of the belligerent parties to introduce the distinction between such part of the trade interrupted as might not have been allowed before the war, and as was therefore unlawful, and such part as having been allowed before the war, might not lawfully be subject to capture.

* See sir William Temple's correspondence with his government (vol. iv. p. 55, of his Works), where the success of his efforts, made with the sanction of his government, is particularly rehearsed.

† See Memorial of Dutch merchants, in the Annual Register for 1778. These treaties remained in force for more than a century—viz. from 1674 to the war with the United Provinces in 1781.

‡ Jenkinson, vol. i. p. 209.

We are now arrived at the treaties of Utrecht, an epoch so important in the history of Europe, and so essentially influencing the conventional law of nations on the subject of neutral commerce.

The treaty of navigation and commerce, March 31, 1713, between Great Britain and France, article xvii., imports, that all the subjects of each party shall sail with their ships with all manner of liberty and security, no distinction being made who are the proprietors of the merchandises laden thereon, from *any port*, to the places of those who now are, or shall hereafter be, at enmity with the queen of Great Britain and the Christian king;" and "to trade with the same liberty and security from the places, ports, and havens, of those who are enemies of both or of either party, without any opposition or disturbance whatsoever, not only directly from the places of the enemy aforementioned to neutral places, but also *from one place* belonging to an enemy *to another place* belonging to an enemy, whether they be under the jurisdiction of the same prince or under several."

Art. xviii. "This liberty of navigation and commerce shall extend to all kind of merchandises, excepting those only which follow in the next article, and which are specified by the name of contraband."

Art. xix. gives a list of contraband, which is limited to warlike instruments.

Art. xx. specifies others, many of which are in other treaties on the list of contraband, declaring that these, with all other goods not in the list of contraband in the preceding article, "may be carried and transported in the freest manner by the subjects of both confederates, even to places belonging to an enemy, such towns or places being

only excepted as are at that time besieged, blocked up round about, or invested *."

Could the principle maintained against Great Britain be more clearly laid down, or more strongly fortified by her sanction?

To give to this example the complete effect which it ought to have, several remarks are proper.

In the first place, on comparing the description given of the free trade which might be carried on between the neutral party and an enemy of the other party, with the description of the free trade allowed between the parties themselves; by the first article of the treaty it appears, that, in order to except the colonial trade in the latter case, the freedom stipulated in article i. is expressly limited to *Europe*. The terms are, "that there shall be a reciprocal and entirely perfect liberty of navigation and commerce between the subjects on each part, through all and every the kingdoms, states, dominions of their royal majesties *in Europe*." In the stipulation relating to the neutral commerce of either with the enemy of the other (who, if a maritime enemy, could not fail to possess colonies out of Europe) the terms are, "that all merchandises, not contraband, may be carried in the freest manner to places belonging to an enemy, such towns or places only being excepted as are at that time besieged or blockaded, &c." without any limitation to Europe, or exception of colonies any where. It is obvious, that the terms here used comprehend all colonies, as much as the terms in the first article would have done, if colonies had not been excepted by limiting the freedom of trade to places "*in Europe*;" and consequently, that, if

* Chalm. vol. i. p. 390.

any distinction between the colonial and other places of an enemy had been contemplated in the neutral trade of either party with him, as it was contemplated between the colonies and European possessions of the parties in their commerce to be carried on between themselves, the distinction would have been expressed in the latter case as it was in the former; and not being so expressed, the trade in the latter case was to be as free to the colonies, as it would have been in the former, if the colonies had not been excepted by the limitation of the trade to Europe*".

Secondly. But the treaty, not content with this necessary construction in favour of a neutral commerce with the colonies of an enemy, proceeds, in conformity to the example in the declaratory convention between England and Holland in 1674, explicitly to declare the freedom of the neutral party to trade, not only from *any port* to the places of an enemy, and from the places of an enemy to neutral places, but also from *one place* to *another place* belonging to an enemy, whether the places be under the same or different sovereigns. Here both the coasting trade and the colonial trade, which, in relation to the parent country, is in the nature of a coasting trade, are both placed on the same footing with every other branch of commerce between neutral and belligerent parties, although it must have been well known that both those branches are generally shut to foreigners in time of peace, and, if opened at all, would be opened in time of war, and for the most part on account of the war.

Thirdly. It is well known that this particular treaty underwent great opposition and discussion,

* There are other treaties to which this reasoning is applicable.

both without and within the British parliament; and that it was for some time under a legislative negative. Yet it does not appear, either from the public debates, or from the discussions of the press, as far as there has been an opportunity of consulting them, that the difficulty arose in the least from this part of the treaty. The contest seems to have turned wholly on other parts, and principally on the regulations of the immediate commerce between the two nations. This part of the treaty may be considered, therefore, as having received the complete sanction of Great Britain. Had it indeed been otherwise, the repeated sanctions given to it on subsequent occasions, would preclude her from making the least use of any repugnance shown to it on this.

On the 28th November, 1713, a treaty of peace, and another of commerce and navigation, were concluded at Utrecht with Spain, renewing and inserting the treaty of May 13, 1667, the twenty-first and twenty-sixth articles of which have been seen to coincide with the rules of neutral commerce established by the treaty at Utrecht between Great Britain and France *.

Genoa and Venice were comprehended in the treaty of Utrecht between Great Britain and Spain †.

The above treaty of 1713 was confirmed by Article xii. of a treaty of December 3, 1715, between Great Britain and Spain ‡.

From the above date to the treaty of 1748, at Aix-la-Chapelle, the following treaties between England and other powers took place; in each of

* Chalm. vol. ii. p. 109.
† Id. ibid. p. 341.
‡ Id. ibid. p. 174.

which the principles established by her treaties at Utrecht are reiterated:

With Sweden, January 21, 1720, Article xviii *.

With Spain, June 13, 1721, Article ii.—Confirming the treaties of 1667 and 1713 †.

With France and Spain, November 9, 1729, Article i.—Renewing all treaties of peace, of friendship, and of commerce, and consequently those of Utrecht ‡.

With the emperor of Germany and the United Netherlands, March 16, 1731, Article i.—Renewing all former treaties of peace, friendship, and alliance §.

With Russia, December 2, 1734—Stipulating in Article ii. a free trade between either party and the enemy of the other, in all articles except munitions of war; and consequently articles permitted after, though not permitted before the war ‖.

With Spain (a convention) January 14, 1739, Article i.—Reiterating, among former treaties, those of 1667 and 1713, above cited ¶.

The treaty of Aix-la-Chapelle, concluded in 1748, forms another memorable epoch in the political system of Europe. The immediate parties to it were Great Britain, France, and the United Provinces.

The third Art.†† of this treaty renews and confirms, among others, *the treaties of Utrecht* ‡‡.

* Jenkinson, vol. ii. p. 263.
† Id. ibid. p. 265.
‡ Chalm. vol. ii. p. 200.
§ Ibid. vol. i. p. 312.
‖ Azuni, vol. ii. p. 129.
¶ Jenkinson, vol. ii. p. 340.

†† The treaty *of commerce* at Utrecht not being specially mentioned in that of Aix-la-Chapelle, it may, perhaps, be questioned, whether it be included in the confirmation. The question is of little consequence, as that treaty is expressly included in the confirmation of preceding treaties by the treaties of Paris of 1763 and 1783.

‡‡ Jenkinson, vol. ii. p. 374.

This treaty was acceded to by Spain, Austria, Sardinia, Genoa, and Modena.

In 1763 *, in the treaty between Great Britain, France, and Spain, to which Portugal acceded, the first article expressly renews and confirms, among other treaties, the treaties of peace and *commerce* at Utrecht †.

The treaty with Russia in 1766, Art. x., stipulates a free trade between either party, being neutral, and an enemy of the other, with the sole exception of military stores, and places actually blockaded ‡.

In a convention with Denmark, July 4, 1780, explanatory of a list of contraband settled in a former treaty, it is expressly determined that merchandise not contraband may be transported to *places* in possession of enemies, without any other exception than those besieged or blockaded §.

The treaty of peace in 1783 with France, by Art. ii., renews and confirms, among others, the treaties of Westphalia in 1648, of Utrecht in 1713, of Aix-la-Chapelle in 1748, and of Paris 1763; in all of which the neutral right, now denied by Great Britain, was formally sanctioned by her stipulations ‖.

In her treaty of the same date with Spain, the same confirmation is repeated ¶.

In the treaty of commerce again with France in 1786, deliberately undertaken in pursuance of Art. xviii. of the treaty of 1783, the articles above recited from the treaty of Utrecht are inserted word

* If Great Britain had rested her captures of vessels trading with colonies of enemies, during the war of 1756, on the principle now asserted, this treaty relinquished the principle.

† Jenkinson, vol. ii. p. 180.

‡ Ibid. vol. iii. p. 228.

§ Chalm. vol. i. p. 97.

‖ Jenk. vol. iii. p. 337.

¶ Jenk. vol. iii. p. 377.

for word; and thus received anew the most deliberate and formal sanction.—*Chalm.* vol. i. p. 350.

It may be here again remarked, that, although this treaty underwent the most violent opposition in Great Britain, it does not appear that the opposition was at all directed against the articles on the subject of neutral commerce.

The treaty of 1786 was explained and altered in several particulars, by a convention bearing date August 31, 1787; without any appearance of dissatisfaction, on either side, with the articles on neutral commerce.

In the negotiations at Lisle, in 1797, it was proposed on the part of Great Britain, by her ambassador, lord Malmsbury, to insert, as heretofore usual in the articles of peace, a confirmation of the treaties of Utrecht, Aix-la-Chapelle, &c.; which was opposed by the French negotiators, for reasons foreign to the articles of those treaties in question.

On this occasion, lord Malmsbury, in urging the proposed insertion, observed, "that *those treaties had become the law of nations*, and that if they were omitted * it might produce confusion." This fact is attested by the negotiations, as published by the British government †.

If the treaties had become, or were founded in, the law of nations, such an omission, although it might be made a pretext for cavil between the parties, could certainly have no effect on the law of nations: and if the treaties expressed the law of nations on any subject at all, on what subject, it might be asked, have they been more explicit than on that of the maritime rights of neutrals?

* Those treaties were not inserted in the treaty of Amiens, probably for the reasons which prevailed at Lisle.

† See lord Malmsbury's dispatch to lord Grenville, dated 19th July, 1797.

This series of treaties, to which Great Britain is an immediate party, lengthy and strong as it is, has not exhausted the examples by which she stands self-condemned. One in particular remains for consideration; which, if it stood alone, ought for ever to silence her pretensions: — It is the treaty with Russia on the 5-17th of June, 1801.

A very important part of the treaty is the preamble:

"The mutual desire of his majesty the king of "the United Kingdoms, &c., and his majesty the "emperor of all the Russias, being not only to come "to an understanding between themselves with re- "spect to the differences which have lately inter- "rupted the good understanding and friendly rela- "tions which subsisted between the two states; but "also to prevent, by frank and precise *explanations* "upon the navigation of their respective subjects, "the renewal of similar altercations and troubles "which might be the consequence of them; and "the *common object* of the solicitude of their said "majesties being to *settle*, as soon as can be done, "an equitable arrangement of those differences, and "an *invariable determination* of *their principles* upon "the *rights of neutrality*, in their application to "their respective monarchies, in order to unite "more closely the ties of friendship and good in- "tercourse, &c., have named for their plenipoten- "tiaries, &c., who have agreed," &c.

With this declaratory preamble in view, attend to the following sections in article iii.

"His Britannic majesty and his Imperial majesty "of all the Russias having resolved to place under "a sufficient safeguard the freedom of commerce "and navigation of their subjects, in case one of "them shall be at war while the other shall be neu- "ter, have agreed:

"1st. That the ships of the *neutral* power may *navigate freely to the ports and upon the coasts* of the nations *at war*.

"2d. That the effects embarked *on board neutral ships* shall be *free*, with the exception of *contraband of war* and of *enemies' property;* and it is agreed not to comprise under the *denomination of the latter*, the merchandise of the produce, growth, or manufactures of *the countries at war* which should have been *acquired* by the subjects of the neutral power, and should be *transported on their account;* which merchandise cannot be excepted *in any case* from the freedom granted to the flag of the said power," &c. &c.

These extracts will receive additional weight from the following considerations:

*First.* This treaty, made with Russia, the power that took the lead in asserting the principles of the armed neutrality, was, with exceptions not affecting the point in question, acceded to by Sweden and Denmark, the two other European powers most deeply interested in and attached to those principles. It is a treaty therefore of Great Britain, as to this particular point, as well as to most of the others, with Russia, Sweden, and Denmark.

*Secondly.* The treaty had for its great object, as appears by its adoption of so many of the definitions of the armed neutrality, to fix the law of nations on the several points therein which had been so much contested; the three northern powers yielding the point of free ships, free goods; and Great Britain yielding to all of them those relating to the coasting, as well as every other branch of neutral trade; to blockades, and to the mode of search; and yielding to Russia, moreover, the point relating to the limitation of contraband. With respect to the case of convoys,—a case not comprehended in the armed neutrality of 1780, but of much subsequent litigation, and inserted in that of 1800,—a modification, satisfactory to the northern powers, was yielded by Great Bri-

tain; with a joint agreement, that the subjects on both sides should be prohibited from carrying contraband or prohibited goods, according to an article in the armed neutrality of both dates.

*Thirdly.* The treaty is expressly declared to be an *invariable* determination [fixation] of their *principles* upon the *rights of neutrality*, in their application to their respective monarchies.

It cannot be pretended that this *stipulated* application of the rights of neutrality to the contracting parties, limits the *declaratory* effect, which is equally applicable to all neutral nations. *Principles* and *rights* must be the same in all cases, and in relation to all nations; and it would not be less absurd than it would be dishonourable, to profess one set of principles or rights in the law of nations towards one nation, and another set towards another nation.

If there be any parts of the treaty to which this declaratory character is regarded as not applicable, it cannot be pretended that they are the parts relating to the rights of neutrals to trade *freely* to the *ports* and on *the coasts* of nations at war; because, as already observed, the main object of the treaty was to settle the questions involved in the armed neutrality; of which this was a primary one, and is here placed, by the structure of the article, under the same precise stipulation with the liability to confiscation of enemies' property in neutral ships; a point above all others which Great Britain must have wished to consecrate as the law of nations, by declaratory acts for that purpose.

It cannot be pretended that the neutral rights here declared, do not extend to the colonial as well as coasting trade of belligerent nations, because the colonial trade is not only included in a "free trade to the ports and on the coasts" of such nations, but because it is expressly declared that the

effects belonging to neutrals, and transported on their account from countries at war, cannot be excepted from the freedom of the neutral flag *in any case*, and consequently not *in the case of colonies*, more than any other portion of such countries. It is not improper to remark that this declaratory stipulation is not only included in the same article which recognised the principle that enemies' property is excepted from the freedom of the neutral flag, but is associated with that recognition in the same section of the article, and even in the same sentence *.

* The British government having become aware of the entire renunciation here made of her claim to intercept, in time of war, the commerce of neutrals with the colonies of her enemies, set on foot negotiations, with a view to new-model the stipulation. Nothing more, however, could be obtained from Russia than her concurrence in an explanatory declaration, dated October 20, of the same year, in the terms following:—"In order to prevent any doubt or misunderstanding with regard to the contents of the second section of the third article of the convention, concluded June 5-17, 1801, between his *Britannic* majesty and his majesty the emperor of all the *Russias*, the said high contracting parties have agreed and declare, that the freedom of commerce and navigation granted by the said article to the subjects of a neutral power [in the column in French de la puissance neutre], does not authorise them to carry, in time of war, the produce and merchandise of the colonies of the belligerent power direct to the continental possessions; nor, *vice versa*, from the mother country to the enemies' colonies; but that the said subjects are, however, to enjoy the same advantages and facilities in this commerce as are enjoyed by the most favoured nations, and especially by the *United States of America*."

In this declaration it will be observed that it excepts from the general right of the neutral party to trade with the colonies of an enemy, merely the *direct* trade between the colony and the mother country. It leaves consequently, and *recognises* to the neutral party, 1st, an *indirect* trade between the mother country and her colonies—2dly, the trade between one belligerent country and the colonies of another—3dly, the trade between the neutral party itself and enemies' colonies—4thly, the trade between such colonies and any other neutral country.

If it were possible to controvert the construction here given to the treaty, a reference might be made to a very able speech delivered by lord Grenville in the British house of lords in November 1801, in which this very construction is fully demonstrated. The demonstration is rendered the more striking by the embarrassed and feeble opposition made to it by the ingenuity of the very able speakers who entered the list against him *.

Another observation is, that, as the distinction made between the particular trade excepted, and the other branches of colonial trade, is not deducible, by any possible construction, from the terms of the original text, it must be understood to be a compromise of expediency on the part of Russia, rather than a derogation from the principle on which the general right is founded.

It is to be further observed, that even the particular exception is abridged, by an agreement on the part of Great Britain, that, in case a *direct* trade between an enemy's country and its colonies should be enjoyed by any other neutral country, equal advantages and facilities shall be extended to Russia.

It may be still further observed, that the reference to advantages and facilities, as they may be enjoyed by neutral nations, particularly the *United States*, seems to imply that the United States at least (who are indeed alluded to by sir William Scott, as a nation particularly favoured by France*) furnished an example of such a state of things; and as no such state of things was applicable to them but that arising from regulations of France, which, being prior to the war of 1793, authorised, upon the British principle itself, a like trade by the United States during the war, it follows that all captures and condemnations of American vessels trading between France and her colonies under those regulations, were on the British principle itself illegal, and ought to be indemnified.

Lastly, it may be observed that the treaty to which this explanatory declaration relates, was accepted and ratified by Sweden and Denmark, and that these two powers are not parties to the declaration. If they afterwards become parties, it is more than is known. The observations, of which the declaration has been found susceptible, must, indeed, render the fact of little consequence in any point of view.

* For the speech, see a pamphlet entitled, "Substance of the Speech delivered by Lord Grenville in the House of Lords, No-

* 2 Rob. Rep. 168. 4 Rob. Rep. Append. p 4.

Such is the accumulated and irresistible testimony borne by Great Britain, in her own treaties, against the doctrine asserted by her.

vember 13, 1801." The object of his lordship was to make it appear that the treaty had abandoned certain maritime doctrines of Great Britain; among others, the doctrine relating to the trade of neutrals with the colonies and on the coasts of nations at war. This he has done with the most complete success. With respect to the legality of the doctrine, he assumes, rather than attempts to prove it. Had he employed in the latter investigation the same abilities and candour which distinguish his discussion of the meaning of the treaty, he could not have failed to be as much convinced of the illegality of the doctrine abandoned, as he was of the abandonment itself. For the very lame replies made by other speakers, see Annual Register for 1802, chap. iv.

An anonymous author of six ingenious letters in vindication of the treaty attempts a distinction between its meaning and that of the armed neutralities, with a view to reconcile the former with the British doctrine.

In the two treaties of armed neutrality in 1780 and 1800, the neutral right to trade with a party at war is expressed as follows: "to navigate freely from port to port and on the coasts of nations at war."

In this treaty with Russia, the right is expressed with the following difference of terms: "to navigate freely to the ports and upon the coasts of the nations at war."

The author of the letters contends that the trade "from port to port" means a neutral trade in the purchased produce of the belligerent country carried coastwise, whereas to trade on the coasts of the belligerent means nothing more than to proceed from one port to another in making successive deliveries of the neutral cargo transported to the belligerent country.

The answer is simple as it is conclusive. To navigate on the coast is to navigate from port to port. This is its plain meaning. The distinction between neutral property carried to the belligerent country, and property acquired by a neutral in the belligerent country, is suggested neither by the distinct modes of expression, nor by any circumstance whatever affecting the interpretation of them. The distinction is purely arbitrary. It would not be more so if the different meanings which it assigns to these different phrases were transposed. To navigate or trade from port to port, must mean to trade on the coasts; and to trade on the coast, is a coasting trade. It may be added, that the distinction

It will be in order now to resume the notice of treaties to which she was not a party, but which authorise some inferences and observations contributing still further, if possible, to invalidate her novel pretensions.

The review heretofore taken of this class of treaties was limited to such as preceded the armed neutrality. Those now to be added are principally the treaties and conventions entered into in the years 1780 and 1800.

The treaties of 1780 declare the right of neutrals in the case under discussion in the following terms: "that all vessels shall be permitted to navigate from port to port, and on the coasts of the belligerent powers." Those of 1800 are in terms too little varied to require recital.

It has never been questioned, that these definitions of the neutral right were as applicable to colonies as to any other of the territories belonging to a belligerent nation. All the British writers have so understood the text, and in that sense have employed their pens against it.

and inference attempted, are contradicted both by the general scope of the treaty, and by the terms of Art. iii. sect. 2.

Were the criticism allowed all the force which the author claims for it, he would still give up more than he would gain: for the Russian treaty affirms the right to navigate freely *to the ports* of those at war, without excepting the colonies. The trade would therefore remain free between all neutral and colonial ports; and the neutral trade between a belligerent and its colonies would be unlawful on no other ground but that it was merely a coasting trade, without any of those peculiarities often ascribed to the colonial trade by the advocates for the British principle.

From the aspect of the letters, it may be conjectured that they were not written without a knowledge of the views of the government; and that they were intended to give colour to the distinction on which the explanatory declaration above cited is founded; whether as a measure actually concluded, or projected only, does not appear, the letters having no date in the edition which has appeared in this country.

It need scarcely be remarked, that the treaties in question were framed with a view, not of making a new law of nations, but of declaring and asserting the law as it actually stood. The preamble to the convention of 1800, for the re-establishment of an armed neutrality between Russia and Sweden, explains the object in the terms following: "In order that the freedom of navigation and the security of merchandise of the neutral powers may be established, and *the principles of* the law of nations be fully *ascertained*," &c.

The preamble to the convention of 1780 states the principles avowed by the parties to be the "*principles* derived from the primitive *rights* of nations."

The treaty of 1780 was originally concluded between Russia and Denmark. But it was acceded to by Sweden, Prussia, the United Provinces, Austria, Portugal, and Naples; and, in effect, by France and Spain. The principles of the treaty had the sanction also of the United States of America, in their cruising ordinances. Thus it is seen, that, with the exception of Great Britain alone, all the powers of Europe, materially interested in the maritime law of nations, have given a recent and repeated sanction to the right of neutrals to trade freely with every part of the countries at war. And although several of those nations have, on some of the points contained in these treaties, as on the points of contraband and enemies' property under neutral flags, entered since into adverse stipulations; not one of them has by treaty or otherwise relinquished the particular right under consideration *;

* On the contrary, these rights have been repeated in the following treaties, subsequent to those of the armed neutrality—namely, Russia and Denmark, Oct. 8-19, 1782, Arts. xvi., xvii. (Martens's Treaties, ii. p. 290). Same and the Porte, June 10-21, 1783, Art. xxxix. (Ibid. p. 392). France and Holland, Nov. 10, 1785, Art. viii. (Ibid. p. 616). Austria and Russia, in the year

whilst Great Britain, as we have seen in her treaty with Russia, has herself expressly acceded to the right.

The importance of treaties in deciding the law of nations, or that portion of it which is founded in the consent of nations, will justify the extent which has been given to this review of them; and the conclusion which this review justifies is, that the tenor of treaties, throughout the whole period deserving attention, confirms the neutral right contended for: that for more than one and a half centuries, Great Britain has, without any other interruptions than those produced by her wars with particular nations, been at all times bound by her treaties with the principal maritime nations of the world, to respect this right; and what is truly remarkable, that, throughout the long period of time and the voluminous collection of treatises through which the research has been carried, a single treaty only (putting aside the explanatory article between Great Britain and Russia, noted above) has occurred, which forms an exception to the general mass.

The exception will be found in an article of a Danish treaty of June 1691† with England and Holland. In that article (the 5d), though somewhat obscure, either from inaccuracy in the original text or in the printed copy, it seems that Denmark relinquished her neutral right of commerce between the ports of France, then at war with the other parties. But this exception, instead of availing in any respect the belligerent claim in question, corroborates the testimony furnished by treaties against it; as will appear from the following observations:

1785, Art. xii. (Ibid. p. 624). France and the same, Dec. 31, 1786—Jan. 11, 1787, Arts. xxvi., xxvii. (Martens. Treat. iii. p. 15). Russia and the king of the Two Sicilies, Jan. 6-17, 1787, Art. xviii. (Ibid. p. 44). Portugal and Russia, Dec. 9-20, 1787, Art. xxii. (Ibid. p. 117).

† Dum. tom. vii. part ii. p. 293.

1st. In other parts of the treaty, there are stipulations favourable to Denmark, which may have been regarded as some compensation for the restriction imposed on herself.

2d. Admitting, however, the restriction to have been made without any compensating advantages, the sacrifice might fairly be ascribed to the dreadful oppressions on the Danish commerce practised by England and Holland, and to the desire of Denmark, as a weaker power, to effect some mitigation of her sufferings. These sufferings cannot be better explained, than by an extract from the preamble to a treaty concluded in 1693, between Denmark and Sweden, for the purpose of putting in force a preconcerted plan of reprisals:—"Although their majesties the kings of Sweden and Denmark had hoped, that, after they had concluded their treaty of March 1691, for maintaining their navigation and commerce, the many unjust piracies exercised on their subjects would at length have ceased; they have nevertheless been grieved to find, that, notwithstanding the reclamations and remonstrances which they have from time to time made to the parties engaged in the war, in order that an end might be put to them, they have rather increased and augmented, even to a point that it is in a manner impossible to express—the pretexts, the artifices, the inventions, the violences, the chicaneries, the processes which have been practised, not only against the vessels and goods of the subjects of their majesties, but also against their public convoys, to the prejudice of the customs and tolls of their majesties, to the considerable diminution of their duties and imports, and to the irreparable injury of their kingdoms and provinces, the subjects of which have suffered and lost infinitely, in their persons, their crews, their vessels, goods, and merchandises. Hence it is that their majesties have been obliged," &c.

Distresses, such as are here painted, might sufficiently account for concessions on the part of a sufferer, without supposing them to flow from a deliberate or voluntary acquiescence in the principle on which they were founded.

3d. But admitting the stipulation to have been both gratuitous and deliberate, and to form a fair exception to the general rule of treaties, still being but a single exception to stipulations as numerous and as uniform as have been brought into view, the exception must be considered as having all the effect, in confirming the general rule, which can be ascribed in any case to a confirmation of that sort.

4th. The exception is limited to a trade between one French port and another. It implies, therefore, and recognises, a freedom of trade between foreign and French ports, as well colonial as others.

To this ample sanction, drawn from the conventional monuments of Europe, it will be allowable to add the testimony of the only nation at once civilised and independent in the American hemisphere. The United States have, or have had, treaties with France, Holland, Sweden, Russia, Spain, and Great Britain *. In all of these, except the treaty with Great Britain, they have positively maintained the principle that neutrals may trade freely between neutral and belligerent ports, and between one belligerent port and another, whether under the same or different jurisdictions; and the treaty with Great Britain contained not even an implication against the principle: it merely omitted a stipula-

* To these might be added their treaties with the coast of Barbary, which are all favourable to the neutral rights of commerce. So are various treaties of Great Britain, and of the other powers of Europe, with that coast, and with the Ottoman Porte; all of which, as well as those with the Asiatic powers, it was thought most proper to omit in this inquiry.

tion on the subject, as it did on many others, contained in other treaties *.

