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CONSIDERED WITH REFERENCE

TO THE

LAW OF SELF-DEFENCE.

BY

GEORGE TICKNOR CURTIS.

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It is by no means an easy undertaking to eliminate from this complicated case the real question that has been settled by it, if it can be said that any new question has been settled by the concurrent action of Spain and the United States. The course of the negotiation at Madrid, its sudden transfer to Washington, the change from the original demand to the extradition that was finally agreed upon between Admiral Polo and Mr. Fish, together with the claim of the President's special Message that the extradition "was an admission of the principles on which our demands had been founded," render it necessary to make a careful analysis of the negotiation and the facts. It is important to know what principles and what demands, asserted and made by the United States, have been admitted by Spain. Under the President's Message of January 5th, it might be claimed that, notwithstanding Spain, before the Message was sent to Congress, had proved to the satisfaction of the United States that the Virginius had no lawful title to the national character of an American vessel; that she was in fact either owned or wholly controlled by Cuban insurgents, and was, when seized, engaged in an attempt to land a military expedition on the island of Cuba, if not also engaged in a general cruise against Spanish commerce—yet that Spain has, by acceding to the demand made for her surrender and the surrender of the surviving persons found on board, admitted that her seizure was precisely as unjustifiable as if she had been a regularly documented American vessel, with full title to the

* Message from the President of the United States, transmitting documents and correspondence relative to the capture of the steamer Virginius, and proceedings subsequent thereto. 43d Congress, 1st Session, (1873–74.) House Executive Documents No. 30.

protection of the American flag. In the introductory part of his message, after stating that the Virginius was registered at New-York in 1870, in the name of an American citizen, went to sea, and had never returned to the United States, the President puts the case in this way :

"When, therefore, she left the port of Kingston in October last, [1873,] under the flag of the United States, she would appear to have had, as against all powers except the United States, the right to fly that flag, and to claim its protection, as enjoyed by all regularly documented vessels registered as part of our commercial marine. No state of war existed, conferring upon a maritime power the right to molest and detain upon the high seas a documented vessel ; and it can not be pretended that the Virginius had placed herself without the pale of all law by acts of piracy against the human race. If her papers were irregular or fraudulent, the offence was one against the laws of the United States, justiciable only in their tribunals."

"When therefore it became known that the Virginius had been captured on the high seas by a Spanish man-of-war ; that the American flag had been hauled down by the captors ; that the vessel had been carried to a Spanish port ; and that Spanish tribunals were taking jurisdiction over the persons of those found on her, and exercising that jurisdiction upon American citizens, not only in violation of the rules of international law, but in contravention of the provisions of the treaty of 1795, I directed a demand to be made upon Spain for the restoration of the vessel, and for the return of the survivors to the protection of the United States, for a salute to the flag, and for the punishment of the offending parties."

This, it is true, is only a statement of the case as it appeared to the President when he made the original demand for the extradition. But he proceeds in the same immediate context to say :

"The principles upon which these demands rested could not be seriously questioned ; but it was suggested by the Spanish government that there were grave doubts whether the Virginius was entitled to the character given her by her papers ; and therefore that it might be proper for the United States,

after the surrender of the vessel and the survivors, to dispense with the salute to the flag, should such fact be established to their satisfaction. This seemed to be reasonable and just. I therefore assented to it, on the assurance that Spain would then declare that no insult to the flag of the United States had been intended. I also authorized an agreement to be made that, should it be shown to the satisfaction of this government that the Virginius was improperly bearing the flag, proceedings should be instituted in our courts for the punishment of the offence committed against the United States. On her part, Spain undertook to proceed against those who had offended the sovereignty of the United States, or who had violated their treaty rights."

Having made these statements for the information of Congress—statements which show of themselves that, while the principles on which the original demand was made could not be seriously questioned because the demand was made for a vessel having a right to the protection of the American flag "as enjoyed by all regularly documented vessels registered as part of our commercial marine," yet that Spain had made the surrender as of a case in which the national character of the vessel was denied, and for the purpose of having her true character determined by the United States—the President passes at once to the conclusion that "the surrender of the vessel and the survivors to the jurisdiction of the tribunals of the United States *was an admission* of the principles on which our *demands* had been founded."* Whether this is a *sequitur* or a *non-sequitur*, can be determined only by a full examination of the negotiation and its results. If the President meant the world to understand that he claimed to apply the same principles to the case of a vessel not entitled to the character of "a regularly documented vessel registered as part of our commercial marine," that he would apply to a vessel having such character, and that Spain has admitted that the two cases are not distinguishable in respect to the principles applicable to the supposed right of seizure, the claim is intelligible. But it is