* One of the results of that treaty comprehends a most important separation from Great Britain against the doctrine asserted by her. The seventh article of the treaty stipulated a compensation to citizens of the United States, for the damages sustained from irregular and illegal captures; and established a joint board of five commissioners, to decide on all claims, according to equity, justice, and the *law of nations*. These claims were founded, in a very great degree, on captures authorised by the British instructions of November 6, 1793, and depending, therefore, on the question whether a neutral trade with belligerent colonies, shut in time of peace, was a lawful trade in time of war. The board, on a full consideration, reversed the sentences pronounced, even by the admiralty tribunal in the last resort, in pursuance of those instructions; and consequently, as the commissioners were guided by the law of nations, the reversal decided that the instructions, and the principle on which they were founded, were contrary to the law of nations. The joint commissioners were appointed, two by each of the parties, and the fifth by lot, which fell on an American citizen. Whether the British commissioners concurred in the decision, does not appear: but whether they did or did not the decision was equally binding, and affords a precedent of great weight in all similar controversies between the two nations. Nor is the authority of the case impeached by the circumstance that the casting voice was in an American citizen; first, because he was selected and nominated by the British side as an American candidate possessing their confidence; secondly, because as a man he was highly distinguished for the qualities fitting him for so independent a station; thirdly, because a joint tribunal so composed must, in every point of view, be less liable to improper bias, than a tribunal established by and dependent on the orders of one of the parties only.

## THE CONDUCT OF OTHER NATIONS.

The evidence from this source is merely negative; but is not on that account without a convincing effect. If the doctrine advanced by Great Britain had been entertained by other nations, it would have been seen in the documents corresponding with those which contain the British doctrine. Yet, with all the research which could be employed, no indication has been met with that a single nation, besides herself, has founded, on the distinction between a trade permitted and a trade not permitted in time of peace, a belligerent right to interrupt the trade in time of war. The distinction can be traced neither in their diplomatic discussions, nor their manifestoes, nor their prize ordinances, nor their instructions to their cruisers, nor in the decisions of their maritime courts. If the distinction had been asserted or recognised, it could not fail to have exhibited itself in some or other of those documents. Having done so in none of them, the inference cannot be contested, that Great Britain is the only nation that has ever attempted this momentous innovation on the law of nations.

CONDUCT OF GREAT BRITAIN.

If it be not enough to have shown that the belligerent claim asserted by Great Britain is condemned by all the highest authorities on the law of nations, by the clearest testimony of treaties among all the principal maritime nations of the world, herself included, and by the practice of all other nations, she cannot surely demur to the example of her own proceedings. And it is here, perhaps, more than any where else, that the claim ought to shrink from examination. It will be seen, in the course of the following observations, that Great Britain is compelled, under every appeal that can be made to herself, to pronounce her own condemnation; and, what is much worse, that the innovation which she endeavours to enforce as a right of war, is under that name a mere project for extending the field of maritime capture, and multiplying the sources of commercial aggrandisement; a warfare, in fact, against the commerce of her friends, and a monopolising grasp at that of her enemies.

1st. Whilst Great Britain denies to her enemies a right to relax their laws in favour of neutral commerce, she relaxes her own, those relating as well to her colonial trade as to other branches.

2d. Whilst she denies to neutrals the right to trade with the colonies of her enemies, she trades herself with her enemies, and invites them to trade with her colonies.

1st. That Great Britain relaxes in time of war her trade laws, both with respect to her colonies and to herself, is a fact which need not be proved because it is not denied. A review of the progress and modifications of these relaxations will be

found in Reeves's * Law of Shipping and Navigation; and in the successive orders of the British council, admitting in time of war neutral vessels, as well as neutral supplies, into her West-India colonies. It will not be improper, however, to show, that, in these relaxations of her peace system,

* "This is all that I have been able to collect for illustrating the rules laid down in the act of navigation and of frauds for the conduct of the European trade. And having now taken a view of the policy pursued for rendering the foreign trade of the whole world subservient to the increase of our shipping and navigation, I shall draw the reader's attention to another part of the subject, and present to him the instances in which this spirit of prescribing the mode of carrying on foreign trade has been *compelled to yield*, and the execution of our navigation laws have been suspended, lest, in the attempt to enforce them, our commerce might be extinguished, or greatly endangered.

"The laws of navigation, like other laws, have given way *to necessity*, and have been suspended *in time of war*. During the dread of continual danger from an enemy at sea, it is well if foreign trade can be carried on at all; it is no time to be curious as to the built of the ship that is employed in it, how it is navigated, or whence it comes. At such conjunctures, *it has been usual*, more or less, to suspend the act of navigation: the first instance of this was in the Dutch war, in the reign of Charles II.

"It was then done, as was common in *those* times, by the prerogative exercised by the crown, of dispensing with laws upon urgent occasions. On the 6th March, 1661, it was found *necessary* to issue an order of council for suspending the act of navigation wholly, as far as regarded the import and export of Norway and the Baltic sea, and as far as regarded Germany, Flanders, and France, provided the merchants and the owners of the ships were natural born subjects: it was further permitted to any one of a nation in amity to import from any parts, hemp, pitch, tar, masts, saltpetre, and copper, and to pay duty only as natural born subjects. English merchants were permitted to *employ foreign ships* in the *coasting* and *plantation trade*; but they were to comply with the restriction of shipping in and bringing their cargoes to England or Ireland.

"This was letting loose at once most of the restrictions belonging to our navigation system, and throwing it *among the rest of Europe*, to make the best of it, *during the time* we were *unable* to follow up the plan we had proposed to ourselves.

she has been governed by the same policy of eluding the pressures of war, and of transferring her merchant ships and mariners from the pursuits of commerce to the operations of war, which she represents as rendering unlawful the like relaxations of her enemies.

The object of dispensing in time of war with the navigation act, was avowed by the legislature itself in the preamble to one of its acts, which was

"In the war of 1740, when we had a war with both France and Spain, it was again *necessary* to relax from the strictness of our navigation laws; but it was endeavoured to be done in such a way as would facilitate the carrying on of our trade, without wholly giving up the favourite object of British shipping; and this was, by permitting foreigners to become owners of British ships, and to trade as British subjects.

"In the war with France, beginning in the year 1756, the like law was passed, to continue during that war; and again in the year 1770, during the continuance of the then subsisting *hostilities with France*.

"In these temporary expedients we may trace the progressive increase of British shipping. In the Dutch war of 1664, the nation were obliged at once to abandon the Baltic trade, and to admit *foreign ships into the coasting and plantation trade.* But in the war of 1740 we made no other concession than that of admitting foreigners into the ownership of British built ships, and to navigate with foreign seamen, for carrying the European commodities to this country and *to the plantations.* This was also done in the war of 1756, and in the last war. However, in the last war, pressed as our trade was on all sides, we were *compelled* to yield a little further. Many articles of the trade of Asia, Africa, and America, were permitted to be brought *from any place* in *any ships* belonging to a nation in amity. But in neither of these wars, not even in the last, when we had the maritime powers of both worlds to cope with, Spain, France, Holland, and America, did we allow foreign ships to participate in the coasting or in the plantation trade."—*Reeves's Law of Shipping and Navigation, part 2, chap. 3.*

The reason for not then opening the plantation trade is obvious. The only country furnishing the articles needed, was this country, with which Great Britain was then at war.

In the wars of Great Britain, since the United States have been a neutral country, her colonial trade has been opened to them.

passed not long after the navigation act was adopted. The preamble recites, "And whereas, by the laws "now in force, the navigating of ships or vessels, "in divers cases, is required to be, the master and "three-fourth parts of the mariners being English, "under divers penalties and forfeitures therein "contained: And whereas great numbers of sea-"men are employed in her majesty's service for the "*manning of the royal navy*, so that it is become "*necessary*, during *the present war*, to dispense with "the said laws, and to allow *a greater number of* "*foreign mariners* for the *carrying on of trade and* "*commerce:* Be it enacted, &c., that during the "present war," &c.

Without pursuing the series of similar recitals during successive wars, one other example of later date will be given, in which the same object is avowed. The preamble of 13 Geo. II. c. 3. is in the following words: "For the better supply of mariners and seamen to serve in his majesty's ships of war, and on board merchant ships and other trading vessels and privateers, and for the better carrying on the present or any future war, and the trade of Great Britain during the continuance thereof," &c.

The British orders of council, and proclamations of governors, issued from time to time during war, and opening, on account of war, the colonial trade to neutrals, in cases where it was shut to them in times of peace, are too well known to require particular recital or reference. Orders to that effect are now in operation; and fully justify the position, that, as well in the case of the colonial trade as of the trade with the parent country, the same thing is done by Great Britain herself which she denies the right of doing to her enemies.

2d. That she trades with her enemies, and invites them to trade with herself, during war, are facts equally certain and notorious.

The efforts of Great Britain to maintain a trade at all times with the colonies of other nations, particularly of Spain, both in peace and in war, and both by force and clandestinely, are abundantly attested by her own as well as other historians. The two historians of Jamaica, Long and Edwards, are alone sufficient authorities on the subject.

It has been already noticed, that, in the infancy of her belligerent pretension against the trade of neutrals with the colonies of her enemies, she favoured, by special licences, a trade of her own subjects with the same colonies.

The like inconsistency might be verified by a train of examples since the pretension was, during the war of 1793, brought again into action. But it would be a waste of time to multiply proofs of what is avowed and proclaimed to all the world by her acts of parliament; particularly by the act of June 27, 1805, "to consolidate and extend the provisions respecting the free ports in the West Indies."

This act establishes certain free ports in Jamaica, Grenada, Dominica, Antigua, Trinidad, Tobago, Tortola, New-Providence, Crooked Island, St. Vincent's, and Bermuda. These ports, distributed throughout the West Indies, with a view to the most convenient intercourse with the colonies and settlements of her enemies in that quarter, are laid open to all the valuable productions thereof, and to small vessels with single decks, belonging to, and navigated by, inhabitants of such colonies and settlements. In like manner, the enemies of Great Britain are allowed to export from the enumerated ports, rum, negroes, and all goods, *wares*, and *merchandises*, excepting naval stores, which shall have been imported thither in British vessels. Provision is at the same time made for

the re-exportation, in British vessels, of the enumerated productions imported from the colonies and settlements of her enemies, to Great Britain and her possessions, according to the regulations prescribed by her navigation act.

In pursuance of the same principle exercised in her laws, we find her entering into a treaty in time of war, which in one of its articles opened a branch of colonial trade to neutrals not open to them in time of peace, and which being to continue in force only two years after the end of the war, may be considered as made in effect for the war.

The twelfth article of the treaty with the United States, in 1794, stipulated that American vessels, not exceeding a given size, may trade between the ports of the United States and the British West Indies, in cases prohibited to them by the colonial system in times of peace. This article, it is true, was frustrated by the refusal of the United States to ratify it; but the refusal did not proceed from any supposed illegality of the stipulation. On the part of Great Britain the article had a deliberate and regular sanction; and as it would not have been a lawful stipulation, but on the supposition that a trade not open in peace may be opened in war, the conduct of Great Britain in this case also is at variance with the rule she lays down for others.

But a most interesting view of the conduct of Great Britain will be presented by a history of the novel principle which she is endeavouring to interpolate into the code of public law, and by an examination of the fallacies and inconsistencies to which her government and her courts have resorted in maintaining the principle.

It is a material fact that the principle was never asserted or enforced by her against other nations, before the war of 1756.

That at the commencement of the preceding war of 1739, it did not occur, even to the ingenuity of British statesmen labouring for parliamentary topics of argument, is proved by the debate which on that occasion took place in the house of lords.

In the course of the debate on the expediency of the war, this particular point having fallen under consideration, the following observations were made by lord Hervey against the war:

"Some people may perhaps imagine that great "advantages might be made by our intercepting "the Spanish plate fleets, or the ships that are em- "ployed in the trade with their settlements in Ame- "rica, because no Spanish ships can be employed "in that trade; but even this would be precarious, "and might in several shapes be entirely pre- "vented: for if they should open that trade to the "French and Dutch, it is what those two nations "would be glad to accept of, and *we could not pre- "tend to make prize of a French or Dutch ship on "account of her being bound to or from the* SPANISH "SETTLEMENTS IN AMERICA, *no more than we "could make prize of her on account of her being "bound to or from any port* IN SPAIN. We could "not so much *as pretend* to seize any treasure or "goods (except contraband) she had on board, un- "less we could prove that those goods or treasure "actually belonged to the king or subjects of "Spain. Thus the Spanish treasure and effects "might safely be brought," &c.

Lord Bathurst in answer:—

"We may do the Spaniards much damage by privateering, &c. If they bring their treasure home in flotas, we intercept them by our squadrons: if in single ships, our privateers take them. They cannot bring it home either in French or Dutch

ships *, because by the sixth article of the treaty of Utrecht, the king of France is expressly obliged not to accept of any other usage of navigation to Spain and the Spanish Indies, than what was practised in the reign of Charles II. of Spain, or than what shall likewise be fully given or granted at the same time to other nations and people concerned in trade. *Therefore* the Spaniards could not lay the trade in America open to the French, or at least the French could not accept of it; and if the Dutch should, they would be *opposed by France as well as by us;* an opposition they would not, I believe, choose to struggle with †."

Through the whole of the debate the subject is taken up, not on the ground of a belligerent right, or of a neutral duty, but merely on that of commercial jealousy and policy. Had the distinction between a trade allowed in peace as well as war, and a trade allowed in war only, been maintained by British statesmen then, as it is maintained by them now, the same ready answer would have been given then, as in a like discussion would be given now; *viz.* that neither France nor Holland could enter into a trade with the Spanish colonies, because, being a trade not open in time of peace, it could not be laid open in time of war.

* It was overlooked by both sides in the discussion, that the neutral right to trade with the coasts and colonies of an enemy, and even to cover the property of an enemy, was stipulated by Great Britain to France, in the treaty of Utrecht 1713, then in force, and to the Dutch in the treaty of 1674, then also in force. If it be said that the omission to notice these treaties was deliberate, and proceeded from a construction of the treaties which excluded from their purview the colonial trade of an enemy, this presumed accuracy and deliberation of the speakers would strengthen the inference from the omission to cite the principle in question, that the principle was unknown to or disclaimed by them.

† 6 Lords' Debates, 136, 154.

In the debates also which took place in the house of lords, concerning the Spanish captures in America, and the war which followed, several of the lords in their speeches lay down in detail the cases in which belligerent nations may search, capture, and confiscate, neutral vessels in time of war: yet, although colonial trade was the immediate subject of discussion, the distinction now employed seems never to have entered into the thoughts of the speakers.

Again, in the course of this war, to which France became a party on the side of Spain in 1744, it appears that the tribunals of Great Britain proceeded on the same principle, that the trade of neutrals with the colonies of her enemies, though not open in time of peace, might be a lawful trade in time of war. For this there is the testimony of Robinson's Reports, in which it is stated, that ships taken on a voyage from the French colonies, were released before the lords of appeal*.

We find, then, that prior to the war of 1756 this belligerent claim of attacking all neutral commerce not permitted in time of peace,—a claim so broad in its principle and so baneful in its operation,—never had a place among the multiplied pretensions enforced by power, or suggested by avarice. At some times, nations have been seen engaged in attempts to prevent all commerce whatever with their enemies; at others, to extend the list of contraband to the most innocent and necessary articles of common interchange; at others, to subject to condemnation both vessel and cargo, where either the one or the other was the property of an enemy; at others, to make the hostility of the country producing the cargo a cause of its confisca-

* 2 Rob. 122. Am. edit.

tion. But at no time, as seems to be admitted by sir William Scott himself*, was this encroachment on the rights of neutrality devised by any nation until the war of 1756. Then it was that the naval resources of Great Britain, augmented by her prosperous commerce, more especially that of her then colonies (now the United States of America), gave her an ascendancy over all her rivals and enemies, and prompted those abuses which raised the voice of all Europe against her.

The first effect of this overgrown power was seen in the bold enterprise of seizing on the whole trade of France within her grasp, in contempt of all forms of commencing hostilities required by the usage of nations. It was next seen in the extensive depredations on the trade of neutrals, particularly of the Dutch, in defiance, not only of the law of nations, but of the most explicit stipulations of treaty. The losses of that single nation, within the first two years of the war, amounted to several millions sterling†. The Dutch, by their ambassador at London, remonstrated. The British ambassador at the Hague was instructed to enter into explanations. Among these it came out‡, for the first time, that Great Britain meant, notwithstanding the admonitions of prudence as well as of justice, to deny the right of neutrals to carry on with her enemies any trade beyond the precise trade usually carried on in time of peace.

The origin of this novel principle deserves a more particular developement.

The English government had no sooner made war on the French commerce, than the Dutch

* In the case of the Emanuel. Rob. ii. 156, Am. edit.

† See Annual Reg. 1757-8.

‡ Ibid. 1758.

began to avail themselves of their neutral and stipulated rights to enter into it; particularly the commerce of the colonies, both to their own ports and to French ports. The English immediately made war on this commerce, as indeed they did on the commerce to Spain, Portugal, and other countries. The Dutch vessels were even pillaged on the high seas, and their seamen very badly treated. In the years 1757 and 1758 alone, the number of vessels captured and pillaged amounted to no less than three hundred; and the damages were estimated at eleven millions of florins (between five and six millions of dollars). The Dutch appealed to their treaties with England [those in 1674 and 1675] which made enemies' goods free in their ships, contraband only excepted, and the Dutch trade free from and to the enemies' ports, and from one enemy's port to another. The English were driven to the pretext, that the treaty of 1674 said only that the liberty of trade should extend to all merchandises which were transported in *time of peace*, those of contraband excepted; and was, therefore, not applicable to the colonial trade in time of war. Besides, that *the time of peace*, if it had been any thing more than a mode of expressing the entire freedom of commerce, could refer only to the *kinds of merchandises*, not to the *ports* or *channels* of trade, the Dutch were able to appeal to the declaratory treaty of 1675, which stipulated an unlimited freedom of trade *from* and *to* ports of enemies, without saying any thing as to times of peace. This admitting no reply, the English found no refuge but in the pretext that the Dutch vessels, being engaged in the colonial trade, were to be *considered as French vessels*. This lucky thought eluded the stipulation that free ships make free goods, as well as that which embraced the

right of trade on the coasts and with the colonies of enemies. It was alleged also, but with little seeming reliance on such an argument, that the commerce with the French islands was not known in 1674, and therefore could not be comprised in that treaty. These pretexts being very little satisfactory to the Dutch, the province of Holland, the chief sufferer, talked of reprisals. The English answer is in Tindal's Cont. vol. ix. p. 577-578. Undertaking to decide on a constitutional question within an independent nation, they said, if the province of Holland, which had no authority, should fit out ships, they would be treated as pirates; and if the states general should do it, it would be taken as a declaration of war. Such was the birth of this spurious principle.

Being avowed, however, on the part of the government, it was to be expected that it would have its effects on the courts of admiralty. As the decisions of these, during that period, were never reported, the best knowledge of them is to be gathered from references incidentally made to them in the proceedings of other British courts, and in the proceedings of the high court of admiralty since the reports of them have been published. The most precise information which has been obtained through the first channel, appears in the case of Berens *v.* Rucker, before the court of king's bench, reported in Blackstone, i. p. 313. This was the case of a Dutch ship which had taken in sugars at sea, off the island of St. Eustatius, brought alongside of her by French boats from a French island; which ship was captured in 1758, on her return with that cargo to Amsterdam. Lord Mansfield, in pronouncing on the case in 1760, expressed himself as follows:

"This capture was certainly unjust. The pre-
"tence was that part of this cargo was put on

" board off Saint Eustatius by French boats from a " French island. This is now a *settled point*, by " the *lords of appeals*, to be the *same thing* as if " they had been *landed* on the Dutch shore, and " then *put on board afterwards;* in which case " there is no colour for seizure. *The rule is*, that " if a neutral ship trades to a French colony with " *all* the privileges of a French ship, and is thus " *adopted and naturalised*, it must be looked up- " on as a French ship, and is liable to be taken: " not so, if she has only French produce on board, " without taking it at a French port; *for it may* " *be purchased of neutrals.*"

Here the ground of capture must be distinctly noted. It is not that the trade, as a trade allowed in war only, was unlawful, and thence incurred a forfeiture of both ship and cargo; the ground and measure of forfeiture which are now alleged. The vessel is condemned on the ground or presumption, that it had, by adoption, been made the *property of the enemy;* whilst the cargo is not liable to condemnation, if not proved to be enemies' property. In other words, the vessel is, in spite of the fact, presumed, from the mere circumstance of navigating in a French channel, to be French property; and the cargo, although of French production, and found in a vessel looked upon as French, is, notwithstanding these considerations, open to the presumption that it might be neutral property.

This shows only that the Herculean principle was at that time in its cradle; and that neither the extent of its powers, nor the wonders which it was to be called to perform, were at first understood. Its capacities were to be learnt and applied as they might be unfolded by time and occasions. At that time, neutral vessels being admitted into new

channels of French trade by grants of special licences to the vessels, the occasion was thought to be best answered with respect to the vessels, by the presumption, or rather the fiction, that they were French vessels; and with respect to the neutral cargo, as it did not fall precisely under the presumption applied to the vessels, it was left to escape until further time and occasions should teach the other shapes and uses of which the innovation was susceptible.

These shapes and uses soon began to disclose themselves: for it appears from the references made in the case of the Providencia *, tried before Sir W. Scott in 1799, that French West-India produce, conveyed by neutrals from Monte Christi, a Spanish neutral port, was, in the progress of the war of 1756, condemned, on the pretext that the intervention of a neutral port was a fraudulent evasion of the rule which condemned the trade with a French port; notwithstanding the previous rule of the lords of appeal, according to which the landing or even trans-shipment of such produce, at a neutral port, neutralised the trade and made it lawful.

There is some obscurity, it must be owned, as to the principle on which a neutral trade with the French colonies was condemned after the discontinuance of special licences; it being sometimes stated in the arguments referring to that period, that the condemnation was founded on the principle that the trade was virtually or adoptively a French trade; and sometimes that it was founded on the general principle that it was a trade not open in time of peace. Certain it is, that the original principle was that of a virtual adoption, this principle being commensurate with the original oc-

* 2 Robinson, 120.

casion; and that, as soon as this original principle was found insufficient to reach the new occasions, a strong tendency was seen towards a variation of the principle, in order to bring the new occasions within its reach.

It is remarkable, that, notwithstanding the broad principle asserted by the cabinet through its diplomatic organ at the Hague, which interdicted to neutrals every trade not allowed to them in time of peace, the courts of admiralty not only limited the principle at first, and hesitated afterwards to extend it in the manner which has been seen, but never undertook to apply it to the *coasting trade*, though so strongly marked as a peace monopoly, and therefore so clearly within the range of the principle; nor does it appear even that the principle was applied to the trade with the *Spanish* colonies after Spain joined in the war, notwithstanding the rigorous monopoly under which they are known to be generally kept in time of peace.

It is still more important to remark, as a proof of the inconsistency always resulting from false principles and the indulgence of unjustifiable views, that the English themselves, if the Annual Register is to be believed, were actually trading, by means of flags of truce equivalent to licences, both directly with the French islands, and indirectly through Monte Christi, during the very period when they were confiscating the property of neutrals carrying on precisely the same trade in the same manner.

Such is the state of the question as presented during the war of 1756. The next inquiry relates to the war of the American revolution, or the French war of 1778.

Here it is conceded on the British side, that the new principle was throughout that period entirely suspended. On the other side, it may be affirmed that it was absolutely abandoned.

One proof is drawn from the course of decisions in the British high court of admiralty by sir James Marriot, the predecessor of sir W. Scott.

The first volume only of his decisions has yet found its way to this country. In that are contained the cases referred to below *; all of which are adjudged on the principle that the coasting trade, and of course every other branch of trade, not allowed to foreigners by a nation at peace, and which may be opened to neutral foreigners by such nation when at war, are lawful trades.

Although some of the ships in these cases were Danish, and others Dutch, and consequently within the stipulations of treaties which have been heretofore cited, yet there is no appearance that the judge was guided in his decisions by that authority; nor is it in the least probable that they will now be explained by a resort to it. But should such an attempt be made, it could be of no avail; because among the cases there are two, one of a Lubeck and the other of a Prussian vessel, which could be decided by no other rule than the general law of nations, there being no British treaty with either Prussia or Lubeck applicable to the question. There is another case, a *colonial* one too, decided 21st of January, 1779, in which the law of nations must of necessity have been the sole guide. It was that of a French ship bound from St. Domingo to Nantz. The general cargo, as well as the vessel, were condemned as enemies' property; reserving the question concerning the claims of

* The Yonge Helena, a Dutch ship, p. 141.
La Prosperité or Welfaren, claimed as a Lubecker, p. 170.
Les Quatres Frères, a Danish vessel, p. 180.
The Verenderen, or Le Changement, a Prussian vessel, p. 220.
The Zelden, a Dutch ship, p. 243.
The Dame Catherine de Workeem, a Dutch ship, p. 258.

considerable value, made by two passengers as neutrals, the one asserting himself to be a subject of Bohemia, the other of Tuscany. The articles claimed were ultimately condemned as *enemies' property*, without the slightest allusion to the illegality of a neutral trade between a belligerent country and its colonies; which, if then maintained as it is now, would at once have put an end to the claims.

It is strictly and incontrovertibly just, then, to say that these decisions maintain the law of nations as asserted in this investigation; and abandon and renounce it, as asserted in the decisions of the same court, under its present judge. During the war of 1778, the judge had no guide whatever in prize cases, turning on this question, but the law of nations. Neither treaties, nor acts of parliament, nor any known orders of council, interposed any special rule controuling the operation of that law. That law, consequently, was the sole rule of the decisions; and these decisions, consequently, complete evidence of the law, as then understood and maintained by the court: and let it be repeated, that if such was the law in the case of the coasting trade, it was equally the law as to every other channel of trade, shut in peace, and laid open in war.

These decisions were indeed made by the high court of admiralty, and not by the lords commissioners of appeal, the authority in the last resort on such subjects. But this consideration does not impeach the inference drawn from the decisions; which having not been reversed, nor appealed from, are fair evidence for the purpose to which they are applied. It is impossible to account for an omission to enter appeals, where the captors were in their own country, and must have had the best counsel, without supposing that the appeals

afforded not the smallest chance of a more favorable decision.

But as a further and more unexceptionable proof that the principle was abandoned, it is stated by sir William Scott himself, that "in the case of the Verwagtig* (a vessel trading between France and Martinique during the war of 1778), and in *many other* succeeding cases, the *lords of appeal* decreed payment of freight to the neutral shipowner."—This, it must be observed, is a case of colonial trade; and a colonial trade of the most exclusive kind in time of peace; a trade between the colony and the parent country.

To these authorities, an explanation equally singular and unsatisfactory is opposed. "It was understood," says sir William Scott, "that France, "in opening her colonies during the war of 1778, "declared that this was not done with a temporary view relative to the war, but on a general and "permanent purpose of altering her colonial system, and of admitting foreign vessels, universally and at all times, to a participation of that "commerce. Taking that to be the fact (*however "suspicious* its commencement might be during the "actual existence of the war), there was no ground "to say that neutrals were not carrying on a commerce as ordinary as any other in which they "could be engaged; and therefore, in the case of "the Verwagtig, and many other succeeding cases, "the lords decreed payment of freight to the neutral "shipowner."

At what particular time, and in what particular terms, this important declaration by France was made, is not mentioned; nor has any such decla-

* 1 Rob. 252.

ration been discovered by a search which has been carried through all the French codes, and such of the annals of the time as were most likely to contain it; and without some further account of this "declaration," or this "profession" on the part of France, as it is elsewhere called in Rob. Reports, it is impossible to decide on the precise character and import of it.

But supposing the fact as it was taken to be, how account for so unexampled an instance of blind confidence by Great Britain in the sincerity of an enemy always reproached by her with the want of sincerity; and on an occasion too so peculiarly suspicious as that of a profession at the commencement of war, calculated to disarm Great-Britain of a most precious branch of her rights of war?

If her suspension of the new principle is not to be explained by an intentional return to the established law of nations; and the explanation of the fact lies in the alternative between her respect for a suspicious declaration of France, made in the suspicious crisis of a war, more than any other charged by her on the perfidious ambition of France; and her respect for those prudential motives which her own situation may have suggested for abandoning, rather than renewing, the attempt to maintain such a principle; it will not be easy to avoid preferring the explanation drawn from the following review of her situation.

However bold it may have been in Great Britain to advance and act upon the new principle in the war of 1756, it has been seen that she went but a small part of the length of it; and with an evident desire to make the innovation as little conspicuous and obnoxious as was consistent with her object. In this caution she was probably influenced by a

regard, not only to the progress of opinion in Europe in favour of neutral rights, but particularly to the king of Prussia, whose friendship she courted, and who was known to be a patron of those rights. His dispute with Great Britain, produced by her seizure of Prussian vessels in the preceding war, and by his seizing in return the Silesian funds mortgaged to Great Britain, is well known. The issue of this dispute has been represented as a complete triumph of the belligerent claims of Great Britain over the pretensions of the neutral flag. The fact, however, is, that she was obliged to redeem the Silesian debt from the attachment laid on it, by paying to Prussia the sum of 20,000*l.* sterling, as an indemnity for the prizes made of Prussian ships*.

At the commencement of the war of 1778 the public opinion had become still more enlightened and animated on the subject of neutral rights. The maritime success of Great Britain in the war of 1756 had alarmed, and the abuses of her power had sharpened the feelings of every commercial nation. Champions had started up all over Europe, maintaining, with great learning and strong reasoning, the freedom of the seas and the rights of the neutral flag. The principle that free ships make free goods more especially employed a variety of very able pens, and had made a rapid progress. Other principles, the offspring or auxiliaries of this, and equally adverse to the maritime claims of Great Britain, were also gaining partisans. In a word, that state of fermentation in the public mind was prepared, which, being nourished by the example and the policy of France, enabled Russia, in concert with France, to unite and arm all the maritime

* The instrument containing this stipulation bears date Jan. 16, 1756. It may be seen in Jenkinson's Collection of Treaties.

nations of Europe against the principles maintained by Great Britain.

To these discouraging circumstances in the situation of Great Britain, it must be added, that the cause in which she was fighting, against her colonies who had separated from her, was unpopular; that their coalition with her enemies, weakening her and strengthening them, had a double effect in depressing her; and that it happened, as was to be foreseen, that the fleets and cruisers brought against her, and the distress to which her own West Indies were reduced by her inability to supply their wants, made it questionable whether she might not lose, rather than gain, by renewing the principle which she had formerly asserted.—Early in that war, Mr. Burke, in the house of commons, exclaimed, "we are masters of the sea, no farther than it pleases the house of Bourbon to permit."

The effect of this state of things, in tempering the policy and pretensions of Great Britain during the war of 1778, is attested by a series of her public acts too tedious to be here inserted, but which may be seen in Henning's Collection.

But to whatever causes the relinquishment by Great Britain of the new principle is to be ascribed, the fact of the relinquishment remains the same; and that it did not proceed from any declaration made by France that she had permanently abolished her colonial monopoly, is fully demonstrated by the following considerations.

The first is, that such a declaration, or such an abolition, by France, however satisfactory the evidence of it might be to the British cabinet, could have no legal effect on the decisions of a court, without some notification or instruction, which is not pretended, and which is sufficiently contradicted by the guarded terms used by sir

William Scott in speaking of the declaration. And that the then judge of the court, sir James Marriott, was not in fact influenced in his decisions, either by the declaration of France itself, or by any instruction of his own government founded on such a declaration, is put beyond the possibility of doubt, not only by the want of reference thereto in the decisions, but by an acknowledgement made by sir William Scott, in the case of the Emanuel in 1799 (1 Rob. p. 253); the case of a neutral vessel carrying, from one Spanish port to another, salt owned by the king of Spain, then at war with Great Britain. "With respect to authorities (says he), it has been much urged, that in three cases, *this war*, the court of admiralty has decreed payment of freight to vessels so employed: and I believe that such cases did pass, under an intimation of the opinion of the very learned person who preceded me, in which the parties acquiesced, without resorting to the authority of a higher tribunal." If the decisions of sir James Marriott in the war of 1778 had been guided by the declaration of France, and not by the law of nations, it is evident, as that declaration was inapplicable to the war of 1793, and had even been falsified on the return of peace in 1783, as stated by sir William Scott himself, that the opinion intimated by sir James Marriott with respect to cases, Spanish too, and not French cases, in the beginning of the war of 1793, could have no other basis than the principle, that according to the law of nations, taken by itself, the trade of neutrals on belligerent coasts was a rightful trade.

Secondly. Were it admitted that a declaration by France had been so made and communicated, as to become a rule binding on the admiralty court, it is clear that the rule must have been restricted to cases of trade with the *French colonies*, and could have no effect on those of a trade with *Spanish* or

*Dutch* colonies, whose governments had made no such declaration as is attributed to France; yet it is not pretended, nor is it known, that any distinction was made by the British courts between the former and the latter cases. The principle in question seems to have been equally renounced in all *.

Thirdly. The alleged change in the system of France was restricted to her *colonies*. It is not pretended that any permanent change was either made or declared in the system of her coasting trade. But the decisions of the British court above cited relate principally to the coasting trade. The principle then must have been drawn, not from the alleged change of France, but from the law of nations; and if the law of nations authorised, in the judgement of the court, a coasting trade shut in peace and opened in war, it must have authorised, in the same judgement, the colonial and any other trade shut in peace and opened in war.

It is an inevitable conclusion, therefore, not only that the trade of neutrals to belligerent coasts and colonies was sanctioned by the British courts, throughout the war of 1778, but that the sanction was derived from the law of nations; and, consequently, that the new principle, condemning such a trade, was not merely suspended under the influence of a particular consideration which ceased

* Hennings, a Danish writer, alluding to the period of the war of 1778, says, "But although in respect to the neutral trade to the colonies in America, since France has permitted it to all nations, nothing has been expressly conceded by Great Britain. Yet the courts of admiralty have released all prizes which had been brought in, as coming from the French or Dutch possessions in America; and the commerce of neutrals with the colonies has been generally permitted. This permission, therefore, may be considered as a settled point."—Treatise on Neutrality, p. 58.

with that war, but was, in pursuance of the true principle of the law of nations, judicially abandoned and renounced.

Passing on to the war of 1793, it appears, however, that the policy of the British government, yielding to the temptations of the crisis, relapsed into the spirit and principle of her conduct towards neutral commerce, which had been introduced in the war of 1756.

The French revolution, which began to unfold itself in 1789, had spread alarm through the monarchies and hierarchies of Europe. Forgetting former animosities and rival interests, all the great powers on the continent were united, either in arms or in enmity, against its principles and its examples: some of them, doubtless, were stimulated also by hopes of acquisition and aggrandisement. It was not long before the British government began to calculate the influence of such a revolution on her own political institutions; as well as the advantages to which the disposition of Europe, and the difficult situation of her ancient rival and enemy, might be turned. War was, indeed, first declared by the French government; but the British government was, certainly, the first that wished it, and never perhaps entered into a war against France with greater eagerness, or more sanguine hopes. With all Europe on her side, against an enemy in the pangs of a revolution, no measure seemed too bold to be tried, no success too great to be expected.

One of her earliest measures was accordingly that of interdicting all neutral supplies of provisions to France, with a view to produce submission by famine *.

* See Instructions of June 8, 1793.

The project, however, had little other effect, than to disgust those most interested in neutral commerce, and least hostile to France. This was particularly the case with the United States, who did not fail to make the most strenuous remonstrances against so extraordinary a proceeding. The correspondence of their secretary of state with the British plenipotentiary (Mr. Hammond), and of Mr. Pinkney the American plenipotentiary with lord Grenville the British secretary of state, are proofs of the energy with which the innovation was combated, and of the feebleness and fallacy with which it was defended. The defence was rested on a loose expression of Vattel. Bynkershock, who had not altogether got rid of the ideas of the former century, and by whom Vattel probably was misled, could have furnished a still stronger authority *.

The next experiment of depredation on neutral commerce was directed, notwithstanding the former abandonment of the principle, and the continuance of the abandonment into the early cases of the war † of 1793, against that carried on with the

* Frumentum scilicet etiam non hostis, ad hostem recte advehit, excepta obsidionis *famis-ve* causa. Lib. 1. cap. ix.

† The Charlotte (Coffin), an American vessel, taken on a voyage from Cayenne to Bourdeaux, October 1793, and reserved with a class of like cases prior to the instructions of November 1793, was tried and decided by the lords of appeal in 1803. On the side of the claimants it was argued, that considering the *changeable ground* on which the principle — condemning a trade in war not permitted in peace — was *first established in* 1756, and the *apparent abandonment* of it during the war of 1778, neutral merchants were intitled to the benefit of a justifiable ignorance, until the instructions of November 1793 had conveyed an admonition to them. On the other side it was contended that the principle was *sufficiently obvious* as a *principle of public law*, without any instructions, and that neutrals had no right to presume that relaxations confined to circumstances of the war of 1778,

possessions of France in the West Indies. This experiment, too, fell with peculiar weight on the United States. For some time the irregularities went on, without any known instructions from the government reviving the abandoned principle; but without the licentious excesses which followed.

As early, however, as November 6, 1793, instructions were issued, which struck generally at the neutral commerce with the French West Indies. That of the United States was the principal victim. The havoc was the greater, because the instructions, being carried into operation before they were promulged, took the commerce by surprise.

This instruction of November 6th, 1793, was addressed to the commanders of ships of war, and to privateers having letters of marque against France, in the following terms: —

"That they shall stop and detain all ships laden with goods the produce of any colony belonging to France, or carrying provisions or other supplies for the use of any such colony, and shall bring the same with their cargoes to legal adjudication in our courts of admiralty."

(on which subject by the way it was impossible they could have any knowledge) would be continued. The court, concurring in this view of the case, pronounced the ship and cargo, with the others in the like situation, subject to condemnation. 4 Rob. appendix, p. 12. As the state of appearances had misled the "very learned person" who preceded sir William Scott into an opinion that the neutral trade, though not permitted in peace, was lawful in war, it was surely rather a hard sentence that refused to unlearned traders a plea of ignorance, of which so very learned an expositor of the law is obliged to avail himself. Besides, if "the principle was sufficiently obvious," why were the cases depending on it reserved, and, above all, why were the parties kept in uncertainty and expense for ten years, and till the war was over? — These are questions which it is more easy to ask than to answer.

In some respects this instruction went further than the new principle asserted by Great Britain: in others, it fell short of that principle.

It exceeded the principle in making the *produce* of a French colony, although owned by neutrals, and going from a neutral port where it might have been regularly naturalised, the criterion of the trade. The principle would have extended only to produce exported *immediately* from the colony, in a trade not permitted in time of peace.

Again, the principle was not applicable to an immediate trade from certain ports* and places in the colonies, authorised by permanent regulations antecedent to the war. The instruction extends *to any colony*, and consequently violates a trade where it was permitted and customary before the war.

On the other hand it falls short of the principle, in as much — 1. as it spares articles directly exported from, though not the produce of, the colonies: 2. as it does not effect the coasting trade of France, and other branches of French trade, laid open in time of war, on account of the war.

With these mitigations, however, the instruction had a sweeping operation on the neutral commerce with the French colonies, carried on chiefly from the United States.

The resentment produced by it, and which was doubled by the ensnaring concealment of the instruction, appeared not only in the outcry of the suffering merchants, but in the discussions and proceedings of the government. Important restrictions on the commerce of Great Britain were agreed to by one branch of the congress, and negatived

* See the French Free-Port Act of 1784, in force in 1793.

by a single vote in the other. A sequestration of British funds and effects in the United States was proposed and strongly supported. And an embargo withholding supplies essential to the subsistence of the British West Indies actually passed into a law, and remained in force for some time. These measures, at length, gave way to the mission of a plenipotentiary extraordinary to the British court, which terminated in the treaty of 1794.

The British government, in the mean time, aware of the powerful tendency of such depredations to drive the United States into a commercial, if no other, warfare against her, prudently retreated from the ground taken by this instruction, as early as the 8th of January, 1794, when she revoked the instruction to her cruisers, of November 6th, 1793, and substituted the following;—

"1st. That they shall bring in for lawful adjudication all vessels, with their cargoes, that are loaded with goods the produce of the *French West-India islands*, and *coming directly* from any port of the said islands to any port *in Europe*."

"2d. That they shall bring in for lawful adjudication all ships, with their cargoes, that are loaded with goods the produce of the said islands, the property of which goods shall belong to subjects of France, to whatsoever ports the same may be bound."

"3d. That they shall seize all ships that shall be found attempting to enter any port of the said islands that is, or shall be, blockaded by the arms of his majesty or his allies, and shall send them in with their cargoes for adjudication, according to the terms of the 2d article of the former instructions, bearing date the 8th day of June, 1793."

"4th. That they shall seize all vessels laden wholly or in part with naval or military stores,

bound to any port of the said islands, and shall send them into some convenient port belonging to his majesty, in order that they, together with their cargoes, may be proceded against according to the rules of the law of nations."

As the three last articles cannot be regarded as any relaxation or re-modification of the instructions of November 1793, since they relate only to principles well known to have been long enforced by Great Britain, as a part of the law of nations, it is not easy to discern the motive to them. The only effect of the articles, as an enumeration and definition of belligerent rights, in certain branches of trade, seems to be, to beget perplexing questions with respect to these rights in the branches of trade pretermitted.

The material article is the first. It varies the preceding instructions in three respects: 1st. in substituting "the French West-India islands" for "any colony of France;" of which there are some not *islands*, and others not *West-India* islands: 2d. in limiting the seizure to produce "*coming directly*" from any port of the said islands: 3d. in the very important limitation of the seizure to vessels bound from those islands to any port *in Europe*.

By these limitations it was, apparently, intended to take the direct trade from the French West Indies to the United States out of the operation of the order of 1793: and probably, also, the trade from the United States to the West Indies, leaving the trade *to Europe*, from the French West Indies, a prey to British cruisers. Whether it was also meant, as seems to be implied, that the neutral trade from Europe to the French West Indies was to be undisturbed, is a distinct question. This question was actually raised under the ambiguity of the instruction, and decided, not without some

marks of self distrust, by sir William Scott, in the case of a trade from France herself to a West-India colony*.

The explanation of this change in the instructions of the British government is given by the reporter of sir William Scott's decisions, in the following passage, extracted from the appendix to 4 Rob. p. 4. "The relaxations that have since (the instructions of November 6, 1793) been adopted, have originated chiefly in the change that has taken place in the trade of that part of the world since the establishment of an independent government on the continent of America. In consequence of that event, American vessels had been admitted to trade in some articles, and on certain conditions, with the colonies, both of this country and of France. Such a permission had become a part of the general commercial arrangements, as the ordinary state of their trade in time of peace. The commerce of America was therefore abridged by the *foregoing instructions*, and debarred of the right generally ascribed to neutral trade in time of war, that it may be continued, with particular exceptions, on the basis of its ordinary establishment. In consequence of representations made by the American government *to this effect*, new instructions to our cruisers were issued, 8th January, 1794, apparently designed to exempt American ships trading between their own country and the colonies of France."

One remark suggested by this explanation is, that if it be a just defence of the orders of January, 1794, it is a severe imputation on those of November, 1793: for the sole reason which is stated, as requiring this revocation of the orders of 1793,

* Immanuel, 2 Rob. 156.

was in existence at the date of those rigorous orders; and ought, therefore, to have prevented them. Yet they were not only not prevented, but were permitted to have a secret and extensive operation on the American commerce: nor does it appear, that in any of the decisions on the captures made within that period, conformably to the instructions (but contrary, as is here admitted, to the law of nations, which, on the British principle, authorised the American commerce, at least as far as it had been actually enjoyed with the French, in time of peace), the court ever undertook to modify the instructions; as is alleged to have been done in the war of 1778, in consequence of the professions of France that she had opened her colonial ports, generally, to the permanent trade of other nations.

The explanation calls for two other remarks. The first is, that the instruction goes beyond the reason assigned for it. The reason assigned is, that the trade between the United States and the French islands had, by the permission of France, become "the ordinary state of their trade in time of peace." Now so far as this was the fact, the trade is expressly and truly stated, in the explanation itself, to have been limited to "some articles," and "on certain conditions." But the instruction is admitted to have been designed to exempt, without any such limitations, American ships trading between their own country and the colonies of France.

The second remark is, that it is not a fact that the *representations of the American government* were made *to the effect* here stated: namely, that the instructions of 1793 debarred them of the right of trading with the French colonies in time of war, *according to the ordinary state of the trade* per-

mitted to them *in time of peace.* The representations of the American government recognised no such principle, nor included any such complaint; as is proved by official documents* on the subject.

A third remark might be added. If the ordinary permissions of France to trade with her colonies was a good reason for exempting the trade of the United States from the orders of November 1793, the exemption ought to have been co-extensive with the permissions, and, consequently, to have embraced the *neutrals of Europe,* who enjoyed the same permissions as the United States, instead of being restricted to the latter.

One is really at a loss which most to admire, the hasty and careless facility with which orders proceed from the government of a great and an enlightened nation, laying prostrate the commerce and rights of its friends; or the defective and preposterous explanations given of such orders by those who undertake to vindicate or apologise for them.

* Among the printed documents of that period, is a letter of January 9, 1794, from Mr. T. Pinkney, the American minister at London, to Mr. Jefferson, then secretary of state, in which, alluding to an interview with lord Grenville, he says, "I reminded him that our ideas differed materially from theirs on this subject; and, without repeating the arguments I had before addressed to him, both verbally and in writing, in support of our position, it was only necessary to say, that we did not admit the right of the belligerent powers to interfere further in the commerce between neutral nations and their adversaries, than to prevent their carrying to them articles which, by common usage, were established as contraband, and any articles to a place fairly blockaded; that, consequently, the two first articles, though founded upon *their principles,* of not suffering, in war, *a traffic which was not admitted by the same nations in time of peace,* and of taking their enemy's property when found on board of neutral vessels, were nevertheless contrary to what *we contended* to be *the just principles* of the modern law of nations."

But whatever may have been the origin, or the intention, of the second orders of 1794, revoking the restraints imposed by those of 1793 on the United States—whilst they suffered those restraints to continue, in great part at least, on other nations, two consequences resulted, which seem not to have been taken sufficiently into foresight.

One of them was, that the nations of Europe, excluded from the trade not forbidden to the United States, were not a little soured by the distinction; and which, very possibly, may have contributed to the revival of the sympathies which brought about the armed neutrality of 1800.

The other was, the vast growth of the carrying trade of the United States, which supplied all parts of Europe with the produce of the West Indies, and without affording to Great Britain any of the profits of an entrepôt.

The developement of these consequences could not fail to awaken the attention of the British government, and is the best key to the instruction which was issued January 25, 1798; and which was extended to the possessions of Spain and Holland, then united with France against Great Britain.

It revoked the instructions of January 1794, reciting, as the consideration which rendered the alteration expedient, "the present state of the commerce of Great Britain, as well as that of neutral countries;" and, in lieu thereof, the following was issued:—

"That they should bring in for lawful adjudication all vessels, with their cargoes, that are laden with goods the produce of any island or settlement belonging to France, Spain, or the United Provinces, and coming directly, from any port of the said islands or settlements, *to any port in Europe*,

*not being a port of this kingdom, nor a port of that country, to which such ships, being neutral ships, shall belong.*" The residue of the articles merely extend to the islands and settlements of France, Spain, and Holland, the three last articles in the instructions of January 1794.

The effect of this new change in the instructions was, to sanction a direct trade from *all* the French islands, as well as from those in the *West Indies*, and also from the French *settlements* which were not islands; with a like sanction to a like trade from the islands and settlements of the other enemies of Great Britain; to extend to neutrals in Europe the enjoyment of this trade, with a refusal to the American states of the *direct trade* from those islands and settlements to such European neutrals; and finally, to permit to these states, as well as to the neutrals of Europe, a direct trade from the hostile islands and settlements *to Great Britain herself.*

The explanation attempted by the reporter, Dr. Robinson, in his appendix to the fourth volume, p. 4—5, is, that "In consequence of the relaxation [in 1794] of the general principle in favor of *American* vessels, a similar liberty of resorting to the colonial market, for the supply of their own consumption, was conceded to the *neutral* states of *Europe*—a concession rendered more reasonable by the events of war, which, by annihilating the trade of France, Spain, and Holland, had entirely deprived the states of Europe of the opportunity of supplying themselves with the articles of colonial produce in those markets."

With regard to the *permission to all neutrals* to convey the produce of the enemies' colonies directly *to British ports*, he is *silent.*

From a summary, however, of the discussions which had taken place on cases before the lords of

appeal, as it is given in the appendix to 4 Rob. p. 6, an explanation of this part of the regulation might be easily collected, if it were not otherwise sufficiently obvious. Among the arguments used for so construing the last order of 1798, as to justify a Danish vessel in trading from a Spanish colony to a neutral country, to which the vessel *did not belong*, it is observed, "that, originally, the pretension to exclude *all neutrals* was uniformly applied on the part of the belligerent; by which the effect *of reducing* such settlements *for want of supplies* became a *probable issue of the war: now*, since the relaxations have conceded to neutral merchants the liberty of carrying thither cargoes of innoxious articles, and also of withdrawing the produce of the colony, for the purpose of carrying it to their own ports; *now*, to restrict them from carrying such cargoes *directly to the ports of other neutral states*, becomes a rule apparently capricious in its operation, and one of which the policy is not evident. From the northern nations of *Europe* no apprehensions are to be entertained of a *competition injurious to the commercial interests of our own country.* To exclude *them* from this mode of traffic [that is, of trafficking directly from such colonies to other neutral countries] in the produce of the enemy's colonies, is to throw *a further* advantage into the hands of *American* merchants, who can, with greater ease, import it first into their own country, and then, by *re-exportation*, "send it on" to the neutral nations of Europe."

No other key is wanted to let us into the real policy of the orders of 1798, which placed the neutral nations of Europe and the United States on the same footing, by extending the rights of the former, and thereby abridging the advantages of the latter. This change of "the actual state of

the commerce of this country (G. B.), as well as that of neutral countries," was expedient for two purposes: — It conciliated the northern nations, then perhaps listening to a revival of the armed neutrality, and *from whom* " no apprehensions were to be entertained of an injurious competition with the commercial interests of Great Britain;" and at the same time it so far took the advantages of re-exportation out of the hands of the American merchants, from whom such a competition probably was apprehended.

But a mere adjustment of the balance between neutrals in their advantageous trade with the enemy colonies, did not answer all the purposes which were to be consulted. It gave Great Britain herself no share of the forbidden fruit. She took at once, therefore, the determination, whilst she would permit none of the neutral merchants of any country to carry on this colonial trade of her enemies with another neutral country, to authorise them *all* to carry it on *with herself;* disguising, as well as she could, the policy of making herself the centre and thoroughfare of so extensive a branch of profit, under the general expediency of changing " the state of commerce both British and neutral," as it had resulted from her regulations of 1794; and avoiding, as much as she could, to present to notice the palpable inconsistency of making herself a party to a trade with her colonial enemies, at the very moment when she was exerting a belligerent pretension, having no other basis than the probable reduction of them, by suppressing all trade whatever with them.

This subject is too important not to be a little further pursued. Unpleasant as the task is — to trace into consequences so selfish, and so abounding in contradictions, the use made by Great Britain of the principle assumed by her — the develope-

ment is due to truth and to the occasion. It will have the important effect, at the same time, of throwing further light on the checkered scene exhibited by the admiralty jurisprudence of Great Britain.

It must be added, then, that the *commercial policy* for which she employs her new *belligerent* principle is the more apparent from two subsidiary pretensions, as new, as they are at variance with the maritime rights of neutral nations.

The object of *drawing* through her own warehouses and counting-houses the colonial trade of her enemies, on its way from the West Indies to the other countries of Europe, being counteracted by the extensive intercourse between the United States and those colonies, and by the re-exportation from the United States of the imported surplus of colonial produce, the project was adopted of *forcing* this trade directly from the West Indies to, and through, Great Britain.—1st. by checking the West-India importations into the United States, and thereby lessening the surplus for re-exportation: 2d. by embarrassing the re-exportation from the United States—both considerations seconded, no doubt, by the avidity of her cruisers and by the public interest supposed to be incorporated with their success in making prizes; and the first consideration seconded also, perhaps, by a desire to give an indirect check to the exportation of contraband of war from the United States.

In order to check importations, the principle is advanced, that the outward and the return voyage are to be regarded as forming but a *single voyage;* and consequently, if a vessel is found with an innocent cargo on board, but on her return from a hostile port—her outward cargo to which was a contraband of war subject to capture—the vessel is thereby rendered liable to capture, and the chance for capture by that means doubled.

That this principle is of modern date, can be shown by more than negative evidence, and from a source highly respectable. When sir L. Jenkins was judge of the high court of admiralty, in the latter period of the 17th century, it was the practice, sometimes for the king, at others for the commissioners of appeal, to call for his official opinions, in writing, on cases depending in other courts, or diplomatically represented to the government. These rescripts are valuable, not only as one of the scattered and scanty materials composing the printed stock of admiralty precedents in Great Britain, but as the testimony of a man, who appears to have been not undeservedly regarded as an oracle in his department of law, and to have delivered his opinions with a candor and rectitude—the more meritorious, as he served a sovereign who gave little encouragement to these virtues, and as he was himself of a temper and principles sufficiently courtly.