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* In all cases, the *italics* marking the extracts from these documents are our own.

important to ascertain whether Spain has made this admission. If the case which Spain put into the hands of the United States for investigation was the case of a vessel asserted by Spain not to be entitled to the national character of an American vessel, the mere extradition for the purposes of that investigation, carries no admission that the seizure was wrongful. Such an admission could only be claimed in consequence of a clear and unequivocal concession on the part of Spain, that, whether the vessel was or was not entitled to the American character, the principles that govern the rightfulness of the seizure are the same. Such a concession would seem to be repelled by the fact that Spain denied that "the Virginius was entitled to the character given her by her papers," and had surrendered her to the United States to have this question investigated, as the vital one on which the salute to our flag was to turn, and in order that she might be proceeded against under the municipal law of the United States. If the course of the negotiation, indeed, shows that Spain accompanied or preceded the surrender by an admission that the national character, or the want of it, made no difference in respect to the asserted right of seizure, then the claim of the President's Message, taken in its broadest scope, is sound. Otherwise, that claim will not be so received by the world at large.

The Virginius was seized, after a chase, by the Spanish cruiser Tornado, on the high seas, not far from Jamaica. Intelligence of the fact was received by the American government on the 5th of November. Mr. Fish, the Secretary of State, was absent, but he returned to Washington on the evening of the 6th. Communication with the Spanish government was immediately commenced through General Sickles, the American Minister at Madrid, and the negotiation through that channel was continued down to the time when it was transferred to Washington. The first peremptory demand made through General Sickles was cabled to that Minister by Mr. Fish on the 14th of November, in these terms:

"Unless abundant reparation shall have been voluntarily tendered, you will demand the restoration of the Virginius, and the release and delivery to the United States of the persons captured on her who have not already been massacred,

and that the flag of the United States be saluted in the port of Santiago, and the signal punishment of the officials who were concerned in the capture of the vessel and the execution of the passengers and crew. In case of refusal of satisfactory reparation within twelve days from this date, you will, at the expiration of that time, close your legation, and will, together with your secretary, leave Madrid, bringing with you the archives of the legation." . .

This demand was prompted, at the time, mainly by the intelligence that a large number of the persons taken from the Virginius, after she had been carried into Santiago de Cuba, had been put to death by the local authorities; and it was feared that there might be American citizens among the survivors. What then was the case, in reference to which this demand for the surrender of the vessel was made, with the alternative of an immediate rupture of diplomatic relations in case of refusal? We have examined the correspondence minutely, and we think it leaves no doubt that the demand was made upon the assumption that the Virginius was a regularly documented American vessel. Although Mr. Fish, two days before (Nov. 12th), had "*confidentially*" informed General Sickles that "grave suspicions exist as to the right of the Virginius to carry the American flag, as also with regard to her right to the American papers which she is said to have," it is plain, from the whole tenor of the correspondence, that the demand was based on the assumption that she had those rights. Writing to General Sickles on the same day (Nov. 12th), Mr. Fish informed him that an investigation was going on at Washington, to ascertain the character of the vessel; but cautioned him not to admit a doubt on this point, until it should appear that the nationality of the vessel could not be sustained; while he at the same time added that "the *doubt* imposes on the government the necessity of caution in ascertaining the facts before making a positive demand." Now, whatever may have been the facts which the American government discovered before the peremptory demand was made, it is certain that General Sickles made that demand as for a regularly documented American vessel, without intimating the least doubt about her national character. In so doing he