The case of a Swedish vessel, which had conveyed enemy's goods, having been seized, on her return, with neutral goods, was represented to the government by the Swedish resident, and by the government referred to sir L. Jenkins, the judge of the high court of admiralty. His report is so interesting in another respect, as well as that for which it was required, that it shall be given in his own words.—

"The question which I am, in obedience to his majesty's most gracious pleasure, to answer unto, being a matter of fact, I thought it my duty not to rely wholly on my own memory or observation, but further to inquire of sir Robert Wiseman his majesty's advocate-general, sir William Turner his royal highness the lord high-admiral's advocate, Mr. Alexander Check his majesty's

proctor, Mr. Roger How principal actuary and register in the high court of admiralty in England, whether they, or any of them, had observed, or could call to mind, that, in the late war against the Dutch, any one ship, otherwise free, as belonging to some of his majesty's allies, having carried goods belonging to his majesty's enenies, *from one enemy's port to another*, and being seized (after it had discharged the said goods) *laden with the proceed of that freight* which it had carried and received of the enemy upon the account of the ship's owners, had been adjudged prize to his majesty; they all *unanimously* resolved that they had not observed, nor could call to mind, that any such judgement or condemnation ever passed in the said court; and to this their testimony I must, as far as my experience reaches, concur: and if my opinion be, as it seems to be, required, I do not, with submission to better judgement, know any thing, either in the statutes of this realm, or in his majesty's declarations upon occasion of the late war, *nor yet in the laws and customs of the seas*, that can (supposing the property of the said proceed to be *bonâ fide* vested in the ship-owners of his majesty's allies) give sufficient ground for a condemnation in this case. And the said advocates, upon the debate I had with them, did declare themselves positively of the same opinion. Written with my hand, this 6th day of February, 1667*."—Sir L. Jenkins' Works, 2d vol. p. 741.

* The works of Jenkins have become so scarce, that it were to be wished that the parts, at least, which contain his admiralty opinions and decisions were re-published. Considering the luminous character and the official weight belonging to them, it might have been expected that this would long ago have been done; as well as that his authority would have been more frequently consulted in admiralty proceedings. Perhaps one cause of the neglect may lie in the difference which would

Here the point is clearly established, that a vessel found with a lawful cargo, on a return voyage, cannot be affected by the unlawfulness of the cargo immediately preceding it; and, consequently, that an outward and return voyage cannot be considered as but one voyage, or the character of one as transfused into the other.

It is true that, in this case, the cargo in question was not contraband of war, but enemy's property. But there is no room for a distinction in the principle applicable to the two cases. If the two voyages in fact make one and the same voyage in law, an outward cargo of enemy's property must authorise capture in the returned voyage as much as an outward cargo of contraband would authorise it. If the two voyages do not make one and the same, the contraband of war, in one voyage, can no more affect another voyage, than enemy's property, in one voyage, can affect another voyage.

It will not have escaped attention, that, in the case stated in the report of Jenkins, the voyage in

be exhibited between his testimony of the law of nations, and the expositions of modern date, on some other points beside that in the text. For example, in defining contraband, he limits it to things "*directly* or *immediately* subservient to the uses of war;" and expressly decides "pitch and tar" not to be contraband. By what authority has the law of nations been changed in this particular? Certainly not by an *unanimous* consent of nations, as was required by Great Britain to change the law subjecting enemy's property under a neutral flag to confiscation; the contrary being admitted by sir William Scott, who remarks that this was a point, though not the only point, of British difference from the tenets of Sweden. [4 Rob. 201.] With respect to tar and pitch, it cannot even be pretended that any change in the uses of these articles, since that date, can have changed the reason of the rule as it existed in the time of Jenkins; or that the change was merely an adaptation of the same general principle to particular circumstances: for tar and pitch had the same relation to ships, and ships the same relation to war, then, as they have now.

which enemy's property had been carried, and which it was imagined might thence have vitiated the return voyage, was a *coasting* voyage from one enemy's port to another. Yet so immaterial was *that circumstance*, at *that time*, that it appears not even to have been taken into his consideration, much less to have influenced his opinion. Had it been otherwise, it would indeed have made his decision so much the stronger against the amalgamation of two voyages, on account of the unlawfulness of one of them: for on that supposition the first of the two voyages would have been doubly unlawful, as engaged both in carrying enemy's property, and in carrying it from one enemy's port to another.

But this particular principle is not only of modern date, but of very recent date indeed. Its history, like that of many other belligerent innovations by Great Britain, is not unworthy of attention.

In December 1798, in the case of the Frederick Molke, a Danish vessel that had got into Havre, then deemed in a state of blockade, and was taken on her way out, August 18th, 1798, it was urged to be like the case of a return voyage, where the cargo of the outward voyage had been contraband. Sir William Scott admitted, that, in the latter case, "*the penalty does not attach on the returned voyage*," but denied the affinity between the cases.—"There is this essential difference," said he; "that in *contraband* the offence is *deposited with the cargo*, whilst in such a case as this, it is continued and *renewed*, in the subsequent conduct of the ship*;" the act of *egress* being, according to him, as culpable as the act of ingress.

* 1 Rob. p. 72.

In August 1799, in the case of the Margaretha Magdalina, a vessel returning to Copenhagen from Batavia, her outward cargo, having consisted of contraband goods, was seized at St. Helena, September 1798. On the ground, however, that the ship and cargo were neutral, and that the outward shipment from Copenhagen was contingent, and not absolutely for Batavia, but sent under the management of the master to invest the proceeds in the produce of Batavia, restitution was decreed by sir William Scott, notwithstanding the fact that the contraband "articles were *actually sold at Batavia,*" with a remark only, that there was great reason to bring this case to adjudication, as a case very proper for inquiry. On this occasion the judge made the following observations:—"It is certainly an alarming circumstance in this case, that, although the outward cargo appears to have consisted of contraband goods, yet the principal owner appears publicly at Copenhagen, and makes oath, 'that there were no pro-'hibited goods on board destined to the ports of 'any party now at war.' The master himself describes the cargo that he carried out as *naval stores;* and, in looking into the invoice, I find that they are there represented *as goods to be sold.* That being so, I must hold that it was a most noxious exportation, and an act of very hostile character, to send out articles of this description to the enemy, in direct violation of public treaties, and of the duty which the owners owe to their own government. I should consider it as an act that would *affect the neutral in some degree* on this *returned voyage;* for although a ship *on her return* is not liable to confiscation for having *carried a cargo of contraband* on her *outward voyage,* yet it would be a little *too much* to say that *all impression* is done

away; because, if it appears that the owner had sent such a cargo, under a certificate obtained on a false oath, that there was no contraband on board, it could not but affect his credit at least, and induce the court to look very scrupulously into all the actions and representations of such a person*."

That the judge was beginning to be a little unquiet under the rule imposed on himself—not to consider a ship on her return voyage as liable to confiscation for having carried a cargo of contraband on her outward voyage—is sufficiently visible. He is found, nevertheless, still submitting to the restriction.

The case of the Immanuel succeeded November 7th, 1799. It is the case of a Hamburg ship, taken 14th of August, 1799, on a voyage from Hamburg to St. Domingo, having in her voyage touched Bourdeaux, where she sold part of her cargo, and took a quantity of other articles for St. Domingo. The question was started, whether the stores which had been discharged at Bourdeaux, though originally destined for St. Domingo, were contraband or not. The inference of the judge was, that they were not of a contraband nature, at least that they were left ambiguous, and without any particular means remaining of affording a certainty upon the matter. "If so," said he, "it is useless to imagine what the effect of contraband, *in such circumstances*, would have been. I shall say no more, than that *I incline to think* that the discharge of the goods at Bourdeaux would have extinguished their powers of infection. It would be an extension of this rule of infection, not justified by any former application of it, to say, that, after the contraband was actually withdrawn, a

* 2 Rob. p. 116, 117.

mortal taint stuck to the goods with which it had once travelled, and rendered them liable to confiscation, even after the *contraband itself* was *out of its reach**."

This was not indeed a return voyage, but one link of an outward voyage. The reason, however, given why contraband, after being discharged, could not leave a confiscating taint on the expedition, namely, because itself was out of the reach of confiscation, is precisely common to the two cases; yet it would seem that the judge is becoming not a little languid in maintaining the opinion, "that the offence of contraband is deposited with the cargo." He now "*inclines to think* that such would be the effect."

February 5, 1800, the case of the Rosalie and Betsey, was that of a ship taken May 31, 1799, on a voyage from the Isle of France, asserted to be to Hamburg. It was made a question of property, turning on a question of fraud. The fraud in the returned voyage was held to be reinforced by the fraud in the outward voyage; and that fraud is stated, by sir William Scott, "as more noxious, on account of the *contraband nature* of several of the articles of the *outward* cargo."

Here contraband in an outward voyage was, in spite of the maxim that its offence was deposited with the cargo, allowed to have an *influence* on the character of the *returned* voyage. Still it was but an indirect and partial influence. It was held to be an *aggravation only* of the fraud, the fraud being the git of the offence.

In 1800, June 24, occurs the case of the Nancy (Knudson, master), a ship taken on a voyage to Copenhagen from Batavia, whither she had car-

* 2 Rob. p. 164.

ried contraband of war. The cargo appears to have been condemned, on the ground of fraud in the papers and destination, *combined with the contraband quality* of the *outward* cargo. The complexion and weight, however, which the last ingredient had assumed in the mind of the judge, are seen in the following extract from the judgement pronounced by him:—

"But it is said this is a past transaction, and that in cases of contraband the returned voyage has *not usually* been deemed connected with the outward. In *European* voyages of no great extent, where the master goes out on one adventure, and receives at his delivering-ports new instructions and further orders, in consequence of advice obtained of the state of the markets, and other contingent circumstances, *that rule* has prevailed; *but* I do not think, in *distant* voyages to the *East Indies*, conducted in the manner this has been, the same rule is fit to be applied. *In such a transaction*, the different parts are not to be considered as *two voyages*, but as *one entire transaction*, formed upon one original plan, conducted by the same persons, and under one set of instructions, *ab ovo usque ad mala**." This condemnation of the cargo was confirmed by the lords of appeal, and the indulgence even allowed with respect to the ship, by the high court of admiralty, reversed by that superior tribunal.

The existence of contraband in an outward voyage not only figures more considerably in this than in any preceding case, but the judge gets hold of a new implement of judicial warfare on neutral commerce. In aid of presumptive fraud, of the alleged continuity of fraud from the out-

* 5 Rob. p. 105, 106.

ward into the returned voyage, and of the aggravation given to fraud by the ingredient of contraband in the outward voyage—in aid of all these, the *distance of the voyage* makes for the first time its appearance. In the case of the Margaretha Magdalena, the voyage, like this, was a voyage to Batavia. In the case of the Rosalie and Betsey, the voyage was also into the East-Indian seas. In neither of these cases the slightest allusion is made to that criterion of right and wrong. The discovery then may fairly be dated with the case of the Nancy, of no older date than June 1800.

But mark the reason why *distant* voyages to the East Indies are distinguished from European voyages of no great extent. It is, because in the latter the master "receives at his delivering-ports new instructions and further orders, in consequence of advice obtained of the state of the markets, and other contingent circumstances;" whereas, in distant voyages to the East Indies, *conducted in the manner this has been*, the two voyages are to be considered as one entire transaction, formed upon one original plan, conducted by the same persons, and under one set of instructions.

If the reason here given for the distinction between distant voyages and voyages of no great extent be a good one, it is not easy to see the reason for requiring, in addition to the distance of the voyage to the East Indies, that it should be conducted in the manner of this particular voyage; unless indeed it be, as there is too much room to remark in the decisions of the judge, with a view to rest every case, as much as possible, on its own particular circumstances, and thereby avoid the judicial fetters formed by a chain of definite precedents.

Certain it is, that if the outward and returned voyages are to be taken as one, where the distance

of them is such, that new orders cannot be given, in consequence of new advices from the foreign ports of delivery, as may be done in voyages of no great extent; but that the whole business must be executed under one original set of instructions. Every voyage to the East Indies, *in whatever manner conducted*, must fall within the rule which determines the outward and returned voyage to be but one voyage: in other words, that, in that extensive branch of neutral commerce the outward and returned voyage making but one, contraband in the outward cargo, *though deposited at its place of destination*, is to have the same effect on the returned voyage as it would have had on the outward voyage, if actually intercepted on the outward voyage.

Nay more—the rule must be applicable to every *European* voyage *of great extent;* an extent so great as to require that the sale of the outward cargo at the ports of delivery, and the purchase of a return cargo, should be provided for in the same original instructions.

In no view can the rule be less applicable to *distant voyages* between Europe and the West Indies, than between Europe and the East Indies; nor more to the European voyages than to American voyages to the West Indies, where these are of so great extent as to require that the returned voyage should be provided for in the same set of instructions with the outward voyage.

Whether these analogies and inferences entered into the contemplation of the judge on this occasion, is an inquiry which may be waved. Nor is it known to the public whether any intermediate steps were taken by him, or by the superior tribunal, between that date and the 24th of June, 1803, conducting the policy or opinion of the cabinet towards the instructions of this last date. These

form, however, a very natural result to those preliminary ideas, as appears by the tenor of the instructions, which is as follows: —

"In consideration of the present state of commerce, we are pleased hereby to direct the commanders of our ships of war, and privateers, not to seize any neutral vessel which shall be carrying on trade directly between the colonies of enemies and the neutral country to which the vessel belongs, and laden with the property of inhabitants of such neutral country: provided, that such neutral vessel shall not be supplying, nor shall have on the *outward voyage* supplied, the enemy with any articles of *contraband of war*, and shall not be trading with any blockaded port."

In these instructions we find the principle formally adopted; and the returned cargoes of West-India produce actually obstructed on their way to the United States, by the application of the principle, wherever the outward cargo had included contraband. We find, of course, the West-India trade so far forced out of the channel to Europe through the United States, into such channels to and through Great Britain as she may choose to prescribe.

This being necessarily and obviously the commercial effect of the instructions, it may fairly be supposed that it corresponds with the intentions of a nation so clear-sighted in whatever affects her commerce; and, consequently, that the principle on which this instruction is founded was assumed as subsidiary to the commercial policy on which was founded the main principle under investigation.

Another observation, with respect to this instruction, forces itself upon us. It was a heavy reproach against the instruction of November 6th, 1793, that it was not promulged until it had for

some time been ensnaring, and laying waste, the commerce of neutral nations with the West Indies. The instruction of June 24, 1803, first found its way (probably by chance) to public notice, in the United States, from the obscure island of Tortola, in the summer of 1805. It must then have been in the pockets of cruisers, ensnaring and destroying the commerce of this country, as far as that degree of innovation could have that effect, for a period of about two years. The reproach is heightened, too, by the consideration that the snare, in this case, was successful in proportion to the respect observed towards former instructions, the faith of which was violated by the *ex post facto* operation of that in question. A reparation of the damage is the least atonement that a just and wise nation can wish to make for such a trespass on all the maxims of public morality, as well as of national honor.

The second pretension subsidiary to the commercial policy of instructions, cloathed with the language of belligerent rights, is that of subjecting to capture colonial produce, re-exported from a neutral country to countries to which a direct transportation from the colonies, by vessels of the re-exporting country, has been disallowed by British regulations. The effect of this pretension evidently is—to check neutral nations, particularly the United States, in the circuitous transportation of West-India produce; and, in the same proportion, to force the trade into channels terminating in British ports. And the effect is the more particularly in her favor, as the re-exportation of the surplus carried into her ports can be regulated by her own laws, for her own interests; whilst she will not permit the laws of other countries to regulate the re-exportation of the surplus carried into their respective ports.

That this pretension, also, is as new as it is arbitrary, will be best seen by a review of its rise and progress; which will, at the same time, as in the other instance, illustrate the inconstancy and inconsistency of the maritime proceedings of Great Britain towards other nations.

Prior to the war of 1756, no trace of any such pretension is discovered; and it is testified by the authority of lord Mansfield, as already seen, that a principle was, during that war, judicially settled in opposition to it. A neutral vessel, off the neutral island of St. Eustatius, had received on board a part of her cargo from French boats, from a French colony. "This," says his lordship, "is now a *settled point*, by *the lords* of appeals, to be the same thing as if they had been *landed* on the Dutch shore, and then put on board afterwards; in *which case* there is no *color* for seizure."

Here the rule was solemnly settled, by the highest admiralty tribunal in Great Britain, that the transshipment, off a neutral port, of colonial goods from an enemy's vessel, protected the goods from capture; and that where such goods had been landed and re-laden, there was not even a *color for seizure*.

Notwithstanding this solemn recognition of the neutral right, it was found, as also has been seen, that French produce exported by neutrals from the neutral port of Monte Christi, during the war of 1756, was not protected by the rule.

During the war of 1778, the whole claim of disturbing neutral commerce, on the ground of its not being open in peace as well as in war, having been relinquished, the question could not occur until the war of 1793. And, what is not to pass unnoticed, the first case in which the point fell under judicial observation appears to have been that of the Emanuel in November 1799. During the six

preceding years, as may be inferred from what then fell from the judge, no doubt had existed that an importation of colonial produce into a neutral country converted it into the commercial stock of the country, with all the rights, especially those of exportation, incident to the produce or manufactures of the country itself.

It will be most satisfactory to present the opinion of sir William Scott, on that occasion, in the words of his reporter. "It is argued that the neutral can import the manufactures of France to his own country, and from thence directly to the French colony: Why not immediately from France, since the same purpose is effected?—It is answered, that it is effected in a manner more consistent with the general rights of neutrals, and less subservient to the special convenience of the enemy. If a Hamburg merchant imports the manufactures of France into his own country (which he will rarely do if he has like manufactures of his own, but which in *all* cases he has an incontrovertible right to do), and exports them afterwards to the French colony, which he does not in their original French character, but as goods which, by *importation*, had become part of the national stock of his own neutral country, they come to that colony with all the inconvenience of aggravated delay and expense: so, if he imports from the colony to Hamburg, and afterwards to France, the commodities of the colony, they come to the mother country under a proportional disadvantage; in short, the rule presses on the supply at both extremities; and, therefore, if any considerations of advantage may influence the judgement of a belligerent country, in the enforcement of the right, which upon principle it possesses, to interfere with it's enemy's colonial trade, it is in that shape of this trade that consider-

ations of this nature have their chief and most effective operation*."

Although the judge is somewhat guarded in his terms—"*more consistent* with the *general* rights, and *less subservient* to the special convenience, of the enemy"—and somewhat vague, if not obscure, in his reasoning, yet he admits that an *importation* of goods from a belligerent country into a neutral country had the effect of making them a part of the national stock of the neutral country, equally intitled, with the national stock itself, to be exported to a belligerent country. What circumstances would constitute an importation are not specified; nor does it appear in what light a mere trans-shipment, at a neutral port, would have been regarded.

The next occasion on which the judge delivered an opinion on this subject, occurred in a case before the court, February 5, 1800, and which came before it again on further proof, April 29, 1800. It was the case of an American ship taken October 16, 1799, on a voyage from Marblehead to Bilboa, with a mixed cargo of fish, sugar, and cocoa. The fish, which made the principal part of the cargo, could not enter into the question. The sugar was part of a whole cargo brought from the Havanna in the same ship, had been warehoused from some time in June till some time in August, during the repair of the ship, and was then re-shipped. The cocoa, small in quantity, was originally from a Spanish settlement, and had been trans-shipped from another vessel, lying at Marblehead, after having been entered at the custom-house. *The ship had been restored by the captors.* The property of the cargo was proved. The legality of the voyage was the sole question. On this question

* 2 Rob. 169, 170.

sir William Scott pronounced the following judgement:—

"There remains then only the question of law, which has been raised, whether this is not such a trade as will fall under the principle that has been applied to the interposition of neutrals in the colonial trade of the enemy? On which it is said, that if an American is not allowed to carry on this trade directly, neither can he be allowed to do it circuitously. An American has *undoubtedly* a right to import the produce of the Spanish colonies for his own use; and after it is imported *bonâ fide* into his own country, he would be at liberty to carry them on to the general commerce of Europe. Very different would such a case be from the Dutch cases, in which there was an original contract from the beginning, and under a special Dutch licence, to go from Holland to Surinam, and to return again to Holland with a cargo of colonial produce. It is not my business to say what is universally the test of a *bonâ fide* importation. It is argued that it would not be sufficient that the duties should be paid, and that the cargo should be landed. *If these criteria are not to be resorted to, I should be at a loss to know what should be the test;* and I am strongly disposed to hold, that it would be sufficient *that the goods should be landed and the duties paid.* If it appears to have been landed and warehoused for a considerable time, it does, I think, raise a forcible presumption on that side; and it throws it on the other party to show how this could be merely insidious and colorable. There is, I think, reason to believe that the sugar was a part and parcel of a cargo said to have been brought from a Spanish colony in this vessel; and if so, the very distribution of the remainder is some proof that they were not brought with an in-

tention only of sending them on. But I have besides positive proof in the affidavit, of Mr. Asa Hooper, who swears *that the duties had been paid for them.* Then the only difficulty remains as to the cocoa; and it is said by one of the witnesses, and by one only, that it was trans-shipped from another vessel, and that it had been brought into America only ten days before: but although there is something of a difficulty arising on this small part of the cargo, yet upon the whole I cannot think it weighty enough to induce me to send the case across the Atlantic for still further proof. As to the facts of this recent importation and transshipment, or of its having been transferred to the present proprietors, or of having been exported without a previous payment of import duties—if it had composed a larger part of the cargo, I might have deemed it reasonable to have had somewhat more of satisfaction on some of these points, which do not appear with sufficient certainty to found any legal conclusion against it. It appears by the *collector's certificate* that it had been *entered* and *imported,* and I think that these words are *sufficient to answer the fair demands of the court.*"

It must be confessed that we perceive, in this opinion of the judge, somewhat of that customary forecast, which, in tying a knot to bind himself, avoids drawing it too close to be loosened a little, if there should be occasion. It is, nevertheless, established by the precedent, that the landing of the goods and paying the duties is a sufficient test of the importation; and that the certificate of the collector, that "they have been entered and imported, is all the evidence of the fact that can *fairly* be demanded by the court."

It might indeed have been expected that the rule stated by lord Mansfield to have been *settled*

*by the lords of appeals* (which makes the trans-shipment to be equivalent to the landing and re-shipment of goods, and this last procedure to take away all color for seizure) would have found its way into the notice of the judge. That rule, however, cannot be impaired by any thing in his decision, for two reasons. One is, that the further satisfaction which, if the part of the cargo trans-shipped had been more considerable, he might have deemed reasonable on some of the questions, might refer not to the legality of the voyage, but to the question of property; and it is certainly agreeable to all the just rules of interpretation so to understand it, rather than to suppose a purpose, in an inferior court, to decide in direct opposition to a rule *settled* by the superior court. The other reason is still more conclusive: it is, that, on the supposition of such a purpose in an inferior court, it could have no legal effect in controling the rule settled by the superior court, the rule by which alone the conduct of individuals could be governed.

Such has been the *judicial* exposition of the neutral right, even under the British restrictions. The acknowledgement by the *cabinet itself* was officially disclosed on the following occasion, and to the following effect:—

The cruisers of Great Britain having seized, and the vice-admiralty courts having condemned, American vessels bound from the United States to the Spanish West Indies, on the pretext that their cargoes consisted of articles the growth of Spain, then at war with Great Britain, the American minister in London, in March 1801, represented to the British government the iniquity of the proceeding, with the indignation which it inspired; and required that precise instructions should be dispatched to the proper officers in the West-Indies,

and Nova Scotia, to put an end to the depredations. The subject was referred to the king's advocate-general, an extract from whose report was communicated by the British secretary of state to the American minister, with information that the king had ordered the doctrine laid down in the report to be immediately transmitted to the several inferior judges, as the law for their future guidance and direction.

The extract containing this doctrine shall be literally recited.

" I have the honour to report, that the sentence of the vice-admiralty court appears to be erroneous, and to be founded in a misapprehension or misapplication of the principles laid down in the decision of the court of admiralty referred to, without attending to the limitations therein contained.

" The general principle respecting the colonial trade has, in the course of the present war, been to a certain degree relaxed, in consideration of the present state of commerce. It is now *distinctly understood;* and has been repeatedly so decided by the high court of appeals, that the produce of the colonies of the enemy may be imported by a neutral into his own country, and may be re-exported from thence, even to the mother country of such colony; and in like manner the produce and manufactures of the mother country may, in this circuitous mode, legally find their way to the colonies. The direct trade, however, between the mother country and its colonies has not, *I apprehend,* been recognised as legal, either by his majesty's government or by his tribunals.

" What is a direct trade, or what amounts to an intermediate importation into the neutral country, may sometimes be a question of some difficulty. A general definition of either, applicable to all

cases, cannot well be laid down: the question must depend upon the particular circumstances of each case. Perhaps the mere touching in the neutral country, to take fresh clearances, may fairly be considered as a fraudulent evasion, and as in effect the direct trade; but the high court of admiralty has expressly decided (and I see no reason to expect that the *court of appeal will vary the rule*) that *landing the goods, and paying the duties*, in the neutral country, *breaks the continuity of the voyage*, and is such an importation as legalises the trade; although the goods be *re-shipped* in the *same vessel*, and on account of the *same neutral proprietors*, and forwarded for sale to the mother country *."

It is impossible to express the law, meant to be here laid down, in clearer terms, so far as it determines "that landing the goods, and paying the duties," in a neutral country, legalises the circuitous trade, even between a belligerent country and its own colonies. What inferior circumstances would have the same effect are not specified. It is not decided, without a "perhaps," that the mere touching, &c. would be insufficient to legalise the trade. Nor is the legality even of a *direct trade* between the mother country and its colonies denied in stronger terms than "I *apprehend* it has not been recognised."

Thus stood the admiralty law in Great Britain as announced by British tribunals, and officially communicated by the British cabinet to the neutral world—so it had continued to stand, as a pledge and safeguard to neutrals, conforming themselves to it, from the dates of those authorities, the last of which is as far back as the spring of the year 1801.

* See the printed correspondence.

With what astonishment, then, must the neutral world now learn, from the decision of sir William Scott on the 23d of July, 1805, that according to the rule of law just laid down, after much deliberation by the lords of appeals, " the circumstances of landing the goods, or securing the duties, do not furnish complete evidence of the termination of the voyage;" and that without this complete evidence derived from the *original intention* of the importing voyage, the voyage from the neutral port will be treated as the continuance of the voyage from the colony to the mother country.

This political change in the judicial rules of condemnation admits no other satisfactory than a commercial explanation: for the loss of character which it induces, is a greater sacrifice than could be made to the cupidity of cruisers, or the value of their prizes to the public.

The whole course, indeed, of modifications pursued by the instructions, and by the decisions of the courts, as they appear from day to day, can leave no doubt that the primary object with Great Britain has been to transfer to herself as large a share as possible of the commercial advantages yielded by the colonies of her enemies. An absolute monopoly was embarrassed by the irresistible pretensions of neutral countries; more especially of the United States, whose neighborhood and habits of intercourse, together with other considerations, forbade a perseverance in the original attempt to exclude them. They were accordingly the first of the neutral nations towards which a relaxation was afforded. The relaxation, after considerable delay, was extended, by the instruction of 1798, to the neutral nations of Europe. That instruction was founded on a compromise between the interest and the prudence of Great

Britain. It permitted neutral nations to trade *directly* with the colonies of her enemies, without trading in colonial productions with one another; and permitted all of them to carry those productions *directly* to *Great Britain*. This arrangement was manifestly calculated to limit the importations of each neutral country to the amount of its own consumption; and consequently to turn the immense residue of colonial wealth, through neutral vessels, into her own market; whence it might be dispensed, under her own regulations, to the neutral countries of Europe having no direct commerce with the West Indies, and even to the belligerent nations whose commerce with their respective colonies she has as completely destroyed, as she has their commerce with foreign countries. The arrangement was specious, but proved to be deceptive. It was expected, that the expense and delay of a circuitous trade through the United States would prevent importations and re-exportations interfering with the projected trade directly from the West Indies to herself; and, as long as this expectation was in any degree indulged, the right of re-exportation was admitted, though reluctantly, both by the government and the courts. Experience, however, finally showed, that the activity, the capital, and the economy, employed by the American traders overpowered the disadvantages incident to the circuit through the ports of the United States, and secured to them the profits of supplying Europe with the colonial productions of her enemies. In proportion as this unforeseen operation disclosed itself, the *commercial* jealousy of Great Britain began to take alarm. Obstructions were to be thrown in the way of importations. Re-exportations were seen with growing discontent. The idea of continuity, by which two voyages were consolidated into one, came into vogue. The vice-admiralty

courts, regardless of the superior decisions in England, would not allow that the landing of a cargo, and paying the duties, protected it against condemnation. At length appeared *the sentence of sir William Scott*, above cited, carrying into effect the construction of the inferior courts, as having been deliberately sanctioned by the lords of appeal. The doctrine established by that decision has been followed by other decisions and *dicta*, at first requiring the re-exportation in another ship, then a previous sale of the articles in the neutral market, then other conditions, one after another, as they were found necessary; till it is finally understood that no precautions whatever are to bar the cruisers from suspecting, nor the courts from scrutinising, the *intention* of the original importer, and that the proof of this intention, not to re-export the articles, is to fall on the claimant. To fill up the measure of judicial despotism, these wanton innovations are now extended to vessels returning from the belligerent mother countries, as well as to those going thither from the United States; with the addition of demands of proof, never before heard of in prize courts, on points utterly unknown to the law of nations.

These unexampled and vexatious proceedings manifestly have in view *the entire obstruction* of colonial re-exports from the United States; and it would be more candid in Great Britain, if not more just, to give public notice, at once, that in all such cases capture and condemnation would be authorised.

Her present system, as subsidiary to the extension of her commerce, will be still further seen in her concurrent measures, of a type not less extraordinary than that of any which have preceded them.

According to the instructions issued within the period of the existing war, or to the received inter-

pretation of them, the permission given to neutrals by those of 1798, to carry the produce of enemy's colonies directly therefrom to Great Britain, has not been continued. At first view, this might appear to be inconsistent with the policy ascribed to her in obstructing re-exportations from the United States. The act of parliament, of June 27, 1805, however, which has been already noticed, changes this appearance of departure from that policy into a new proof, and even an extension of that policy. By the regulations of that act a direct trade is opened between the British colonies in the West Indies and those of her enemies; and her enemies themselves are invited to enter into the trade. Whilst neutrals, therefore, are excluded from carrying colonial produce directly from the colonies to Great Britain, the commercial views of Great Britain are answered by the substitution of another channel through her own colonies; with the additional advantage of a *monopoly to her own ships*, in the transportation from her colonies across the Atlantic; and for the sake of this advantage, or for that of repressing the growth of neutral rivalship, or on both these accounts, she has been willing to encounter all the reproach of cultivating an avowed commerce with her enemies, in the very moment of laying new restrictions on that of neutrals with them.

Further—the act of parliament of June 27, 1805, providing for a trade between Great Britain and the colonies of her enemies, through the medium of free ports in her own colonies, was preceded by an act of April 10, 1805, authorising licenses to *British subjects*, to import, *during the war*, into Great Britain, in *neutral vessels*, for their *own* or neutral account, from the American colonies of her enemies, most of their productions; requiring, at the same time, that all sugar and coffee so imported

should be *re-exported;* and that *the value of* a certain portion of the imports from such colonies should be returned *in goods and commodities from Great Britain.*

Again—in concert with the act of June 27, instructions, founded on another act of parliament, were issued June 29, 1805, authorising British subjects to export in neutral vessels to France, Spain, and Holland, a long list of articles, including their respective colonial productions; and to import therefrom a long list of such articles as suited her own wants.

To complete the arrangement, in all its forms, it has been officially announced in the American gazettes, conformably to a resolution of the British privy council of August 3, 1805, that the trade with the settlements and islands belonging to the enemy, in America and the West Indies, is to be carried on through the medium of the British free ports in the West Indies, and *not otherwise.*

The system of Great Britain may, therefore, now be considered as announced to all the world without disguise, and by the most solemn acts of her government. Her navy having destroyed the trade of her enemies, as well between the mother countries and their colonies as between the former and neutral countries and her courts, by putting an end to re-exportations from neutral countries, reducing the importations into these to the mere amount of their own consumption—the immense surplus of productions accumulating in the American possessions of her enemies can find no outlet but through the free ports provided for it, nor any other market than the British market, and those to which she finds it for her interest to distribute it; with a view to which, she not only allows her enemies to trade with her possessions, but allows her

of capture was restricted by these orders to the trade of neutrals, *from* the colonies of enemies *directly* to ports other than their own *respective ports* and the *British ports*, and consequently there remained exempt from capture:

1st. The coasting trade, and every branch of trade not colonial.

2d. The trade *from any* neutral country *to* belligerent colonies.

3d. The trade by neutrals *from* any belligerent country *to* its own colonies, and to the colonies of another belligerent country.

4th. The trade between belligerent colonies, whether belonging to the same or to different belligerent countries.

Applying this rule of implication to the two orders only of 1794 and 1798, and admitting those of 1793 not to have superseded, by implication, the claims to capture in cases not therein specified, there will be no other exception to the relaxations or exemptions just enumerated in favor of neutral commerce but the coasting trade, and other trades not colonial, to which Great Britain has applied, or may choose to apply, the general principle.

In general the high court of admiralty seems, by applying the assumed principle to the coasting trade, to have pursued that construction of the original order of 1793 which left the general principle in force as to cases not specified in it; and to have considered the relaxations in the succeeding orders of 1794 and 1798 as referring solely to the colonial trade.

There appears, however, at no time to have been any clear and fixed opinion in the court with respect to the illegality and penal consequences of the coasting trade.

Few cases are reported, perhaps few have occurred, of discussions relative to this branch of

trade. In 1 Rob. p. 104, the subject is incidentally brought into view, in a case where a French vessel had been purchased. The doctrine held by the judge is expressed as follows:—"We certainly do allow it [the purchase], but only to persons conducting themselves in a fair neutral manner, &c.: besides, this vessel appears to have been engaged in the coasting trade of France. The court has never gone so far as to say, that pursuing one voyage of that kind would be sufficient to fix a hostile character: but, in my opinion, a habit of such trading would. Such a voyage, however, must raise a strong degree of suspicion against a neutral claim; and the plunging at once *into a trade so highly dangerous* creates a presumption that there is an enemy proprietor lurking behind the cover of a neutral name." Here, not the coasting trade itself, but the presumption of enemy's property found in it, is made the ground of animadversion.

In the case of the Speculator, the same idea presents itself*.

The Emanuel† was itself the case of a coasting trade. In this case the judge descanted with great energy and rigor on the manifest illegality of the coasting trade. "Can there be described," says he, "a more effective accommodation that can be given to an enemy during war, than to undertake it for him during his own inability?" He did not, however, proceed further than to refuse freight on the principle settled by ancient judgements, *that* "*neutrals are not permitted to trade on freight.*" He particularly refers to the case of the Mercurius (Lords, March 7, 1795), in which freight was refused. Why were not the ships confiscated in these cases? that being laid down

* 2 Rob. p. 241. † 1 Rob. p. 249.

in other cases as included in the penalty for illegal voyages, and actually applied ultimately to cases of a trade between a colony and the mother country, to which the coasting trade is strictly analogous; both being trades from one port to another port of the same nation. It is not even to be inferred, from the authorities here cited, that a coasting trade, in the produce of the country, if carried not on freight, but as property belonging to the neutral owner of the ship, is subject to any penalty. This indulgence to the coasting, and rigor towards the colonial trade, is it to be explained by the fertility of the one, and the little value of the other, as a source of captures and commercial profit, or in what other way?

With respect to the orders of 1794 and 1798, and the colonial trade, it appears to have been in general understood that they were to be construed as successively enlarging the trade of neutrals with the colonies of enemies, in the manner and to the extent above explained.

The dilemma was, indeed, unavoidable: either the orders were to be considered as relaxations (and if relaxations at all, in that extent), or as leaving the general principle in force in cases not specified in the orders, and therefore as no relaxations at all.

This latter decision would have given a character of mockery to the profession and parade of making, in their orders, so many sacrifices of belligerent rights to a spirit of moderation and amity towards neutrals. The former side of the dilemma, therefore, was necessarily taken. The orders, those of 1794 and 1798 at least, were relaxations.

As relaxations, however, in the extent required by an obvious and consistent interpretation, the

door opened to neutral commerce with the belligerent colonies was found to be wider than was compatible either with the interests of British commerce, the avidity of British cruisers, or the probable intentions of the British government.

What was to be the remedy?—The first tried was that of shutting the door gradually, by the dint of constructions, as may be seen by tracing the colonial cases adjudged by sir William Scott, and reported by Robinson, and the decisions of the lords of appeals referred to by the reporter.

The task was assuredly not a little difficult, of which there is the strongest demonstration in the crooked and contradictory reasonings and decrees into which it forced the very eminent talents of the judge who presides in the high court of admiralty.

In addition to the evidence already presented, take the following comparison between his rule of construction in the case of the Providentia*, and the rule of construction in the case of the Emanuel†.

In the former case, August 16, 1799, he observes, "the first instructions were to bring in all ships which had been trading with any colony of the enemy: but this country afterwards receded from those directions; and the second orders were to bring in all ships laden with the produce of the West-India islands, *coming directly* from the ports of the said islands *to* any port in Europe. I cannot but consider this as an abandonment of the former law [instruction]; and I cannot but think that a cruiser taking this instruction, in *conjunction with those* given before, *must have inferred* that it was no longer the intention of

* 2 Rob. p. 126. † 2 Rob. p. 159.

government to bring in, and much less to confiscate," [Was there room for this distinction?] "cargoes of West-Indian produce, *unless coming to some port* in Europe. This was followed by instructions now in force, which direct the bringing in of all vessels laden with the produce of the French and Spanish settlements, coming *from* the ports of such settlements to any port in Europe, other than the ports of that country to which the vessel belongs. It is certainly not laid down in the negative that they shall not bring in such vessels as are coming from such settlements to their own ports: but *looking at the former instruction*, I think it was a strong admonition to cruisers not to bring in such ships; and I believe it has been genetally so understood and acted upon by them; and in this court cargoes brought *from* Surinam *to* ports in Europe, to which the vessels belonged, have been uniformly restored on proof of the neutrality of the property."

The reasoning here is plain and just. The first instructions designated for capture the colonial trade, without distinguishing between Europe and America: the second designated the trade to Europe only: therefore, by fair inference, the trade to America was exempted from capture.

Again—the second orders designated for capture the trade to Europe: the third orders designated the trade to ports of Europe *not being of Great Britain or of the country owning the vessel:* therefore, by fair inference, the trade to Great Britain, and to countries owning the vessels, was exempted from capture.

In the Emanuel, November 7, 1799, the case was that of a neutral ship taken on a voyage last *from* France *to* a French colony. According to the reasoning of sir William Scott, just quoted,

the inevitable inference ought to have been that the voyage was legal.

The first instructions designated for capture the trade *to* and *from* the colonies. Both the second and the third designated for capture the trade only *from* the colonies; therefore, according to that reasoning, the trade *to* the colonies was *exempted from capture.*

Hear, nevertheless, the reasoning employed by the judge himself in this case.

After combating the neutral right to trade with the colonies of an enemy, by arguments applicable *in principle*, as well to a trade between neutral ports and the colonies as to a trade between the mother country and its colonies, he proceeds to state, in answer to all pleas for a neutral trade from the mother country to its colonies, "that the true rule to this court is the text of the instructions; what is not found therein permitted, is understood to be prohibited, upon this plain principle, that the colony trade is generally prohibited, and that whatever is not specially relaxed continues in a state of interdiction."

Now as what is *not permitted*, nor *specially relaxed*, is by the instruction to continue prohibited, the question to be decided is, what it is that is permitted, or specially relaxed, by the instructions? Is it what is positively and expressly permitted or relaxed? Then there is no permission or relaxation at all; for every thing positive and express in the instruction is for the capture, not for the permission or relaxation. Is it to be a permission or relaxation implied and inferred from a positive and specified prohibition in one order, and an omission of that, or of a part of that prohibition, in a succeeding order? Then the neutral trade from a belligerent country *to* its colonies, which was prohibited in the order of 1793, and omitted

in the orders of 1794 and 1798, was as much permitted, as specially relaxed, as the trade from a neutral country *to* the colonies of an enemy is permitted or relaxed, by the omission in the orders of 1794 and 1798, to prohibit the trade *to* the colonies, which, as well as the trade *from* the colonies, was positively and specially prohibited by the previous order of 1793; or to recur to the reasoning of sir William Scott, in the former case of the Providentia, as much permitted or relaxed, as the trade from the colonies going *not to Europe* was inferred to be so from the order of 1794, *taken in conjunction* with the order of 1793; the order of 1793 having prohibited the trade from the colonies generally, and the order of 1794 having omitted to prohibit more of the trade from the colonies than what was bound to some port in Europe.

The judge concludes with declaring, " I see no favorable distinction between an outward and return voyage. I consider the intent of the instruction to apply equally to both communications, though the return voyage is the only one specially mentioned."

What favorable distinction, then, could the judge see between the outward and the return voyage, in a trade between a *neutral* country and the colonies of an enemy, more than between the two voyages to Spain, a mother country, and the colonies? Is not the *return* voyage the only one *specially* mentioned, whether the instruction be applied to the former trade or to the latter trade? This is self-evident. Either then he must admit the distinction in both, and say that the return voyage only being specially mentioned, the outward voyage is in both trades permitted; or he must reject the distinction in both, and say that the outward voyage, though the return voyage only be specially mentioned, is prohibited in both. A different course, however, was pursued. The in-

struction was applied to the outward voyage in the neutral trade from the mother country to the colony, without being considered as applicable to the outward voyage in the trade from the neutral country to a colony; which last has not as yet been subjected to condemnation. Whether that is to be its future destiny, as has happened to some other branches of commerce, where it was equally precluded by legal decisions and even *official assurances*, is among the arcana of the admiralty cabinet of Great Britain.

The judgement in this case, it is to be observed, did not go beyond the condemnation of the goods. The vessel was restored, but with a forfeiture of freight and expenses.

By degrees, however, with the aid of alleged fraud, of false destination, and of contraband in the outward voyages, the ship as well as the cargo were brought within the rules of condemnation in the high court of admiralty. The decision of the lords of appeal has finally established, in the case of a voyage from a Spanish colony to a neutral, but forbidden port in Europe, that any illegal trade of neutrals with the colonies of an enemy forfeits both ship and cargo *.

Other examples might be drawn, from the proceedings in the British courts of admiralty, to illustrate the constructive return towards the general principle which had been mitigated by successive instructions, and the anomalous and entangled decisions which have been employed for the purpose. These illustrations cannot be here pursued without too great an addition to the prolixity which has already been incurred. It will only therefore be remarked generally — first, that the course of proceedings, as they relate to

* 4 Rob. Appen. p. 11.

the coasting and different branches of the colonial trade, to the grounds on which these have been interdicted to neutrals, and to the penalties attached to breaches of the interdictions, compose a labyrinth for which no concatenation of principles, no thread of reasoning whatever, affords a clue: — secondly, that constructive decisions, as appears in the last volume of Robinson's Reports, have not only restored, in a great measure, the operation of the general principle, but have introduced collateral principles, greatly extending the mischiefs of its operation.

Whilst all the considerations, therefore, which originally led to the examination of this principle, are requiring additional force, it is fortunate that so irresistible a testimony against its legitimacy should have been furnished by the conduct of Great Britain herself.

### *Review of the reasons urged in defence of the British principle.*

Although some of the reasons by which this belligerent claim of Great Britain is defended have incidentally fallen under consideration in the course which the subject has taken; yet a more particular notice of those most relied on may be necessary to complete the present examination.

The principal champions for the claim are the judge of the high court of admiralty himself, sir William Scott; Mr. Ward, now under-secretary of state in Great Britain, who is sufficiently known by his treatises on the law of nations, one of which embraces this precise subject; and Mr. Brown, a professor of civil law in the university of Dublin, and author of a work on civil and admiralty law.

Sir William Scott has, in every view, the first title to be heard.

In the judgement delivered by him in the case of the Immanuel, his eloquence has painted the belligerent claim in very glowing colors. The passage shall be given in his own words.

" It is an undubitable right of the belligerent to possess himself of such places as of any other possession of his enemy. This is his common right: but he has the certain means of carrying such a right into effect, if he has a decided superiority at sea. Such colonies are dependent for their existence, as colonies, on foreign supplies: if they cannot be supplied and defended, they must fall to the belligerent of course; and if the belligerent chooses to apply his means to such an object, what right has a third party, perfectly neutral, to step in and prevent the execution? No existing interest of his is effected by it: he can have no right to apply to his own use the beneficial consequences of the mere act of the belligerent, and to say, 'True 'it is, you have, by force of arms, forced such 'places out of the exclusive possession of the ene- 'my, but I will share the benefit of the conquest, 'and by sharing its benefits prevent its progress. 'You have in effect, and by lawful means, turned 'the enemy out of the possession which he had ex- 'clusively maintained against the whole world, and 'with whom he had never presumed to interfere; 'but we will interpose to prevent his absolute sur- 'render, by the means of that very opening which 'the prevalence of your arms alone has effected: 'supplies shall be sent, and their products shall be 'exported: you have lawfully destroyed his mono- 'poly, but you shall not be permitted to possess it 'yourself: we insist to share the fruits of your vic- 'tories; and your blood and treasure have been ex- 'pended, not for your own interests, but for the 'common benefit of others.' Upon these grounds it cannot be contended to be a right of neutrals

to intrude into a commerce which had been uniformly shut against them, and which is now forced open merely by the pressure of war; for when the enemy, under an entire inability to supply his colonies and to export their products, affects to open them to neutrals, it is not his will, but his necessity, that changes his system. That change is the direct and unavoidable consequence of the compulsion of war: it is a measure not of *French* councils, but of *British* force."

The first remark to be made is, that were the intrinsic reasonableness of the claim admitted, it would not follow that the claim is justified by the law of nations as actually established. Reason is indeed the main source from which the law of nations is deduced; and in questions of a doubtful nature is the only rule by which the decision ought to be made. But the law of nations, as an established code, as an actual rule of conduct among nations, includes, as already explained, a variety of usages and regulations, founded in consent, either tacit or express, and superadding to the precepts of reason, rules of conduct of a kind altogether positive and mutable. If reason and conveniency alone, without regard to usage and authority, were to decide all questions of public law, not a few of the received doctrines would at once be superseded; and, among the first, some to which Great Britain is most pertinaciously attached. What would become of her favorite claim—to seize and condemn all enemy's property laden in neutral vessels—if the claim were brought to the simple test of reason?—a claim which gives so much more vexation to the nations at peace, than it contributes to any just advantage to those at war. On this question it is well known that the appeal has been constantly made by Great Britain, from the reasoning of her adversaries, to the authority of celebrated jurists,

and other testimonies of the established rules and practice of nations. She must not expect to vary her test of right according to her individual interest; to appeal to authority, when reason is against her; and to reason, when authority is against her.

In testing the British claim, then, by the law of nations, recurrence must be had to other sources than the abstract dictates of reason—to those very sources from which it has been shown that her claim is an unauthorised innovation on the law of nations.

But let us examine this appeal of the eloquent judge to the reasonableness of his cause, and see what is gained by it.

"It is an undubitable right of the belligerent to *possess* himself of such places, viz. colonies [but the argument extends *to all places* shut against neutral commerce in time of peace], as of any other possession of his enemy."—Without question, he has the right to possess himself of any place belonging to his enemy.

"But he has the certain means of carrying such a right into effect, if he had a decided superiority at sea."—This is not so universally true as is assumed. A land force will be also necessary, unless both the superiority at sea, and the situation of the colony, be such as to admit a complete interruption of supplies; and then a blockade must be the only legitimate expedient.

"Such colonies are dependent for their existence, as colonies, on foreign supplies: if they cannot be supplied and defended, they must fall to the belligerent of course."—It is certainly true that they must fall, if they can be neither fed nor defended. But it is not so true that colonies, *as such*, are dependent on foreign supplies. Some insular colonies are so dependent; others are not. Few, if any, of the *continental* colonies or settlements are dependent on foreign supplies.

" And if the belligerent chooses to apply his means to such an object, what right has a third party perfectly neutral to step in, and prevent the execution?"—No right at all to step in, provided the belligerent does, in fact, apply his means to that object, and in the mode conformable to the law of nations; that is, by intercepting contraband of war, and availing himself of his decided superiority at sea to blockade the places which, if deprived of foreign supplies, must fall into his hands of course.

Take the argument under another aspect. Colonies must fall without foreign supplies: therefore it is said, a belligerent, without invading or investing them, may prevent neutrals from supplying them.

The argument has one tendency which ought not to have escaped the penetration of its author. If the dependence of a place for its existence and defence on foreign supplies be the ground of the belligerent right to intercept all neutral trade whatever with it, it will not be very easy to find a reasonable ground for the belligerent right to obstruct neutral supplies to a place blockaded, where the place, as frequently occurs, does not depend on foreign supplies for its existence and defence.

Or the argument may take another turn, which ought not to escape the attention of neutrals. If the applicability, without an actual application of the means, to the legitimate object of possessing himself of the colonies of enemies can justify the capture of neutral trade with such places, the mere existence of a force, applicable to the purpose of a blockade any where, will, without an actual blockade, equally authorise the capture of a neutral trade with ports susceptible of blockade; and thus the neutral trade becomes interdicted with every part of the dominions of

her enemy, on the same principle as interdicts it with the colonial part of their dominions; a blockade being as legitimate an object of war as conquest, and a decided superiority at sea being at least as applicable to the former as to the latter object.

But an essential vice of the argument lies in the fallacy of the inference. It no more follows from the dependence of colonies on foreign supplies, that neutrals have no right to trade with them, with the exceptions of contraband and of blockaded ports, than it follows from the dependence of other countries or parts of countries on foreign supplies, that neutrals have no such right. Is not Holland, is not Portugal, is not even Spain, at all times, dependent on foreign supplies for their subsistence; not less perhaps than some of the insular colonies in the West, and much more than some in the East Indies? Yet since the usurped power of obstructing *all* neutral trade with an enemy was abandoned by belligerent nations, has it ever been pretended that that dependence gave a right to the enemies of those countries to prevent neutral supplies to them?

The argument fails when brought to another test. If the dependence on foreign necessaries constitutes the belligerent claim against the neutral trade to colonies, the principle of the claim limits it to such colonies as labor under this dependence. The continental colonies or settlements, which have within themselves resources necessary for their existence, and which therefore no decided superiority at sea can reduce into the possession of a belligerent, are clearly not within the utmost range of the principle. Yet no distinction is made in the application of it, either in argument or practice, between the most sterile

and indefensible island, and the vast and fertile provinces on the continent of South America.

Thus far, then, the judge has found no foot-hold for the belligerent pretension which he endeavors to support.

But he must be heard further: "No existing interest of his [the neutral] is affected by it [an exclusion, &c.]."

The interest of neutrals may be materially affected by the loss of the customary supplies from belligerent colonies, as must happen, if they can neither trade directly with the colonies, nor receive supplies from them through the mother country. This is the consideration expressly assigned, in the appendix to 4 Rob. for the orders of 1798: "Neutral vessels were by this relaxation allowed to carry on a direct commerce between the colony of an enemy and their own country—a concession rendered more reasonable by the events of war, which, by annihilating the trade of France, Spain, and Holland, had *entirely deprived* the states of Europe of the *opportunity of supplying themselves* with the articles of colonial produce in those markets." This is a view of the subject very different from that given by sir William Scott here, and in another paragraph where he represents "Guadaloupe and Jamaica as no more to Germany, than if they were settlements in the mountains of the moon, to commercial purposes, as not in the same planet."

The judge proceeds, "He [the neutral] can have no right to apply to his own use the beneficial consequences of the mere act of the belligerent."

Why not?—In many respects, as will hereafter be seen, the neutral suffers by war: Is it unreasonable that in some respects he should profit by its effects?

Waving this consideration, it does not follow that one belligerent has a right to deprive a neutral of a *colonial* market opened to him under the pressure of war, by another belligerent, any more than of any new market, or new channel of trade, in relation *to the mother country*, opened under a like pressure. As yet, however, the latter pretension has not appeared*. It is even disavowed in a succeeding passage of this very judgement. Is it not the pressure of war, which at this time obliges the enemies of Great Britain to abandon, in great measure, to neutral vessels, the trade between themselves and other countries? Is it not the pressure of war, during which more food is consumed, with fewer hands to raise it, that often compels nations at war to open their ports to the supplies and ships of neutrals, contrary to their ordinary regulations in time of peace? In a word, the whole commercial policy of belligerent towards neutral nations undergoes changes which the latter is in the constant practice of "applying to their own use;" and it is manifest that Great Britain is as ready as any of her enemies to lay open her navigation and her colonial markets, though so rigorously shut in time of peace, whenever the pressure of war makes it her interest that neutrals should apply the benefit of these changes to their own use.

It is perfectly clear, then, that the mere circumstance of an increase of profit to neutrals, from a participation in branches of trade opened under the

* The pretension has not appeared in the courts in England. But in a late case, in the vice-admiralty court at Halifax, it appears that the judge was disposed to consider the introduction of certain regulations at Bourdeaux favorable to neutral commerce, as forming an *unusual* trade, and, in that view, as a legal ground of capture.

pressure of war, does not render that participation unlawful.

The sequel of the argument assumes a very singular shape. The neutral has no right to say to the belligerent —"True it is you have by force of arms forced such places out of the exclusive possession of the enemy, but I will share the benefit of the conquest, and, by sharing its benefits, prevent its progress. You have, in effect, and by lawful means, turned the enemy out of the possession which he had exclusively maintained against the whole world, and with whom we had never presumed to interfere; but we will interpose to prevent his absolute surrender, by the means of that very opening which the prevalence of your arms alone has effected."

Here, let it be observed, the case first stated is, that the *place* has been forced by one belligerent out of the possession of another belligerent, and that the neutral is undertaking to share the benefit of the *conquest*. Were that the real intention, as it is the inevitable import of the statement, there could be no advocate for a neutral pretension to interfere. But with an inaccuracy (a harder term will not be applied) little to have been looked for where it is found, this conquest, this turning of the enemy out of exclusive possession, does not in the least mean, as is quickly disclosed, a transfer of the *place* or *colony* to a new sovereign. The colony remains precisely as it did; not even attacked or threatened by a military operation. The conquest really meant turns out to be nothing more than the creation of a certain degree of difficulty and danger in the trade between the colony and the mother country. With this change in the statement of the fact, the inference with respect to the intrusion of a neutral commerce must, unfortunately for the ar-

gument, undergo a correspondent change. As the conquest of the colony would have justified the conqueror stepping into the exclusive possession, out of which his arms had forced his enemy, in prohibiting a neutral interference with its trade, it is equally certain that he is not justified in any such prohibition, by the mere obstruction thrown in the way of the ordinary colonial trade, any more than he would be justified by obstructions thrown equally in the way of other branches of his enemy's trade, in prohibiting the entrance of neutrals into them.