conformed to his instructions. In his note of November 15th to Señor de Carvajal, the Spanish Minister of State—a note which covered the formal demand—General Sickles called the vessel "the American ship Virginius;" and in his conferences with that minister both before and after the 15th, General Sickles gave him to understand that the American flag was deemed to have been insulted, and American rights violated by the seizure, because the Government of the United States regarded the Virginius as an American vessel. Señor de Carvajal, who had, on the 13th, an understanding with General Sickles that the real character of the vessel ought to be known, and that there ought to be time given for investigation before her character should be assumed as the basis of a demand, complained that the demand of the 15th was inconsistent with that understanding, and that the demand could only have been made upon knowledge obtained by the United States that the vessel was truly an American ship, the seizure of which would call for reparation; knowledge, he said, which his (the Spanish) government had not yet had time fully to obtain, and therefore it was not in a situation to meet the demand. He closed by saying that Spain would decide upon nothing relating to the supposed offence against the American flag, until she was certain that an offence had been committed by her; but that when so certain, she would make all the reparation that the case required. On the evening of Nov. 18th, the Spanish Minister in Washington expressed to Mr. Fish, by special instruction of his government, its resolution to be governed by the rules of international law, and to punish all who had justly become liable to punishment, and to make reparation if right should require it, urging at the same time that further light upon the case was necessary. This request for further time was assented to by the President, and Mr. Fish instructed General Sickles, on the 19th, to remain at Madrid, until further orders.

It is clear from the whole course of this negotiation, that down to the 19th of November, the demand of the United States, which still rested before the government of Spain at Madrid, was based on the alleged American character of the vessel; that the Spanish government could have understood

it in no other way, because it was not presented to them in any other way, and because they wanted time to ascertain if this basis of the demand was true. It is also apparent, we think, that so far as the English government or other powers, seconded or approved the demand of the United States, they did so on the assumption that the Virginius was what the Deerhound was—a regularly documented ship, with a regular national character.

Further confirmation of the sense in which the Spanish government understood the basis of the demand, is to be found in what took place at Madrid on the 27–28th November. On the 28th, General Sickles telegraphed to Mr. Fish:

"Last night it was agreed that, *accepting my declaration of the nationality of the Virginius*, reparation would be made in accordance with our demand of the 15th instant. This was ratified by the council of ministers at three this morning, and I was promised an official communication in that sense to-day. I am now informed in a note from Minister of State that yesterday you authorized the Spanish Minister in Washington to convey to this government a different proposition on the part of the United States, and that it has been accepted, of which you have been notified through Admiral Polo." The declaration on which General Sickles obtained what he reported as the informal assent of the Spanish government to the demand of the 15th, was in these strong and emphatic terms: "The undersigned has heretofore declared, and he now repeats the declaration, in the name of his government, that the Virginius was, at *the moment of her capture* on the high seas, *a regularly documented American ship*. The assertion of a government which has accorded to a vessel the right to sail under its flag, is the best evidence of her nationality. Every such ship is registered in the public archives. It can not be supposed that any respectable state would volunteer its protection to those having no right to claim it. Nor is it usual, when, in a case like this, the injured government *affirms the nationality of the ship*, to put that averment in issue and demand proof as a preliminary to the consideration of reclamations for an affront offered to its flag. The undersigned, therefore, submits to the enlightened judgment of Mr.

Carvajal, that, in harmony with the usage and comity of nations, *Spain may well dismiss all controversy as to the nationality of the Virginius, accepting as indisputable the fact that she was a regularly documented American ship, and, moved by the traditions of a friendship uninterrupted for a century, proceed at once to accord to the United States that measure of reparation* which she has already loyally recognized as befitting her own dignity, and due to an ancient ally."

We pause here to say that, if the United States thus solemnly asserted the national character of this vessel at Madrid, for the purpose of obtaining compliance with their demand of November 15th, and simultaneously or afterward obtained from Admiral Polo in Washington an agreement to give up the vessel on another basis, that other basis being that she may *not* have been a regularly documented American vessel, but nevertheless that she must be surrendered as if she were, the United States may have acted consistently enough, as diplomacy goes; but it is clear that Spain has not admitted that she could be rightfully demanded unless she was demanded as an American ship. Let us see what takes place at Washington, between Admiral Polo and Mr. Fish; bearing in mind that at this very time General Sickles remains at Madrid only to wait a settlement of this difficulty, and that the plain consequence of a refusal by Admiral Polo to accept the basis on which Mr. Fish still presses the surrender, is—WAR.