That the meaning of the judge is shifted from an expulsion of the enemy from his colony to an obstruction of his trade with his colony, is put beyond all question by the conclusion of this hypothetical address of the neutral to the belligerent:— "Supplies shall be sent, and their products shall be exported: you have lawfully destroyed *his monopoly*, but you shall not be permitted to *possess it yourself*."

Thus the right of a belligerent to possess himself of the colonies of his enemies depending on foreign supplies, which, in the beginning of the argument, was the ground of the unlawfulness of such neutral supplies, as might prevent the colonies from falling into the hands of the belligerent, undergoes a complete transformation in its progress, and ends in a right of the belligerent to supply the colonies himself, in exclusion of neutrals. The neutral is interdicted from sending supplies to an enemy's colony, and exporting its produce; not because it would interfere with the reduction of an enemy's possession, but because it would interfere with a commercial monopoly. This at least would be a new principle in the law of nations.

But it is worth while to inquire how the right of a belligerent to subdue the colonies of his enemy, and for that purpose to obstruct neutral supplies to them, can be reconciled with the actual regula-

tions of the British government on this subject. Whilst this claim is exercised, in general, so much to the disadvantage and dissatisfaction of neutrals, it is relaxed in some respects, which are fatal to the very purpose of the belligerent to *subdue* the colonies of his enemy; which purpose alone could give a color to any such obstruction of neutral commerce. The orders both of 1794 and of 1798 limit their restrictions on neutrals to the trade *from* colonies; leaving by implication, unrestricted, the trade *to* the colonies; or they manifest, at least, under every construction, a solicitude rather against the trade *from*, than against the trade *to*, the colonies. Now, if the object and the pretext, in controuling the trade with the colonies, be the conquest of the colonies, is it not extraordinary, that, whilst checks are opposed to the exports, which can, at the most, have but a remote influence in preserving them from the necessity of surrender, the channel should be left open for the importation of those foreign supplies, for the want of which they might fall to the belligerent of course? How is this to be explained? Not, certainly, by a *belligerent* policy, which is completely defeated by the relaxation. There is but one explanation that is satisfactory, and it must not be deemed uncandid to resort to it. As the orders have endeavored to give to the trade from the colonies such a course as was most favorable to imports into Great Britain, the course allowed to the conveyance of supplies to the colonies is equally favorable to the export of *manufactures* from Great Britain. British manufactures, it must have been supposed, could find their way to hostile colonies through no channel so conveniently and certainly, as through that of neutrals which conveys the means of subsistence. Whilst the regulation, therefore, defeats the measure of conquest, it extends the market for manu-

factures. Every fold of this belligerent claim wraps up some commercial project.

In prosecuting his argument, the judge occupies another ground for this belligerent pretension:— "Different degrees of relaxation," he observes, "have been expressed in different instructions issued at various times during the war. It is admitted that no such relaxation has gone the length of authorising a direct commerce of neutrals between the mother country and its colonies, *because* such a commerce could not be admitted without a *total surrender* of the principle: for allow such a commerce to neutrals, and *the mother country* of the enemy recovers, with some increase of expense, the direct *market of the colonies*, and the *direct influx* of their productions: it enjoys, as before, the *duties of import and export*, the same facilities of sale and supply, and the mass of *public inconvenience* is very slightly diminished."

It was lately the object of dispossessing the enemy of his colonies altogether that authorised the obstruction of neutral supplies. It was next the object of securing to the belligerent himself the monopoly of the commerce with those colonies that gave him such an authority. Now the authority is derived from the policy of with-holding from the mother country of the colony the public conveniences arising from the revenue and from the commercial profits supplied by her direct intercourse with her colonies.

It cannot be necessary to dwell by the hollowness of this foundation, for the claim to make war on the participation of neutrals in a colonial trade. It will be merely observed, or rather repeated, that if neutrals have no right to trade with an enemy, where the enemy in consequence of the pressure of the war would otherwise lose the revenues, and other public advantages flowing from the trade,

the inference fairly is, that Great Btitain, by driving the ships of her enemies, as she does at this moment, altogether from the sea, may renew with effect the old and exploded tyranny of interdicting *all neutral commerce* whatever with her enemies.

This last argument only against the neutral trade to colonies was applicable to the coasting trade. There, neither conquest, nor the substitution of the belligerent's own commerce, could be the object. It will accordingly be seen, in the case of the Emanuel*, that the belligerent claim is founded, as it is here, on its general effect in cramping the revenues of the enemy, and inflicting a pressure which may compel a due sense and observance of justice.

It only remains to advert to a reply from the judge to the counsel at the bar, with which he closes the argumentative part of his judgement.

The inconsistency of Great Britain, in making, in time of war, the same relaxations in her navigation and colonial monopolies, which she denies the right of her enemies to make, is so obvious, that it could not possibly escape the notice of the counsel for neutral claimants. The more striking the inconsistency, however, the greater the delicacy which was to be observed in pressing it on the court. It appears accordingly to have been brought into view, in one instance only, in Robinson's Admiralty Reports, which was in this case of the Emanuel; and here it is managed with much tenderness, and seasoned, finally, with some material concessions to the known opinions of the bench and the government. In order to do justice to Mr. Arnold and Mr. Sewel, charged on that occasion with the defence of the neutral claimants, and for the sake of some very judicious reflexions of

* 1 Rob. p. 249.

a more general nature, with which they introduce their particular argument, no abridgement will be made of the following passage:—

"It is true that the general colonial law of Europe has created a monopoly from which other countries are generally precluded. At the same time, laws respecting colonies, and laws respecting trade in general, have always undergone some change and relaxation after the breaking out of hostilities: it is necessary that it should be so, with regard to the rights of neutral nations; because, as war cannot be carried on between the principal powers of Europe, in such a manner as to confine the effects of it to themselves alone, it follows that there must be some changes and variation in the trade of Europe; and it cannot be said that neutrals may not take the benefit of any advantages that may offer from these changes: because, if so, it would lead to a total destruction of neutral trade. If they were to suffer the obstructions in their old trade, which war always brings with it, and were not permitted to engage in new channels, it would amount to a total extinction of neutral commerce. Such a position therefore cannot be maintained, that they may not avail themselves of what is beneficial in these changes, in lieu of what they must necessarily suffer, in other parts of their trade, in time of war. It is not meant that they should be entirely set at liberty from all the restrictions of peace: that would be going too far—but that, as there has been a regular course of relaxations, as well in our navigation laws *as in the colonial trade*, in admitting importations and exportations not allowed in time of peace, it seems not to be too much to say, that if they have been regularly relaxed in former wars, neutral

merchants may think themselves at liberty to engage in it, in any ensuing war, with impunity; and *it does justify a presumption, that, as a belligerent country allows a change in its own system as necessary, and invites neutrals to trade in its colonies under relaxations,* so it would allow them *to trade in the same manner with the colonies of the enemy.*"

In reply:—

"It is an argument," says the judge, "rather of a more legal nature than any derived from those general topics of commercial policy, that variations are made in the commercial systems of every country *in wars and on account* of wars, by means of which neutrals are admitted and invited into different kinds of trade, from which they stand usually excluded; and if so, no one belligerent country has a right to interfere with neutrals for acting under variations of a like kind made for similar reasons in the commercial policy of its enemy. And certainly if this proposition could be maintained without any limitation—that wherever any variation whatever is made during a war, and on account of the state of war, the party who makes it binds himself in all the variations to which the necessities of the enemy can compel him—the *whole colony trade* of the enemy is *legalised,* and the instructions which are directed against any part are equally unjust and impertinent; for it is not denied that some such variations may be found in the commercial policy of this country itself, although some that have been cited are not exactly of that nature. The opening of free ports is not necessarily a measure arising from the demands of war: it is frequently a peace measure in the colonial system of every country. There are others which more directly arise out of the necessities of

war—the admission of foreigners into the merchant service as well as into the military service of this country; the permission given to vessels to import commodities not the growth, produce, and manufacture of the country to which they belong, and other relaxations of the act of navigation, and other regulations founded thereon: these, it is true, take place in war, *and arise out of war;* but then they do not arise out of the *predominance of the enemies' force*, or out of any necessity *resulting therefrom;* and this I take to be the *true foundation of the principle.* It is not every convenience, or even *every necessity*, arising out of a state of war, but *that necessity* which arises out of the *impossibility* of otherwise providing against the urgency of distress, inflicted by the hand of a *superior enemy*, that can be admitted to produce such an effect. Thus, in time of war, every country admits foreigners into its general service—every country obtains, by the means of neutral vessels, those products of the enemy's country which it cannot possibly receive, either by means of *his* navigation or its own. These are ordinary measures, to which every country has resort in every war, whether prosperous or adverse: they arise, it is true, out of a state of war, but are totally *independent of its events,* and have therefore no common origin with those *compelled relaxations of the colonial monopoly;* these are acts of distress, signals of defeat and depression; they are no better than partial surrenders to the force of the enemy, for the mere purpose of preventing a total dispossession. I omit other observations which have been urged and have their force: it is sufficient that the variations alluded to stand upon grounds of a *most distinguishable nature.*"

On comparing the argument of the counsel with the discourse of the judge, there is but too much

room to remark, that there are in the former a coolness and clearness not unworthy of the bench; and in the latter a florid and fervid style, which might have been less unsuitable to the zeal of the bar. But it is more important to examine and weigh the effect which their respective reasonings, so far as those of the judge can be extricated from the general and somewhat obscure expressions employed by him, ought to have on the point in question.

The reasoning at the bar is simply this—that as Great Britain is herself in the practice of opening to neutrals, in time of war, channels of navigation and colonial markets, which she shuts to them in time of peace, she ought to allow, or might reasonably be presumed to allow, as equally lawful in time of war, a like relaxation of the colonial system of her enemies.

The judge does not deny the fact that Great Britain is in the practice of relaxing in time of war her system of colonial trade. He does not deny the inference that a like relaxation would be equally lawful on the part of her enemies. It might have been expected, therefore, that in his reply he would have allowed to the enemies of Great Britain the same right to capture neutrals trading with her colonies as is exercised by Great Britain against neutrals trading with the colonies of her enemies; and have contented himself with the advantage enjoyed by Great Britain in her superior means of intercepting the neutral trade with her enemies, and of preventing her enemies from intercepting the neutral trade with herself. This, it would seem, was a more consistent, and also a more politic, ground to have taken. The judge was of a different opinion. Unwilling to make even that degree of concession, he attempts to retain the privilege claimed by Great Britain, and at

the same time withhold it from her enemies, by certain distinctions between the two cases. With what success the distinctions are made is now to be seen.

One of the distinctions is between a colonial trade which is *frequently opened in peace*, as in the case of *free ports*, and a colonial trade opened in war only.

The example of *free ports* was not very happily chosen; for it has been seen that the trade from such ports in the French West Indies to the United States was not excepted in the British orders on the subject of neutral trade with the colonies of France; nor is it known that any such exception has been made in the British courts of admiralty.

The distinction, however, fails in its essential point. It is not an uncommon thing for relaxations to take place *in time of peace* as well as in time of war, in the colonial monopolies of all the European nations. The Spaniards, the French, and the Dutch*, never fail to open their colonies to foreign supplies, whenever a scarcity, or other cause, renders it inconvenient to supply them from European sources. Even on this ground, then, as admitted by the judge himself, a neutral trade with enemy's colonies would be lawful in time of war.

Another distinction is intimated between the ordinary measures of relaxation — to which every country has resort in every war, whether prosperous or adverse — and unusual measures of relaxation produced by a peculiar state of the war.

Here again the distinction directly militates

* It is well known that the Dutch island of Curacoa, as well as that of St. Eustatius, has been constantly open in time of peace to the trade of foreigners. The orders, however, of Great Britain, extend equally to those islands, with the other colonial possessions of her enemies.

against the object for which it is made, it being well known to be an *ordinary* measure with the enemies of Great Britain, in all modern wars at least, to open their colonial ports to neutral supplies. Prior to the American revolution, Great Britain had, in these states, resources which rendered it unnecessary for her colonies to invite supplies, if indeed they could have been obtained, from any foreign sources. In her wars since that event, she has followed the example of her enemies in relaxing her colonial system, as far as was necessary to obtain supplies from the sources and through the channels which furnish her enemies. At this moment her islands are as open as the colonies of her enemies to the supplies and the vessels of the United States, with this difference, indeed, that her ports are opened by regulations more temporising and more special than those of some, if not all, of her enemies, and therefore, with pretensions to legality according to her own standard, inferior to those of her enemies.

The remaining distinction is the sole fortress on which the defence of the principle maintained by the judge must depend. This distinction is so novel, and in its appearance so refined, that in explaining it some difficulty was naturally felt in the selection of apposite expressions. A critic, tinctured with want of candour, might be tempted to exclaim, that a distinction between a necessity arising out of a state of war, and a necessity arising out of an impossibility, which impossibility arises out of a state of war, was a subject less proper for discussion, than for a less serious treatment.

The judge, however, cannot be justly charged with a want of meaning, whatever may have been his difficulty or his caution in expressing it. It

may be collected, with sufficient certainty, that he meant to establish the right of Britain and the want of right in her enemies to interrupt neutral commerce, on the predominance of force, on the decided superiority at sea, which she enjoys, and on the inferiority of force under which her enemies labor. When she opens her colonial ports to neutrals, although it arises out of a state of war, it does not arise, like theirs, out of the predominance of the enemy's force. This predominance he frankly declares to be the *true foundation of the principle.*

And thus we are arrived at the *true foundation* of the principle which has so often varied its attitudes of defence, and, when driven from one stand, has been so ready to occupy another. Finding no asylum elsewhere, it at length boldly asserts, as its *true foundation, a mere superiority of force.* It is right in Great Britain to capture and condemn a neutral trade with her enemies, disallowed by her enemies in time of peace, for the sole reason that her force is predominant at sea. And it is wrong in her enemies to capture and condemn a neutral trade with British colonies, because their maritime force is inferior to hers. The question no longer is, whether the trade be right or wrong in itself, but on which side the superiority of force lies? The law of nations, the rights of neutrals, the freedom of the seas, the commerce of the world, are to depend, not on any fixed principle of justice, but on the comparative state of naval armaments, which itself may change at every moment, may depend on the event of a battle, on the skill of an admiral, on the tack of the wind, on one of those thousand casualties which verify the admonition, that the battle is not always given to the strong, any more than the race to the swift.

A government which avows such a principle of conduct among nations, must feel great confidence in the permanence, as well as the predominance, of its own power.

It would nevertheless not be unwise in any nation to reflect on the vicissitudes of human affairs, and to ask herself the honest question, how she would relish the application of the principle, if, in the course of events, a maritime superiority should happen to change sides? — Should Great Britain ever find the state of things thus reversed, she might wish, in vain perhaps, to let her claim pass silently into obeyance, as she alleges was done in the war of 1778.

Nor would it be less unworthy of her wisdom to reflect, that if a predominance of force on one element confers right, a similar right must result from a predominance of force on another element.

The supposition may be made to press more immediately on her reflexions. Great Britain as a maritime power is as dependent on external commerce, as the insular dominions of her enemies are, as colonies, dependent on external supplies. In this general view, the principle which she employs against the colonies of her enemies may be turned by her enemies against herself. But a more particular view demands her attention. She has already beheld her principal enemy on a coast little distant from her own, by a decided preponderance of force on land, and a threatened co-operation of naval armaments, giving to the war an unexampled pressure on her faculties and resources. The wheel of fortune may re-produce the crisis. Her seamen may be taken from her merchant-ships, to man her fleets. Her fleets may be called home from the protection of commerce to the defence of the state. In this posture of things, her harvest may fail, her existence may depend on foreign food, its

importation on neutral commerce, and the successful use of this resource, on the right of neutral ships to a navigation, not open to them in times of peace. With such monitory possibilities in view, ought an enlightened nation, by her own example and her own language, to authorise her enemies to say to her friends—You have no right to step into a trade with our enemy, from which his monopoly of the navigation excluded you in times of peace; you have no right to import for him supplies which are absolutely necessary for his support, and which the distress I am inflicting renders it impossible for him otherwise to obtain. Neither have you any right by a trade, also forbidden in time of peace, to furnish to his colonies the supplies which his command of the sea no longer insures to them, and without which they must fall of course into our possession.

What reply could be made to such an expostulation by a neutral, who had not refused to recognise a like claim on the part of Great Britain; and, by the refusal, consulted better the interest of Great Britain than she had consulted it herself in advancing the claim.

Taking leave of the very distinguished judge, with these observations, some notice is next due to Mr. Ward and Mr. Brown.

A remark that soon occurs on opening the volumes of these writers, is, that both of them confound the principle here in question, with the question whether free ships make free goods; and under this confusion bring the former within the arguments and the authorities belonging to the latter only. The confusion results not only from the more general expressions in which they describe the controversy between neutral and belligerent nations, on the subject of commerce, but is promoted by their frequent use of the terms "carry-

ing trade," without distinguishing between the carriage of enemies' property in neutral vessels, and the neutral carriage of neutral property in channels navigated in time of peace by domestic carriers only. These questions are evidently and essentially distinct; and the distinction answers, of itself, much of the reasoning employed by those writers, and most of the authorities cited by them.

With respect to the *consolato del mare*, so much appealed to by Mr. Ward, it has been already observed, that, however direct its authority may be against the principle—that enemy's property in neutral vessels is subject to confiscation—there is not a sentence in that compilation which directly or indirectly recognises or favors a belligerent claim to confiscate neutral property, on the principle that it is found in channels of trade not open at all, or to other than subjects or citizens of the belligerent in time of peace. The negative testimony of the *consolato*, therefore, is completely in favor of the contrary principle.

In recurring to Grotius, Mr. Ward is led by his own comment on the passage which describes the rights of belligerents against the trade of neutrals, to conclude that the real question before Grotius was that which Grotius said had been so much and so sharply agitated, namely, whether a belligerent had a right to interdict *all* neutral commerce with his antagonist; and Mr. Ward accordingly takes the *defensive* ground of maintaining that the neutral "claim to a carrying trade had never entered the mind of Grotius."

If by the "*carrying trade*" Mr. Ward means the carriage of *enemy's property*, it must have been within the view of Grotius; because he has furnished Mr. Ward himself with an authority against the lawfulness of such a trade. If by the "carrying trade" he meant a trade carried on in

war, where it was not allowed in peace, it is strictly true that it appears never to have entered the mind of Grotius. It did not enter his mind, because no such particular claim had ever been asserted or exercised against neutrals. The general claim to intercept all neutral commerce with an enemy did enter into his mind and into his discussion, as well as the other particular claims of belligerents in the case of contraband and of blockades; because as well that general claim, as those particular claims, had, at different periods, been asserted and exercised against neutrals. To suppose that the carrying trade could be unnoticed by Grotius, for any other reason than that no belligerent right to intercept that particular branch of trade had been asserted, would be the more preposterous, for the reason suggested by Mr. Ward, "that Grotius lived in a time when his countrymen were raising to its height the source of their commerce, by rendering their state the emporium of trade, and becoming the *carriers of the rest of the world*,"—carriers as well of their own property as of the property of others, and in every channel which might be opened to them with profit to the carriers.

Notwithstanding this relinquishment of the authority of Grotius, in relation to the carrying trade, Mr. Ward has shown a strong inclination to extract from certain terms employed by Grotius, on the subject before him, some general countenance to the British principle.

Grotius, it must be admitted, is less definite in explaining himself in this particular instance than he is in others; and much less so than other jurists who have succeeded him. It is impossible at the same time to put on his words any construction that will avail Mr. Ward.

Although the passage has been heretofore analysed, it will not be improper to re-examine it with a particular reference to the argument of this writer.

Grotius having made his distribution of the articles of neutral commerce into three classes—1st, of such as are wholly of pacific use; 2d, such as are wholly military; and 3d, such as are *usus ancipitis*, of a doubtful or double use—enlarges on this third class in the words following:—"*In tertio illo* genere, usûs ancipitis, distinguendus erit belli status. Nam si tueri me non possum nisi quæ mittuntur intercipiam, *necessitas* ut alibi exposuimus jus dabit sub onere restitutionis, nisi causa alia accedat. Quod si juris mei executionem rerum subvectio impedierit, id que scïri potuerit qui advexit, ut si oppidum obsessum tenebam, si portus clausos, et *jam* dedito aut pax expectabatur, tenebitur ille mihi de damno culpa dato, ut qui debitorem carceri eximit*," &c. &c. He proceeds next to graduate the injuries done to the belligerent, and the penalties due to the neutral, according to certain distinctions since exploded, particularly the distinction between a just and unjust war, on which he founds a rule:—"Quod si præteria evidentissima sit hostis mei in me injusticia, et ille eum *in bello iniquissimo confirmet*,

* This passage stands as follows in the English translation:—"As to the third sort of things that are useful at all times, we must distinguish the present state of the war. For if I cannot defend myself without intercepting those things that are sent to my enemy, necessity, as I said before, will give me a good right to them, but upon condition of restitution, unless I have just cause to the contrary. But if the supply sent hinder the execution of my design, and the sender might have known as much—as if I have besieged a town, or blocked up a port, and thereupon I quickly expect a surrender or a peace—that sender is obliged to make me satisfaction for the damage that I suffer upon his account, as much as he that shall take a prisoner out of my custody."

jam non tautum civiliter tenebitur de damno sed et criminaliter, &c."

From this text Mr. Ward makes the following deduction: — "The tenor of these words — '*status belli*,' which is a general description; of '*juris executione*,' which is the very right to take arms; of '*pax expectabatur*,' which is a final termination of hostilities, not surrender of the besieged place; and lastly, of '*bello confirmet*,' which is demonstrably applicable to the whole field of war — These, he says, prove him to be occupied with the general plan of operations, and the general exigencies of a state of hostility."

The great importance attached to this passage in Grotius, and the extensive consequences drawn from it by this learned champion of the British principle, will be apologies for a more critical attention to the passage than it could be thought of itself to require.

Whether Grotius did or did not limit his meaning to the nature of contraband articles, and the case of blockades, it is demonstrable that his words are inapplicable to the distinction between a trade permitted, and a trade not permitted, in peace.

1. According to Grotius, the articles in question are of the third class only — the class of a doubtful or double use. The principle of Great Britain makes no such distinction. Articles of every class and kind, found in the new channel of trade, are rendered unlawful by the channel itself, however inapplicable they may be to the uses of war.

2. According to Grotius, it is one state of war compared to another state of war that is to be distinguished — "*distinquendus erit belli status.*" According to Great Britain, the essence of the

distinction is between the state of war and the state of peace, or rather between the state of the municipal laws of commerce in time of war, and the state of those laws in time of peace.

3. According to Grotius, the right to intercept the neutral commerce accrues from its particular necessity as a measure of defence: according to Great Britain, the necessity is not the criterion. If there be no such necessity, the trade is condemned, in case the channel were unlawful before the war. Be the necessity what it may, the trade is free, if the channel was lawful before the war.

4. According to Grotius, it must be such a necessity as he had elsewhere pointed out—"*ut alibi exposuimus.*" The British advocates have not undertaken to show any other passage of Grotius giving the explanation which their principle requires. No such passage exists.

5. According to Grotius, the articles intercepted, if no other cause prevent, are to be restored. According to the British decisions, no such restitution is due: both vessel and cargo are confiscated.

6. Finally—the war to which Grotius refers, when he uses the expression "*bello confirmet,*" is "a war of the most evident injustice"—"*evidentissima injusticia; bello* INIQUISSIMO *confirmet,*" not *bello confirmet*, as cited by Mr. Ward. The distinction between *just* and *unjust* war does not enter into the principle on which Great Britain founds her belligerent claim. It is, in fact, disclaimed by Bynkershoek*, who succeeded Grotius;

* The whole passage is criticised, and, in several particulars, censured, by Bynkershoek; whose comment, at the same time, shows that he understood Grotius, not in the sense of Mr. Ward, but in that here assumed.—LIB. 1. c. xi.

and though countenanced by Vattel, is generally understood to be excluded from questions effecting belligerent and neutral rights.

Whether the text of Grotius, therefore, is to be understood as confined, or not confined, to the case of contraband and blockade, it cannot possibly be applied to the case of a trade asserted to be unlawful in war, merely as being a trade not permitted in peace.

It may be observed, nevertheless, in justice to Grotius, that his meaning ought, in fairness, not to be extended beyond the cases of contraband and blockades: First, because it is the only construction that can satisfy one part of the text; whilst the terms used in the other part are by no means inconsistent with that construction. The expression least apposite to the case of a blockade is that of "*pax expectabatur*," or "the expectation of peace;" as an event which might be frustrated by the neutral commerce. But there may certainly be wars where peace itself might depend on a blockade. It is obvious that a blockade of particular ports—such as that of Amsterdam, the chief emporium of the country of Grotius—might influence the question of peace, as well as the question of capitulation. Or to state a case still more decisively—a state at war may consist of little more than the place actually blockaded. Venice and Genoa formerly, Hamburg at present, are examples. A close and continued blockade of such places as these would necessarily involve a question of peace with that of a surrender.

Again—the meaning of Grotius ought not to be extended, as Mr. Ward extends it, beyond those two cases of contraband and blockade, "to the general plan of operations, and the general exigencies of a state of hostility;" because this construction is directly at variance with the principles

heretofore cited from Grotius; particularly in the note where he condemns the practice of England and Holland in their general prohibition of neutral trade with her enemy.

But the construction attempted by Mr. Ward not only puts Grotius at variance with himself: it puts Mr. Ward at variance with himself also, as well as with the limits affixed to the principle by his own government. For if the belligerent right laid down in the passage of Grotius be not restricted to contraband and blockades, and cannot be applied to the British distinction, between a trade in war and a trade in peace, but extends to the general exigency of hostilities, it is impossible to deny to belligerents a right to intercept *all* neutral trade with their enemy, whenever the state of the war, the accomplishment of justice, or the expectation of peace, prescribe it; or, whenever a neutral trade may be calculated to *confirm* an enemy *in the war*. This consequence is inevitable. Yet Mr. Ward expressly *, in another place, disclaims any such a latitude in the rights of war, with an exultation that his country had once, and once only, attempted it; and, on seeing its injustice, candidly renounced the attempt.

The observations which have been already made on Puffendorf, and on his letter to Groningius, cited by Barbeyrac, afford a a conclusive reply to the use which Mr. Ward faintly endeavors to make of that authority on the point here in question. He seems, indeed, in general, rather to combat it as an authority claimed by an opponent, than to claim it as of much weight in his own scale.

Bynkershoek and Heineccius, though jointly cited as explicit authority for the principle that free

* See Ward's Treatise, &c. p. 9.

ships do not make free goods, are neither of them appealed to by Mr. Ward as supporting the principle that a trade not allowed in peace was unlawful in war. This silence of Mr. Ward, considering his spirit of research, and his zeal for this latter principle, may reasonably be ascribed to his discovery that he could gain nothing by bringing it to the test of those authorities.

The same inference may be drawn from his silence with respect to the authority of Vattel, as to a trade of that description.