On the 27th of November, Admiral Polo called upon Mr. Fish. We take the following extract from the official memorandum of the interview:

"Admiral Polo called upon Mr. Fish, when the latter read to him a telegraphic dispatch, dated last evening, received this morning from General Sickles, some words of which, he stated, are not capable of being intelligibly deciphered, but enough is translated to disclose the general purport of the dispatch. It presents a proposition on the part of the Spanish government with which Mr. Fish says that the United States can not comply. [The proposition was to make the reparation demanded, on or before the 25th December, if the investigation then making by the Spanish government should show that the

Virginius was not a regularly documented American ship.] Mr. Fish makes this statement and communication to Admiral Polo, inasmuch as it appears from General Sickles's dispatch, now received, that he has requested his passports, and may have left Madrid. He [Mr. Fish] proceeds to say that it can not be and is not questioned that the Virginius was regularly documented with American papers when she sailed from the United States in October, 1870, and that she was entitled to carry the flag of the United States; that the official report of the commander of the Tornado, published in Havana papers of the 15th inst., states that the Virginius bore the American flag when she was captured on the high seas by a Spanish vessel, and that the American flag was hauled down and the Spanish flag was hoisted by an officer of the Spanish navy. He said that the United States deny the right of any other power to visit, molest, or detain on the high seas, in time of peace, *any American vessel;* that the exemption of *the vessels of every power* from visit or molestation in time of peace, and on waters common to all nations, is claimed and observed by all the great maritime powers, and is recognized by all the principal writers on international law."

Here then it is as plain as words could make it, that Mr. Fish asserts that this vessel, when she sailed from the United States in October, 1870, was regularly documented and entitled to wear the flag of the United States. This was not true, as subsequent investigation proved, but of course Mr. Fish did not then know that it was not true. But right or wrong, it was asserted, as the basis of the demand with which Mr. Fish informs Admiral Polo he must somehow comply; and it is as to "any *American vessel*," that Mr. Fish denies the right of any other power to visit, molest, or detain on the high seas, in time of peace. Accepting what is thus asserted of the national character of this vessel as the basis of her surrender, Admiral Polo agrees that on this basis she shall be given up and the American flag shall be formally saluted by Spain (the usual apology in such cases), unless Spain shall, before the 25th of December, reverse this basis by proving that the Virginius did not rightfully carry the American flag, and was not entitled to the American papers which she carried. If such proof should

be made, the salute was to be dispensed with, because nothing had in that case been done in derogation of the sovereignty and jurisdiction of the United States. Spain is therefore, in our opinion, fully entitled to say that the surrender was made upon the ground that the American government claimed the vessel as being absolutely entitled to the American character; that the surrender is an admission of the principles on which our demands had been made, so far as those principles relate to the case of a vessel fully entitled to the character of an American vessel; but that so far as they relate to a vessel of the character which Spain subsequently proved was the true character of the Virginius, no admission whatever has been made. To give any other construction to the surrender, or to deduce any other consequence from it, would obviously be unfair. It would, moreover, leave the government of the United States under the imputation of having forced a perhaps comparatively weaker government into an admission that it never intended to make. Whatever may be the latitude that is allowed to diplomacy, we have no desire to see the reputation of our country for fair dealing exposed to the injury that results from gaining its national objects by one means, and then claiming that it has gained them by another. We are disposed to construe the President's Message with a charitable regard to the facts, and not to understand him as claiming that Spain has admitted what the facts show she has not admitted.

Passing from all diplomatic assumptions respecting the character of this vessel, and from all statements respecting her character as the basis of an agreed extradition, we will now make a careful statement which will show her true character; premising that we draw it, in part, from the evidence on which the Attorney-General of the United States found that she had not, at the time of her seizure, a right to carry the American flag, because she had not been registered according to law. We do not propose to adopt in all respects the Attorney-General's law, or to discuss at any length his qualification that the Virginius had not a right to wear the flag, "as against the United States." If he meant, as we presume he did, that in regard to the United States as her sovereign, this vessel had no right to wear the American flag, and conse-