In Hubner, whose authority it is a great object with Mr. Ward to discredit, he finds a half concession, to which he does not fail to summon a marked attention. Hubner, it seems, referring * to the case of a neutral trade with an enemy's colonies, opened on account of the war, admits that it is subject to some uncertainty — "*Quelque incertitude.*" He immediately subjoins, however, "that he does not see why neutral sovereigns should refuse themselves so considerable a benefit when it offers, provided they abstain from supplying those colonies with any merchandise which is prohibited in war. It is true," he adds, "if, besides that they are careful not to carry provisions thither — by which I mean articles of the first and second necessity, which, in time of war, are fully and more than equivalent to contraband of war properly so called — then it is *evident* that neutral nations may lawfully carry on that commerce, because the principal cause of its being opened to them during the war will not have had the effect intended to be produced; by means of which, that commerce will no longer have any thing that may directly influence the war, and which consequently may be an object

* Saisie, b. 1. c. 4. sec. 6.

of the right which belligerent nations have of opposing every thing which tends to the immediate assistance of their enemies." In this ramble of Hubner from the plain path, in which he commenced his answer to the uncertainty suggested by himself, he bewilders both himself and his subject, and lays a foundation for real uncertainties, in his attempt to remove an imaginary one. How could distinctions be maintained, in practice, between provisions of the first and those of the second necessity, and between both and all other provisions? What is meant by the right which belligerent nations have of opposing *every* thing, which *tends* to the immediate assistance of their enemies?

But were the concession free from these incumbrances, it could not avail the advocates for the British doctrine: *First*, because the concession is limited to the colonial trade, not extending even to the coasting trade: *Secondly*, because it is limited to the case of those *necessary* supplies *to* the colonies, which were the object in opening the trade to neutrals; whereas the British doctrine extends to all trade *to* and *from* the colonies.

If any thing further be requisite to invalidate this fugitive concession, or rather hesitation of Hubner, it is amply furnished by Hubner himself, in sec. 5 of the same chapter and book, in which he systematically establishes principles by which the rights of neutral commerce are to be determined.

"But let us suppose," says he, "that the commerce of a neutral nation with one of the belligerent parties, however innocent it may be, should indirectly strengthen the latter, does it follow that his adversary has a right to hinder it, to the detriment of the neutral nation, who, in carrying it on, neither had nor could have that particular object in view; which merely exer-

cises her industry as in time of peace, and which, besides, will be very glad to trade with that same adversary, upon the like terms, as far as his commercial laws will permit, and the nature and interest of its own commerce may require?

"To attempt to render a neutral state responsible for the increase of the strength of an enemy, because that increase arises from the commerce which that state carries on with him, is to impute to one a thing which he has caused by mere accident."

Again—"Neutral nations, by trading with those who are at war, merely avail themselves of their incontestible right. Now, whoever makes use of his right, and merely does so, never can do an injury to another which he can have a right to complain of. The possible consequences of just, innocent, and lawful acts, never can hinder us from doing them; at least, there is no one who has a right to prohibit us, &c."

With such principles in his mind, it is not wonderful, that, if Hubner was started, as Mr. Ward expresses it, by the terms of his own premises, he should be more startled at his own concession; and that, finding himself at a loss to explain the ground on which such a claim as that of Great Britain could in any degree be reconciled with the rights of neutral commerce, he should be in a hurry to resume his principle, "that there is no reason why sovereign states who are neuter should refuse the advantage presenting itself, provided they abstain from supplying colonies with contraband."

Hubner wrote in the war of 1756. Another Danish writer, Hennings, published a treatise on "Neutrality," in the interval between the war of

1778 and the war of 1793. His authority is precise and peremptory against Mr. Ward.

After the capture of Grenada and the Grenadines by the French, in the war of 1778, an act was passed by the British parliament * "to protect goods or merchandise of the growth, produce, or manufacture of those islands, on board neutral vessels bound to neutral ports during the present hostilities," with provisoes, that the protection should not extend to cargoes from any other island, nor effect any sentence of any vice-admiralty court, which prior to a given day should have condemned productions of the said islands.

There is some obscurity in the object and the text of this act. To make it consistent, however, with itself, as well as with the acknowledgement on all hands, that a neutral trade in neutral property was free, during that period, with French colonies, it must be understood as intended either to exempt the trade of those islands, which had become French, from the operation of British laws, and to put them on the same footing with other French islands; or to exempt from capture the *property* of the inhabitants of the islands become French property and French subjects—an indulgence † that might be thought due to those who had but just

* This act being temporary, is not found in D. Pickering's statutes at large; but is inserted at full length in Henning's collection of state papers during the war of 1778, vol. 2. p. 114.

† So great was the disposition to assuage the misfortunes of these islands, and perhaps to expiate the omission to defend them, that the Dutch, their enemies, were permitted by an additional instruction to trade with them, as also with St. Vincent and Dominica, freely as neutrals, for four months. — 2 Hen. p. 105.

ceased to be British subjects, and who might be restored to that character by a peace*.

Hennings, however, conceiving the act to have been intended to legalise a neutral trade with French colonies, which otherwise might be subjected by the British courts to condemnation, is led to the following assertion of the law of nations in opposition to such a principle:

"An important subject which ought to be here noticed, is the trade with the colonies in America. Is there any principle on which the sugar-islands in the West Indies ought to be considered as blockaded? And if there is no such principle, why is the permission of Great Britain required for neutral ships to take sugars from the islands of Grenada and the Grenadines, since those islands have fallen into the hands of the French, and the French had opened a free trade to Martinico, and to their other islands, &c."

"This law is *evidently* contrary to the rights of neutral powers; and they might refuse to acknowledge its obligation, as France alone has a right to permit or prohibit trading with her colonies; and, as long as she permits it, no neutral ought to be molested therein."

Hubner and Henning appear to be the only writers who have taken notice of the principle in question. The former, having written at a period when the principle was in operation, was doubtless influenced by that consideration. The atten-

* If the act is to be construed as a proof that the parliament did not think the general trade of neutrals with enemy colonies justified by the law of nations, and therefore, as requiring a special legalisation by this act, it strengthens the proof that the courts thought otherwise; since they continued to release neutrals taken in the general trade with enemy colonies, in spite of the constructive denial of its legality by this act of parliament.

tion of the latter seems to have been drawn to the subject by the act of parliament concerning Grenada and the Grenadines, which he was inserting in his collection of state papers, and by the construction which he gave to the purport of that act.

The other numerous writers of most modern date, though generally strenuous advocates for the neutral rights of commerce, make no allusion to the British principle; for it would be absurd to regard in the light of an allusion to, and consequently a recognition of, this particular principle, the language they happen to use in stating the general principle, that when war arises between some nations, the nations at peace with all are to proceed in their trade with all on the same footing in time of war as they did before the war broke out. The obvious meaning of these phrases is, that, with the particular exceptions of contraband and blockades made by all of them, the neutral right to trade with a nation at war remains the same as if that nation was at peace, and consequently the right to trade to whatever places in whatever articles, and in whatever vessels, their regulations might mutually permit. That such must have been the intention of such writers as Galiani, Azuni, and even Lampredi, as well as of Schlegel and the German writers, cannot be questioned, without setting up a forced construction of a particular phrase, in opposition to the whole tenor of their publications; without supposing, that whilst they contend for the general system of the armed neutrality, of which this is an essential principle, and have for their main object the enlargement of neutral rights, they could, by a loose stroke of the pen, sacrifice a neutral right, far more important than those which they took up their pens to maintain. Such suppositions cannot for a moment be

entertained. Nor indeed have any of the partisans of Great Britain undertaken to advance them.

With respect to the opinion of these very late writers, indeed, it is impossible to doubt that their sentiments are in opposition to the belligerent principle of Great Britain. If they have not been more expressly so, their silence is readily explained by the period when they wrote; that is, after the abandonment of the principle during the war of 1778, and before their attention could be called to the subject by the occurrences of the war of 1793. As late even as the year 1799, it was affirmed, at the bar of the high court of admiralty, that "in the late practice of this court, *during this war*, there have been a variety of cases from the French and Dutch colonies, in which the court has either ordered further proof, or restored in the first instance*." And in a prior case, in the same year, sir William Scott, in reply to an argument at the bar, that the illegality of a trade between the mother countries and their West Indies had been in a good measure abandoned in the decisions of the lords of appeal, does not pretend that any contrary decisions had taken place. He says only —"I am not acquainted with any decision to that effect; and *I doubt* very much whether any decision *yet made* has given even an indirect countenance to this supposed dereliction of a principle, rational in itself, and conformable to all general reasoning on the subject†." Even the orders of council, commencing in January 1793, could not have been known to these writers; and if they had, were so loosely expressed, so frequently changed, and had their effects at so great a distance from European jurists, that the innovation could not be expected to

* 2 Rob. p. 122.
† 1 Rob. p. 250.

become an immediate subject of their attention and discussion.

To the incidental hesitation of Hubner, then, opposed by his own deliberate explanation of his principles, are to be opposed the direct authority of one of his countrymen, and the unanimous authority of a host of modern writers, all of a date later than Hubner, and many of them more distinguished for their talents and their erudition on subjects of public law.

It will be found that Mr. Ward is not more successful in his definitions and reasonings on this subject, than in his appeal to the authority of jurists.

That the obscurity and incongruity into which this heresy in public laws betrays the votaries who engage in its defence, may be the better seen, Mr. Ward shall be exhibited in his own words: —

" Let it be remembered, therefore, that the question on the part of the belligerent is not, as has been grossly supposed, whether he has a right to interfere with the neutral, but merely whether he cannot prevent the neutral from interfering with him? In other words, whether, when the former *extends* the bounds of his trade not *with* but *for* a belligerent, not only purchases what he wants for his own consumption, or sells his usual peace supply of articles, but sells to him articles which may be easily converted into the means of annoyance, or even turns carrier for his oppressed friend, who uses the surplus strength which is thus afforded him against his opponent; whether in such case the other belligerent has no reason to be offended, and to reclaim those rights which the pretended neutral is deposed to deny him. This is, in fact, the true state of the question*."

P. 4.

"In granting, therefore, the fair and unreasonable enjoyment of their privileges to neutral nations, there must always be added the fair and reasonable caution that they use them so as not to hurt the belligerent; and that I may not seem to entrench myself in generals "*ubi sæpe versatur error*," I would add that they have certainly no right to use them in any one, the smallest degree *more* than they did in times of peace, nor even in so great a degree, if such augmented, or the ordinary use of them, bears immediate mischief to either belligerent. For example, they may increase their purchases to any amount in the belligerent countries, provided their own consumption requires it, and provided they remain domiciled in their own country. But if they persist in carrying, much more if they extend their faculty of carrying, for the belligerent, where the latter was in the habit of carrying before—and if, in consequence, he is enabled to come to the battle, and to stand the shock of war, with augmented strength, which he never would nor could have possessed without it—I see little or no difference between this and an actual loan of military assistance. All the distinction is, that he substitutes his own people in the place of taking foreigners; for every man which the neutral lends to his trade enables him to furnish a man to his own hostile fleets. In other words, it enables him to meet his enemy with undiminished forces, and yet preserve entire his sources of revenue; when, if it was not for this conduct of the neutral, either the forces or the revenue of the belligerent must be diminished*.

"According to our principles, the same reason

* P. 8—9.

which applies to contraband applies to all *nocent* cases whatsoever."

A complaint, in general terms, that a power which had hitherto stood by should step in and do that for the belligerent which he was no longer able to do himself, introduces the following passage:— "To come a little more into the detail and application of this argument, let us suppose, as was the case with France, a heavy duty on foreign freight had formed an almost fundamental law of her own commercial code; which, in times of peace, was a kind *of navigation-act amounting to an interdiction of foreign interference;* and that of a sudden, while engaged in war, *wanting her sailors*, perhaps her *merchant-ships*, for hostile expeditions, at the same time wanting the pecuniary and other sources of her trade, which would thus be extinguished, she applied to nations calling themselves neutral, by taking off this duty, or even by bounties, to carry on this trade. Here is a proof how necessary this trade is to her exigencies, and how impossible it is to preserve it consistently with her warfare. But where is the man of plain understanding, and uninterested in the question, who would not determine, that, if the neutral accepted the offer, that instant he interfered in the war, &c.?*"

"These observations apply very generally to all the carrying trade, but they more particularly apply to that specific claim, in the first article of the armed neutrality of 1780, to navigate freely on the coasts, and from port to port of nations at war. In so far as the coasting trade of a nation is more valuable and more necessary to its exist-

* P. xi.

ence than its foreign commerce, in just so far is the interposition of neutrals more powerful in its favor*."

These extracts cannot be charged wsth perverting or mutilating the argumentative part of Mr. Ward's vindication of the belligerent claim in question.

The views of this claim, which Mr. Ward here gives, are, it must be confessed, so vague and so confused, that it is difficult to fix on the real meaning of the writer. As far as it can be reduced to any thing like precision, he appears to be at variance with himself; and what is, perhaps, not less extraordinary, at variance with sir William Scott; sometimes going beyond the belligerent claims of the judge, and sometimes relinquishing a part of them.

Thus, on comparing him with himself, he first allows neutrals to increase their purchases to any amount, provided their own consumption require it. He next states, that the neutral privilege is not only not to be used in the smallest degree more than in peace, but not in the *ordinary degree*, if it bears immediate mischief to either belligerent. Finally, he maintains, that the same reason which applies to contraband applies *to all nocent* cases whatsoever.

On comparing him with sir William Scott, Mr. Ward admits that neutrals have a right to trade, so far as to purchase and increase their purchases, to the amount of their own consumption. It has been sufficiently seen that sir William Scott, and indeed his superiors both in the admiralty and executive departments, consider the trade of neutrals beyond the permission to trade in peace, as

* P. xii.

merely a relaxation of the rights of war. Here then he stops short of sir William Scott.

If we are not to consider that as his real meaning, but pass on to his next position, which denies to neutrals a trade, even in the *ordinary degree*, if it bears immediate mischief to a belligerent (by which the context will not permit us to understand any possible allusion to contraband), he here expressly contradicts sir William Scott, who lays it down with emphasis, "that the general rule is, that the neutral has a right to carry on in time of war his accustomed trade to the *utmost extent* of which that accustomed trade is capable."

If we recur to his last and most rigorous position, that all *nocent cases* whatever are within the reason applicable to contraband, he must be still more extensively at variance with sir William Scott.

In support of the claim, whatever be the extent in which he means to give it, Mr. Ward urges the unlawfulness of a neutral trade, which "is not *with*, but *for*, an enemy." This has been a very favorite phrase with the patrons of the British claim. It probably was first used in expressing the fiction by which neutral ships, licensed to trade with the French colonies, were converted into French ships. In its application to the subsequent pretext, which determines the channel of trade itself to be unlawful, it is not easy to find any distinct signification. If by trading *for* an enemy be meant carrying, in neutral vessels, *enemy's property*, the phrase has no connexion with the present question; which is not, whether enemy's property in a neutral ship be liable to capture, but whether neutral property in a neutral ship, in a particular channel, be a lawful trade. If by trading *for* an enemy be meant carrying to or from his ports neutral property, where he used to carry it himself, then

it cannot be any thing more than trading *with*, not *for*, him during the war; as he traded with, not for, the neutral nation before the war, and the case is nothing more than a relaxation of a navigation-act. If by trading with an enemy be meant carrying neutral articles of trade, which he would neither carry himself, nor permit to be carried by neutrals before the war, but the carriage of which he permits both to neutrals and to himself during the war, this can no more be *trading* FOR, *not* WITH, *him*, than it was *trading* FOR, *not* WITH, *each other*, for either to carry to the other, during war or peace, articles at one time prohibited, and then permitted by the other; and the case is nothing more than a relaxation with respect to the *articles* of commerce, as the former was a relaxation with respect to the vessels transporting the articles. The same distinctions and inferences are generally applicable where particular ports, shut at one time, come to be opened at another.

The essence of the argument, supposed to be compressed into this equivocal phrase, thus evaporates altogether in the analysis. It either means nothing that is true, or nothing that is to the purpose.

But the real hinge on which the reasoning of Mr. Ward turns, is the injury resulting to one belligerent, from the advantage given to another, by a neutral whose ships and mariners carry on a trade previously carried on by the belligerent himself, and which, consequently, enable the belligerent to employ his own ships and mariners in the operations of war, without even relinquishing the revenue which has its sources in commerce. Between this and an actual loan of military assistance by the neutral, Mr. Ward can see no difference; and this is the most plausible consideration perhaps which could be urged in the cause which he defends.

But unfortunately for this defence, it is completely subverted by three other considerations:—

1. The argument is just as applicable to cases where the vessels of the nation, before it was at war, were actually employed, without any *legal* exclusion of those of the neutral nation, as to cases where there was a legal exclusion of foreign vessels before, and a legal admission of them during, the war. In both cases, the belligerent vessels and seamen, as far as they are liberated by the substitution of foreign vessels and seamen, may be added to his military strength, without any diminution of his exports and imports, or of the revenues connected with them. Either, therefore, the argument must be extended (which will not be undertaken) to the latter case, or it loses its force as to the former.

2. It has been shown that Great Britain does herself thus relax her navigation-act, and avowedly for the purposes of substituting neutral vessels and mariners in place of those which she finds it expedient to employ in the operations of war. Mr. Ward must therefore either relinquish his argument, or condemn the practice of his own government.

3. This fundamental argument of Mr. Ward is expressly thrown out of the question by sir William Scott, who admits that Great Britain, like all countries, in all wars relaxes her navigation-acts, and other regulations founded thereon, in order to obtain the service of foreigners with their vessels, where she did without it in times of peace; but that these relaxations, though they arise out of a state of war, do not arise from that predominance of force which he takes to be the true foundation of the principle*

* 2 Rob. p. 171.

When Mr. Ward then asks "Where is the man of plain understanding, and uninterested in the question, who would not determine, that, if the neutral accepted the offer (of a trade from which the ships and seamen of the belligerent were withdrawn for the purposes of war), that instant he interfered in the war?" A man may be named, whose determination of the question Mr. Ward, as may be inferred from his eulogies on sir William Scott, would of all men be the last to contest.

On turning to the work of Mr. Brown, it does not appear that he has presented any views of the subject which require particular examination. He has, in fact, done little more than appeal to the authority of sir William Scott, and praise and repeat the arguments of Mr. Ward.

It may be thought that some notice ought to be taken of a discourse of the present earl of Liverpool, prefixed to his collection of treaties. It would be injustice to the distinguished author of that defence of the maritime principles of Great Britain to deny it the merit of learning, ingenuity, and a vein of candor more than is always found in such discussions. His attention, however, was almost wholly directed to the question, whether free ships make free goods—a question not within the limits of this investigation. He has, indeed, a few cursory observations, such as could not be here noticed without going into unnecessary repetitions in favor of the doctrine, that a trade not customary in peace cannot be lawful in war. These observations he concludes with one referred to by Mr. Ward, as of great force, on the general question between belligerent and neutral nations; namely, "that if this right were admitted, it would be the interest of all commercial states to promote dissensions among their neighbors."

If there be any plausibility in this argument, it is

certainly all the merit that can be claimed for it. The wars which afflict mankind are not produced by the intrigues or cupidity of the weaker nations, who wish to remain in peace whilst their neighbors are at war. They are the offspring of ambitious, and not unfrequently commercial rivalships among the more powerful nations themselves. This is a fact attested by all history. If maxims of public law are to be tested, therefore, by their pacific tendency, such maxims, it is evident, must be favored as circumscribe, not the rights and interests of neutral nations, but the belligerent and commercial interests of their more powerful and warlike neighbors.

As a further answer to the observations of this noble author, and as a final answer to all the arguments which are drawn from the intrinsic equity or conveniency of this principle, the following considerations must have weight with all candid and competent judges.

In the first place, it may be repeated, that on a question which is to be decided, not by the abstract precepts of reason, but by rules of law positively in force, it is not sufficient to show on which side an intrinsic reasonableness can be traced. It is necessary to show on which side the law, as in force, is found to be. In the present case, it has been shown that this law is not for, but against, the British side of the question.

But secondly it is denied, that, if reason, equity, or conveniency, were alone to decide the question, the decision would be different from that which the law in force pronounces on it.

War imposes on neutral commerce a variety of privations and embarrassments. It is reasonable, therefore, as well as lawful, that neutrals should enjoy the advantages which may happen to arise from war.

1. In the case of contraband, the articles of which especially, according to the British catalogue, may compose an important branch of exports in time of peace, the commerce of particular nations remaining at peace may suffer material defalcations from the exercise of the rights of war.

2. In the case of enemy's property carried by neutral ships (as Great Britain, at least, understands and enforces the law of nations), a branch of trade more or less important to all commercial nations, and constituting the most profitable branch of trade with some in times of peace, becomes an object of belligerent interruption and confiscation.

3. In the case of blockades, the abridgement and embarrassment to which the trade of neutrals, especially those at a distance, is subjected by war, form other important items of loss on their side. This is a belligerent claim, on which much might be said, if the notoriety of its effects, to say nothing of its extravagant abuses, did not render it unnecessary.

4. The interruptions proceeding from searches of neutral vessels on the high seas, the erroneous suspicion and inferences which send them into port for trial, the difficulty of obtaining all the requisite proofs thereon by the claimant, the delays and expenses incident to the judicial proceedings (more especially where the trial is at a great distance, and above all when appeals still more distant become necessary), the changes in the state of markets during all these delays, which convert into loss the gains promised by the expedition, the suspension of the mercantile funds, the heavy sacrifices, and sometimes bankruptcies thence ensuing; all these injuries, which war brings on neutral commerce, taken together, must surely, during war, require a very great weight in the op-

posite scale to balance them; and the weight of these injuries is sometimes not a little increased by the piracies which a state of war generates and emboldens.

The injuries, besides, which are here enumerated, are limited to such proceedings as the laws of war may be thought to authorise. To a fair estimate of the evils suffered by neutral commerce, must be added all those abuses which never fail to be mingled with the exercise of belligerent rights on the high seas; the protracted interruptions, the personal insults, the violent or furtive spoliations, with a thousand irregularities which are more or less inseparable from the proceeding, and which can seldom be so far verified and prosecuted, to effect against the wrong-doers, as to amount to a reparation.

If the evils brought on neutrals by a state of war were to be traced to their full extent, a long list of a distinct kind ought moreover to be thrown into the same scale. How many condemnations are made either directly contrary to the law of nations, or by means of unjust presumptions, or arbitrary rules of evidence, against neutral claimants? How often and how severely are the neutral appellants aggrieved by measuring the restitution awarded to them, not according to the actual loss, but according to the deficient estimates, or the scanty proceeds of sales, decreed by ignorant or corrupt vice-admiralty courts*, in places and

* The character of these courts may be estimated by a single fact stated on the floor of the British house of commons, 29th April, 1801—that out of three hundred and eighteen appeals, thirty-five only of the condemnations were confirmed by the superior court. Notwithstanding this enormity of abuses, and the strong remonstrances against them, no change was made in the courts till about four months before the war was over. They were then put on an establishment somewhat different, but which still leaves them a scourge to the fairest commerce of neutrals.

under circumstances which reduce the price to a mere fraction of the value? Examples of this sort might easily be multiplied, but they may be thought of the less weight in the present case, as they furnish a just ground of resort, from the ordinary tribunals of justice, to those ulterior remedies which depend on negociations and arrangements between the belligerent and neutral governments. But whatever may be the provisions for indemnity obtained in these modes, it remains an important truth, on the present subject, that, besides the intermediate disadvantage to neutral traders from the mere delay of diplomatic and conventional remedies, the justice stipulated is always rendered very incomplete, by the difficulties in verifying the losses and damages sustained.

The principle urged against a neutral trade in time of war, not permitted in peace, is the more unreasonable, because it gives to a tribunal, established by the belligerent party only, a latitude of judgement improper to be confined to courts of justice, however constituted*.

* The English courts of municipal law are much celebrated for the independent character of the judges, and the uniformity of their decisions. The same merit has been claimed for the prize courts. In answer to the objection made in a Prussian remonstrance against the condemnation of Prussian vessels during the war of 1739—viz. that the admiralty courts were *ex parte* tribunals, and their decisions not binding on other nations—the duke of Newcastle, in his letter inclosing the report of the four law officers, observes, "that these courts, both *inferior* courts "and courts of appeal, always decide according to the uni-"versal law of nations only, except in those cases where par-"ticular treaties between the powers concerned have altered the "dispositions of the law of nations." In the report itself it is declared, "that this superior court [lords of appeal] judges by the same rule which governs the court of admiralty: viz. the law of nations, and the treaties subsisting with that neutral power whose subject is a party before them;" "that in England the crown never interferes with the course of justice. No *order* or *intimation* is ever given to *any judge;*" that, "had it been

In cases even where the tribunal has an equal relation to both the parties, it has ever been deemed proper that the rules of decision

intended by agreement to introduce between Prussia and England a variation in any particular from the law of nations, and consequently a new rule for the court of admiralty to decide by, it could only be done by a solemn *treaty in writing*, properly authorised and *authenticated*. The memory of it could not otherwise be preserved; the parties interested, and the *courts of admiralty* could not *otherwise* take *notice of it*." In the judgement pronounced by sir William Scott, in the case of the Swedish convoy [2 Rob. 295], the independent and elevated attributes of his judicial station are painted with his usual eloquence. "In forming that judgement," says he, "I trust that it has not escaped my anxious recollection for one moment what it is that the duty of my station calls for from me, namely, to consider myself as stationed here not to deliver *occasional* and *shifting* opinions, to serve present purposes of particular *national interest*, but to administer with indifference that justice which the law of nations holds out without distinction to independent states, some happening to be neutral and some to be belligerent. The seat of judicial authority is indeed locally here in the belligerent country, according to the known law and practice of nations; but the law itself has no locality. It is the duty of the person who sits here, to determine this question exactly as he would determine the same question if sitting at Stockholm; to assert no pretension on the part of Great Britain which he would not allow to Sweden in the same circumstances; and to impose no duties on Sweden, as a neutral country, which he would not admit to belong to Great Britain in the same character. If, therefore, I mistake the law in this matter, I mistake that which I consider, and which I mean should be considered, as the *universal law* upon the question."

Does the judge either sustain these lofty pretensions, or justify the declaration of his government to Prussia, when, a few months after, in the case of the Immanuel [2 Rob. 169], he observes to the bar, "that much argument has been employed on grounds of commercial analogy: this trade is allowed—that trade is not more injurious: Why not that to be considered as equally permitted? The obvious answer is, that the *true rule* to this court is the *text* of the instructions. What is not found there permitted is understood to be prohibited, upon this general plain principle, that the colony trade is generally prohibited, and whatever is not specially relaxed continues in a state of interdiction."

He is not extricated from these inconsistencies by alleging

should be as plain and as determinate as possible; in order not only that they might be the surer guide to those who are to observe them, but also a better

that the instructions, the text of which was taken at his rule, was a relaxation of the law of nations, within the prerogative of the crown, and favorable to the interests of the neutral parties.— 1. Because it was incumbent on him, if he meant to keep himself above all executive interference with the course of justice, to have reserved to him the right to test the instructions by the law of nations, instead of professing so ready and so unqualified a submission to the text of them. 2. Because, without examining the extent of the royal prerogative, which depends on the local constitution and laws, it has been shown that, in some respects, the instructions have extended the belligerent claims against neutral commerce *beyond* the law of nations, as asserted on the part of Great Britain.

How far the authority of the instructions has been pursued by the high court of admiralty, in opposition to precedents of the superior courts settling the law of nations, is a fit subject of inquiry, for which the adequate means are not possessed.

The opinion has long and generally prevailed, that the admiralty courts in England were not those independent and impartial expositors of the law of nations which they have professed to be; but rather the political organs of the government, so constituted as to deliver its *occasional* and *shifting* views, with reference to the occasional and shifting interests of the nation, belligerent and commercial. And it is to be regretted that this opinion is but too much countenanced by the series of royal orders and judicial decisions which the last and present war have produced. It would be an unjustifiable sacrifice of truth to complaisance, not to say, on the present occasion, that with all the merits of the illustrious civilian who presides in the high court of admiralty, the Englishman at least is often discerned through the robes of the judge.

This want of confidence in the impartiality of the admiralty courts is the less surprising, when it is considered that the lords of appeal, who decide in the last resort, are frequently statesmen, not jurists; that they not only hold their seats in that court at the most absolute pleasure of the crown, but are members of the cabinet, and it may be presumed are, in that capacity, the original advisers and framers of the very instructions which, in their judicial capacity, they are to carry into effect.

With respect to the inferior prize courts, orders directly addressed to them are neither unusual nor concealed. As an example, take the orders communicated to Mr. King by lord Hawkesbury, above cited. Another example is furnished by the orders communicated to this government through Mr. Merry in 1804, as having

guard against the partialities and errors of those who are to apply them. Say, then, whether it be not an abandonment of every reasonable precaution, while the judges have, in their national prejudices, in the tenure of their official emoluments, and in their hopes of personal advancement, an exclusive relation to one of the parties; say whether it be not unreasonable to leave to the opinion, perhaps to the conjectures, of a tribunal so composed, the questions—whether in a distant quarter of the globe a particular trade* was or was not allowed before the war; whether, if not allowed before the war, its allowance during the war proceeded from causes distinct from the war, or arising out of the war; whether the allowance had or had not been common to all wars; whether again, if resulting from the particular pressure of the war, the pressure amounted to a necessity: whether, if amounting to a necessity, the necessity resulted from an impossibility, imposed by a decided predominance and superiority at sea of the adverse party. These are not questions of fancy or of unfairness. They are questions which it has been seen that the enlightened judge in the British high court of admiralty has himself recognised;

been addressed to the vice-admiralty courts in the West Indies, as a rule on the subject of blockades.

* See the case reported by Robinson, vol. 4, p. 267, of a vessel in the trade to Senegal, and the difficulty, expense, and delay, in ascertaining whether the trade was or was not open before the war. A case (of Coffin, an American citizen) is now depending, which involves the question, whether the trade from the island of Java in the East Indies, to Muscat in the Persian gulph, was or was not open before the war. This question was decided, in the first instance, by a vice-admiralty court at Ceylon; and will probably be removed to Great Britain for a re-examination. The case, therefore, will have for its space three quarters of the globe. Through what period of time it may extend, is a problem to be decided. There are precedents, as has been already seen, for ten years at least.

as involved in the principle for which he contends. But they are questions in their nature improper to be decided by any judicial authority whatever; and, in their importance, they are questions too great to be left even to the sovereign authority of a country where the rights of other sovereigns are to be the object of the decision.

Finally—The belligerent claim, to intercept a neutral trade in war not open in peace, is rendered still more extravagantly preposterous and pernicious by the latitude which it is now assuming. According to late decisions in the British courts, it is in future to be a rule that produce of an enemy's colony, lawfully imported into a neutral country, and incorporated into its commercial stock, as far as the ordinary regulations of a sovereign state can work such an effect, is to be subject on re-exportation to capture and condemnation: unless it can be shown that it was imported in the preceding voyage, with an intention that it should not be re-exported. Consider for a moment the indignity offered to a neutral sovereign in subjecting the integrity of its internal regulations to the scrutiny of foreign courts, and to the interested suspicions of belligerent cruisers: consider the oppression on the individual traders, inseparable from a trial in a distant court, and perhaps an appeal to another court still more distant, where the intention of an antecedent voyage is to be traced through all the labyrinth of mercantile transactions. A neutral vessel goes to sea with a cargo consisting, in whole or in part, of colonial produce. It may be the produce of a *neutral* colony; it may be the produce of the country exporting it. The United States already produce cotton, sugar, rice, &c. as well as the West Indies. The cruiser does not forget that the proof will probably be thrown on the claimants; that besides the possibility that

it may be a licensed capture, the difficulty of proof may have the same effect in producing condemnation. He recollects also that in the event of an acquittal the costs* will, where there is the least color for seizure, be thrown on the claimants; and that, at the worst, he can only be put to the inconvenience of giving up a few men to take charge of the prize, in exchange for a few others not unfrequently *impressed into the vacancy.* In a word, his calculation is, that he may gain, and cannot lose. Will not, under such circumstances, every hogshead of sugar, or bale of cotton, or barrel of rum, &c. be a signal for detention? Could ingenuity devise a project holding out a more effectual premium for the multiplication of vexatious searches and seizures, beyond even the ordinary proportion of condemnations—a project, in fact, more unjust in itself, more disrespectful to neutral nations, or more fatal to the liberty and interests of neutral commerce? — Would Great Britain be patient under such proceedings against her, if she held in her hands the means of controling them? — If she will not answer for herself, all the world will answer for her, that she would not; and what is more, that she ought not.

* It is well known to be the practice to favor the activity of cruisers against the colonial trade. Sir William Scott, in the case of the Providentia, in which the ship and cargo were restored [2 Rob. 128], says, "Cases respecting the trade of neutrals with the colonies of the enemy are of considerable delicacy; and I therefore think it has been properly brought before the court."

THE END.

WOOD AND INNES, PRINTERS, POPPIN'S-COURT, FLEET-STREET.

A

# LETTER

FROM THE

# MINISTER PLENIPOTENTIARY

OF THE

# UNITED STATES

TO

# LORD MULGRAVE,

LATE SECRETARY OF STATE FOR FOREIGN AFFAIRS.

COMMUNICATED TO CONGRESS BY THE PRESIDENT,

AND PUBLISHED BY THEIR ORDER.

# STATE PAPER,

*&c. &c. &c.*

" *Great Cumberland Place, No.* 12.
*Sept.* 23, 1805.

" MY LORD,

" I FLATTERED myself, from what passed in our last interview, that I should have been honored before this with an answer from your lordship to my letters respecting the late seizure of American vessels. I understood it to be agreed, that the discussion which then took place should be considered as inofficial, as explanatory only of the ideas which we might respectively entertain on the subject, and that your lordship would afterwards give me such a reply to my letters, respecting that measure, as his majesty's government might desire to have communicated to the government of the United States. In consequence I have since waited with anxiety such a communication, in the daily expectation of receiving it. It is far fom being my desire to give your lordship any trouble in this business which I can avoid, as the time which has since elapsed sufficiently shows. But the great importance of the subject, which has, indeed, become more so by the continuance of the same policy, and

the frequency of seizures, which are still made of American vessels, place me in a situation of peculiar responsibility. My government will expect of me correct information on this point, in all its views, and I am very desirous of complying with its just expectation. I must, therefore, again request that your lordship will be so good as to enable me to make such a representation to my government of that measure, as his majesty's government may think proper to give.

" I am sorry to add, that the longer I have reflected on the subject, the more confirmed I have been in the objections to the measure. If we examine it in reference to the law of nations, it appears to me to be repugnant to every principle of that law; if by the understanding, or as it may be more properly called, the agreement of our governments respecting the commerce in question, I consider it equally repugnant to the principles of that agreement. In both these views your lordship will permit me to make some additional remarks on the subject.

" By the law of nations, as settled by the most approved writers, no other restraint is acknowledged on the trade of neutral nations with those at war, than that it be impartial between the latter; that it shall not extend to articles which are deemed contraband of war; nor to the transportation of persons in military service; nor to places actually blockaded or besieged. Every other commerce of a neutral with a belligerent is considered a lawful commerce; and every other restraint on it to either of the belligerents by the other, an unlawful restraint.

" The list of contraband is well defined, as are also the circumstances which constitute a blockade. The best authorities have united in confining the first to such articles as are used in war, and are applicable to military purposes; and in requiring, to constitute

the latter, the disposition of such a force, consisting of stationary ships, so near the port, by the power which attacks it, as to make it dangerous for the vessel of a neutral power to enter it. The late treaty between Great Britain and Russia designates these circumstances as necessary to constitute a blockade, and it is believed that it was never viewed before in a light more favorable to the invading power.

" The vessels condemned were engaged in a commerce between the United States and some port in Europe, or between those States and the West-India or other islands, belonging to an enemy of Great Britain. In the European voyage the cargo consisted of the productions of the colonies; in the voyage to the colony, it consisted of the goods of the power to which the colony belonged, and to which the ship was destined. The ship and cargo, in every case, were the property of American citizens; and the cargo had been landed, and the duty paid on it, in the United States. It was decided that these voyages were continuous; and the vessels and cargoes were condemned on the principle that the commerce was illegal. I beg to refer more especially in this statement to the case of the Essex, an appeal from the judgement of the vice-admiralty court, at New Providence, in which the lords commissioners of appeals, in confirming that judgement, established this doctrine.

" It requires but a slight view of the subject to be satisfied that these condemnations are incompatible with the law of nations, as above stated. None of the cases have involved a question of contraband, of blockade, or of any other kind that was ever contested till of late, in favor of a belligerent against a neutral power. It is not on any principle that is applicable to any such case, that the measure can be defended. On what principle, then, is it supported by Great Britain? What is the nature and extent of her doc-

trine? What are the circumstances which recommend the arguments which support it?—For information on these points we cannot refer to the well-known writers on the law of nations; no illustration can be obtained from them of a doctrine which they never heard of. We must look for it to an authority more modern; to one which, however respectable for the learning and professional abilities of the judge who presides, is, nevertheless, one which, from many considerations, is not obligatory on other powers. In a report of the decisions of the court of admiralty of this kingdom, we find a notice of a series of orders issued by the government, of different dates and imports, which have regulated this business. The first of these bears date on the 6th of November, 1793; the second on the 8th of January, 1794; the third on the 25th of January, 1798. Other orders have been issued since the commencement of the present war. It is these orders which have authorised the seizures that were made, at different times, in the course of the last war, and were lately made by British cruisers of the vessels of the United States. They, too, form the law which has governed the courts in the decisions on the several cases which have arisen under those seizures. The first of these orders prohibits altogether every species of commerce between neutral countries and enemies' colonies, and between neutral and other countries, in the productions of those colonies; the second and subsequent orders modify it in various forms. The doctrine, however, in every decision, is the same; it is contended in each, that the character and just extent of the principle is to be found in the first order, and that every departure from it since has been a relaxation of the principle, not claimed of right by neutral powers, but conceded in their favor gratuitously by Great Britain.

" In support of these orders it is urged, that as the colonial trade is a system of monopoly to the parent

country, in time of peace, neutral powers have no right to participate in it in time of war, although they be permitted so to do by the parent country; that a belligerent has a right to interdict them from such a commerce. It is on this system of internal restraint, this regulation of colonial trade, by the powers having colonies, that a new principle of the law of nations is attempted to be founded; one which seeks to discriminate, in respect to the commerce of neutral powers with a belligerent, between different parts of the territory of the same power, and likewise subverts many other principles of great importance, which have heretofore been held sacred among nations. It is believed that so important a superstructure was never raised on so slight a foundation. Permit me to ask, Does it follow, because the parent country monopolises in peace the whole commerce of its colonies, that in war it should have no right to regulate it at all? That on the contrary it should be construed to transfer, in equal extent, a right to its enemy, to the prejudice of the parent country, of the colonies, and of neutral powers? If this doctrine was sound, it would certainly institute a new and singular mode of acquiring and losing rights; one which would be highly advantageous to one party, while it was equally injurious to the other. To the colonies, more especially, it would prove peculiarly onerous and oppressive. It is known that they are essentially dependent for their existence on supplies from other countries, especially the United States of America, who, being in their neighborhood, have the means of furnishing them with the greatest certainty, and on the best terms. Is it not sufficient that they be subjected to that restraint in peace when the evils attending it by the occasional interference of the parent country, may be, and are frequently, repaired? Is it consistent with justice or humanity, that it should be converted into a principle, in favor of an enemy, inexorable of course, but

otherwise without the means of listening to their complaints, not for their distress or oppression only, but for their extermination? But there are other insuperable objections to this doctrine. Are not the colonies of every country a part of its domain, and do they not continue to be so until they are severed from it by conquest? Is not the power to regulate commerce incident to the sovereignty, and is it not co-extensive over the whole territory which any government possesses? Can one belligerent acquire any right to the territory of another, but by conquest? And can any rights which appertain thereto, be otherwise defeated or curtailed in war? In whatever light, therefore, the subject is viewed, it appears to me evident that this doctrine cannot be supported. No distinction, founded in reason, can be taken between the different parts of the territory of the same power to justify it. The separation of one portion from another by the sea, gives lawfully to the belligerent which is superior on that element, a vast ascendancy in all the concerns on which the success of the war, or the relative prosperity of their respective dominions, may in any degree depend. It opens to such power ample means for its own aggrandisement, and for the harrassment and distress of its adversary. With these it should be satisfied. But neither can that circumstance, nor can any of internal arrangement, which any power may adopt for the government of its dominions, be construed to give to its enemy any other advantage over it. They certainly do not justify the doctrine in question, which asserts, that the law of nations varies in its application to different portions of the territory of the same power, that it operates in one mode, in respect to one, and in another; or even not at all, in respect to another; that the rights of humanity, of neutral powers, and all other rights, are to sink before it.

"It is further urged, that neutral powers ought

not to complain of this restraint, because they stand under it, on the same ground with respect to that commerce, which they held in time of peace. But this fact, if true, gives no support to the pretension. The claim involves a question of right, not of interest. If the neutral powers have a right in war to such commerce with the colonies of the enemies of Great Britain as the parent states respectively allow, they ought not to be deprived of it by her, nor can its just claims be satisfied by any compromise of the kind alluded to. For this argument to have the weight which it is intended to give it, the commerce of the neutral powers with those colonies should be placed and preserved through the war, in the same state as if it had not occurred. Great Britain should in respect to them take the place of the parent country, and do every thing which the latter would have done had there been no war. To discharge that duty, it would be necessary for her to establish such a police over the colony, as to be able to examine the circumstances attending it annually; to ascertain whether the crops were abundant, supplies from other quarters had failed, and eventually to decide whether under such circumstances the parent country would have opened the ports to neutral powers. But these offices cannot be performed by any power which is not in possession of the colony: that can only be obtained by conquest, in which case the victor would of course have a right to regulate its trade as it thought fit.

" It is also said, that neutral powers have no right to profit of the advantages which are gained in war by the arms of Great Britain. This argument has even less weight than the others. It does not, in truth, apply at all to the question. Neutral powers do not claim a right, as already observed, to any commerce with the colonies which Great Britain may have conquered of her enemies, otherwise than

on the conditions which she imposes. The point in question turns on the commerce which they are intitled to with the colonies which she has not conquered, but still remain subject to the dominion of the parent country. With such it is contended, for reasons that have been already given, that neutral powers have a right to enjoy all the advantages in trade, which the parent country allows them; a right of which the mere circumstance of war cannot deprive them. If Great Britain has a right to prohibit that commerce, it existed before the war began, and of course before she had gained any advantage over her enemies. If it did not then exist, it certainly does not at the present time. Rights of the kind in question cannot depend on the fortune of war, or other contingencies. The law which regulates them is invariable, until it be changed by the competent authority. It forms a rule equally between belligerent powers and between neutral and belligerent, which is dictated by reason, and sanctioned by the usage and consent of nations.

" The foregoing considerations have, it is presumed, proved that the claim of Great Britain to prohibit the commerce of neutral powers in the manner proposed, is repugnant to the law of nations. If, however, any doubt remained on that point, other considerations which may be urged cannot fail to remove it. The number of orders of different imports which have been issued by the government, to regulate the seizure of neutral vessels, is a proof that there is no established law for the purpose. And the strictness with which the courts have followed those orders, through their various modifications, is equally a proof that there is no other authority for the government of their decisions. If the order of the 6th of November, 1793, contained the true doctrine of the law of nations, there would have been no occasion for those

which followed; nor is it probable that they would have been issued: indeed, if that order had been in conformity with that law, there would have been no occasion for it. As in the cases of blockade and contraband, the law would have been well known without an order, especially one so very descriptive, the interest of the cruisers, which is always sufficiently active, would have prompted them to make the seizures; and the opinions of eminent writers, which in that case would not have been wanting, would have furnished the courts the best authority for their decisions.

" I shall now proceed to show that the decisions complained of are contrary to the understanding, or what may more properly be called the agreement, of the two governments on the subject. By the order of the 6th November, 1793, some hundreds of American vessels were seized, carried into port, and condemned. Those seizures and condemnations became the subject of an immediate negociation between the two nations, which terminated in a treaty, by which it was agreed to submit the whole subject to commissioners, who should be invested with full power to settle the controversy which had thus arisen.—That stipulation was carried into complete effect: commissioners were appointed, who examined laboriously and fully all the cases of seizure and condemnation which had taken place, and finally decided on the same; in which decisions they condemned the principle of the order, and awarded compensation to those who had suffered under it. Those awards have been since fairly and honorably discharged by Great Britain. It merits particular attention, that a part of the twelfth article of that treaty referred expressly to the point in question, and that it was, on the solemn deliberation of each government, by their mutual consent, expunged from it. It seems, therefore, to

be impossible to consider that transaction, under all the circumstances attending it, in any other light than as a fair and amicable adjustment of the question between the parties; one which authorised the just expectation that it would never have become again a cause of complaint between them. The sense of both was expressed on it in a manner too marked and explicit to admit of a different conclusion. The subject too was of a nature that when once settled ought to be considered as settled for ever. It is not like questions of commerce between two powers, which affect their internal concerns, and depend, of course, on the internal regulations of each. When these latter are arranged by treaty, the rights which accrue to each party under it, in the interior of the other, cease when the treaty expires. Each has a right afterwards to decide for itself in what manner that concern shall be regulated in future, and in that decision to consult solely its own interest. But the present topic is of a very different character. It involves no question of commerce, or other internal concern, between the two nations. It respects the commerce only which either may have with the enemies of the other in time of war. It involves, therefore, only a question of right, under the law of nations, which in its nature cannot fluctuate. It is proper to add, that the conclusion above mentioned was further supported by the important fact, that, until the late decree, in the case of the Essex, not one American vessel engaged in this commerce had been condemned on this doctrine; that several which were met in the channel, by the British cruisers, were permitted, after an examination of their papers, to pursue their voyage. This circumstance justified the opinion, that that commerce was deemed a lawful one by Great Britain.

"There are other grounds on which the late

seizures and condemnations are considered as highly objectionable, and to furnish just cause of complaint to the United States. Until the final report of the commissioners under the 7th article of the treaty of 1794, which was not made until last year, it is admitted that their arbitrament was not obligatory on the parties in the sense in which it is now contended to be. Every intermediate declaration, however, by Great Britain, of her sense on the subject, must be considered as binding on her, as it laid the foundation of commercial enterprises, which were thought to be secure while within that limit. Your lordship will permit me to refer you to several examples of this kind, which were equally formal and official, in which the sense of his majesty's government was declared very differently from what it has been in the late condemnations. In Robinson's Reports, vol. II. p. 368 (case the Polly, Lasky, master), it seems to have been clearly established by the learned judge of the court of admiralty, that an American has a right to import the produce of an enemy's colony into the United States, and to send it on afterwards to the general commerce of Europe; that the landing the goods and paying the duties in the United States should preclude all further question relative to the voyage. The terms "for his own use," which are to be found in the report, are obviously intended to assert the claim only that the property shall be American, and not that of an enemy: by admitting the right to send on the produce afterwards to the general commerce of Europe, it is not possible that those terms should convey any other idea. A *bonâ fide* importation is also held by the judge to be satisfied by the landing the goods and paying the duties. This therefore is, I think, the true import of that decision. The doctrine is again laid down in still more explicit terms by the government itself, in a correspondence

between lord Hawkesbury, and my predecessor Mr. King. The case was precisely similar to those which have been lately before the court. Mr. King complained, in a letter of March 18, 1801, that the cargo of an American vessel going from the United States to a Spanish colony had been condemned by the vice-admiralty court of Nassau, on the ground that it was of the growth of Spain, which decision he contended was contrary to the law of nations, and requested that suitable instructions might be dispatched to the proper officers in the West Indies, to prevent like abuses in future.

" Lord Hawkesbury, in a reply of April 11th, communicated the report of the king's advocate-general, in which it is expressly stated, that the produce of an enemy may be imported by a neutral into its own country and re-exported thence to the mother country; and in like manner, in that circuitous mode, that the produce and manufactures of the mother country might find their way to its colonies; that the landing the goods and paying the duties in the neutral country broke the continuity of the voyage, and legalised the trade, although the goods were re-shipped in the same vessel, on account of the same neutral proprietors, and forwarded for sale to the mother country of the colony. It merits attention in this report—so clearly and positively is the doctrine laid down, that the landing the goods, and paying the duties in the neutral country, broke the continuity of the voyage—that it is stated as a doubtful point whether the mere touching in the neutral country to obtain fresh clearances will be considered in the light of the direct trade, that no positive inhibition is insisted on any but the direct trade between the mother country and the colonies. This doctrine, in the light herein stated, is also to be found in the treaty between Great Britain and Russia, June 17, 1801.

By the second section of the 3d article, the commerce of neutrals, in the productions or manufactures of the enemies of Great Britain, which have become the property of the neutral, is declared to be free. That section was afterwards explained by a declaratory article of October 20th, of the same year, by which it is agreed, that it shall not be understood to authorise neutrals to carry the produce or merchandise of an enemy, either directly from the colonies to the parent country, or from the parent country to the colonies. In other respects the commerce was left on the footing on which it was placed by that section, perfectly free, except in the direct trade between the colony and the parent country. It is worthy of remark, that as by the reference made, in the explanatory article of the treaty with Russia, to the United States of America, it was supposed that those States and Russia, Denmark, and Sweden, had a common interest in neutral questions, so it was obviously intended, from the similarity of sentiment which is observable between that treaty as amended, and the report of the advocate-general above mentioned, to place all the parties on the same footing. After these acts of the British government, which, being official, were made public, it was not to be expected that any greater restraint would have been contemplated by it, on that commerce, than they impose; that an inquiry would ever have been made, not whether the property with which an American vessel was charged belonged to a citizen of the United States or an enemy, but whether it belonged to this or that American; an inquiry which imposes a condition which it is believed that no independent nation, having a just sense of what it owes to its rights or its honor, can ever comply with. Much less was it to be expected that such a restraint would have been thought of, after the report of the commissioners above adverted to, which placed the

rights of the United States incontestibly on a much more liberal, and, as is contended, just footing.

" It is proper to add, that the decree of the lords commissioners of appeals, in the case of the Essex, produced the same effect as an order from the government would have done. Prior to that decree, from the commencement of the war, the commerce in question was pursued by the citizens of the United States, as has been already observed, " without molestation." It is presumable that till then his majesty's cruisers were induced to forbear a seizure, by the same considerations which induced the American citizens to engage in the commerce—a belief that it was a lawful one. The facts above mentioned were equally before both the parties; and it is not surprising that they should have drawn the same conclusion from them. That decree, however, opened a new scene: it certainly gave a signal to the cruisers to commence the seizure which they have not failed to do, as has been sufficiently felt by the citizens of the United States who have suffered under it. According to the information which has been given me, about fifty vessels have been brought into the ports of Great Britain in consequence of it, and there is reason to believe that the same system is pursued in the West Indies and elsewhere*. The measure is the more to be complained of, because Great Britain had, in permitting the commerce for two years, given a sanction to it by her conduct, and nothing had occurred to create a suspicion that her sentiments varied from her conduct. Had that been the case, or had she been disposed to change her conduct in that respect towards the United States, it might reasonably have been expected that some intimation would have been

* The number is said to be at this time about 150, without comprising the seizures made in the West Indies.

given of it before the measure was carried into effect. Between powers who are equally desirous of preserving the relations of friendship with each other, notice might in all such cases be expected. But in the present case the obligation to give it seemed to be peculiarly strong. The existence of a negociation which had been sought on the part of the United States some considerable time before my departure for Spain, for the express purpose of adjusting amicably and fairly all such questions between the two nations, and postponed on that occasion to accommodate the views of his majesty's government, furnished a suitable opportunity for such an intimation, while it could not otherwise than increase the claim to it.

" In this communication I have made no comment on the difference which is observable in the import of the several orders which have regulated at different times the seizure of neutral vessels, some of which were more moderate than others. It is proper, however, to remark here, that those which were issued, or even that any had been issued, since the commencement of the present war, were circumstances not known till lately. On principle it is acknowledged, that they are to be viewed in the same light; and it has been my object to examine them by that standard, without going into detail, or marking the shades of difference between them. I have made the examination with that freedom and candor which belong to a subject of very high importance to the United States, the result of which has been, as I presume, to prove that all the orders are repugnant to the law of nations, and that the late condemnations which have revived the pretension on the part of Great Britain, are not only repugnant to that law, but to the understanding which had taken place between the two powers, respecting the commerce in question.

" I cannot conclude this note without adverting to

the other topics depending between our governments, which it is also much wished to adjust at this time. These are well known to your lordship, and it is therefore unnecessary to add any thing on them at present. With a view to perpetuate the friendship of the two nations, no unnecessary cause of collision should be left open. Those adverted to are believed to be of this kind, such as the case of boundary, the impressment of seamen, &c. since it is presumed that there can be no real conflicting interest between them on those points. The general commercial relation may then be adjusted or postponed, as may be most consistent with the views of his majesty's government. On that point also it is believed that it will not be difficult to make such an arrangement, as by giving sufficient scope to the resources, to the industry, and the enterprise of the people of both countries, may prove highly and reciprocally advantageous to them. In the topic of impressment, however, the motive is more urgent. In that line, the rights of the United States have been so long trampled under foot, and the feelings of humanity, in respect to the sufferers, and the honor of their government, even in their own ports, so often outraged, that the astonished world may begin to doubt, whether the patience with which those injuries have been borne, ought to be attributed to generous or unworthy motives; whether the United States merit the rank to which, in other respects, they are justly intitled among independent powers; or have already, in the very morn of their political career, lost their energy, and become degenerate. The United States are not insensible that their conduct has exposed them to such suspicions, though they well know that they have not merited them. They are aware, from the similarity in the person, the manners, and, above all, the identity of the language, which is common to the people of both nations, that the sub-

ject is a difficult one: they are equally aware, that to Great Britain, also, it is a delicate one; and they have been willing, in seeking an arrangement of this important interest, to give a proof by the mode of their very sincere desire to cherish the relations of friendship with her. I have only to add, that I shall be happy to meet your lordship on these points, as soon as you can make it convenient to you.

" I have the honor to be,

" With high consideration,

" Your lordship's most obedient servant,

(Signed) " JAMES MONROE."

WOOD AND INNES, PRINTERS, POPPIN'S-COURT, FLEET-STREET.