quently was not within that sovereign's protection—in which we should entirely concur—we should yet by no means concur in his proposition that she could not under any circumstances be interfered with on the ocean by another sovereign. A vessel derives its national character from the law of the country which grants its evidence of national character; and if it has no national character derived from compliance with that law, as respects the nation to which it ostensibly belongs, it has none with respect to the whole world. To have a national character, whether for municipal or international purposes, a vessel must have derived that character from the law of some nation, by compliance with the conditions on which that nation grants the national character of its ships. The law of nations can only regard the municipal law, in determining whether a ship, when she left her home port, or the port which she claims as her home, was regularly documented. Where and how the question of national character can be raised and tried, depends upon the jurisdiction that may have been acquired by a seizure and upon the cause of that seizure. A nation may, it is true, if it chooses to make its own will stand for law—*pro ratione voluntas*—declare that it will not permit a foreign court, in time of peace, to try the national character of any vessel that bears its papers and wears its flag, whether it bears the one and wears the other rightfully or wrongfully. But this would be a mere exercise of assumed superior physical force. It is not in accordance with sound principle thus to throw the protection of a great and powerful nation over any rover of the seas that may have irregularly possessed itself of a register and wrongfully assumed a flag; nor is it in accordance with a proper respect for the courts of the law of nations, which exist for the adjudication of all causes of seizure which the law of nations recognizes. We do not understand that the United States had previously adopted any such attitude. The declaration made by the American Senate in June, 1858, certainly does not go this length. It includes, as under the national jurisdiction and exempt from visitation, molestation, or detention on the high seas, in time of peace, by a foreign power, "American vessels" only; vessels that are truly American, and not those which

fraudulently assume to be such. Nor would it be any infringement on the principle of this declaration—a principle perfectly in accordance with the public law and denied by no one—if a foreign court, after receiving a plea and claim of national character, should look through the alleged title, and try the question whether the vessel claiming that character was entitled to wear it. The jurisdiction of the foreign court to make this inquiry would depend upon the existence of a justifiable cause of seizure; a question that might turn on the very fact that the vessel had no national character under which it could with impunity (in respect to the law of nations) do the act that led to the seizure. That such a question had arisen in the case of the Virginius, will be apparent from the following statement:

The Virginius was registered at New-York on the 26th of September, 1870, as the property of an American citizen, who made the oath required by law to his ownership. He failed, however, to comply with the provision of law which required a bond to be filed, signed by the owner, the captain, and one or more sureties; there being no sureties on the bond which was filed. Evidence was taken and submitted to the American government by the Spanish Minister, which had a very strong tendency to show that the nominal owner was not the real owner, but that the vessel was the property of certain Cuban leaders, who furnished the money for her purchase. Upon both grounds, the fact of foreign ownership, and the defect in the bond, the Attorney-General of the United States held that the alleged American character of the vessel was vitiated *ab initio.* It is not necessary for our purposes to settle the question of her actual ownership, either under a paper title of any description, or under any secret trust. It is enough, that before she left New-York her ostensible owner had not obtained for her a lawful right to the character of an American vessel, by filing the bond required by statute. She did not acquire the national character of an American vessel, by his registration, and her Cuban owners, if she was in fact owned by Cubans, could give her no national, or *quasi*-national character, for they were not acting under a belligerent power. She was on the ocean, therefore, when she left New-York, and

down to the time of her seizure, without any real national character whatever. The course of her history shows, moreover, that during the whole period of three years, she never returned to the United States, and that if not owned, she was wholly controlled by certain Cuban leaders. She sailed from New-York in October, 1870, for the island of Curaçoa, without any cargo, but with various Cuban leaders on board, who joined her at sea from a lighter. Off the island of Curaçoa, a cargo of arms and munitions of war, brought from New-York in the schooner Billy Butts, was put on board of her. At Puerto Cabello, about the middle of November, Sheppard, the captain who had brought her out from New-York, left her and returned to New-York. At this time, she became temporarily mixed up with one of the contending parties in the State of Venezuela, while carrying the flag of Venezuela. Before this occurred, one Marquez, chief-engineer, was made "paper-captain," the real commander being a Cuban named Eloy Camacho, who came out in her from New-York. After she left these Venezuelan doings, she landed a military expedition on the coast of Cuba. In April, 1872, she was at Aspinwall, under the command of one Bowen, an American, who was commissioned to take charge of her by the Cuban leader Quesada and his chief executive officer, who told Bowen that she was to be used in landing military expeditions on the Cuban coast. At this time she had no American flag on board, and Bowen bought one himself. Bowen remained in command for two or three months, and neither knew nor recognized any ownership but that of the Cubans who directed her movements. Bowen left her at Puerto Cabello, and Captain Smith took command, having been engaged by Quesada, as his predecessors had been. While Bowen was in command, there was but one American flag on board, and there were six of the insurgent Cuban flags. Under Smith she cruised about, sometimes with Quesada on board. On the 11th of August, 1872, she was at Maracaibo. There Smith left her on the 15th of November, 1872. Smith was succeeded as captain by Knight, the second engineer; but the vessel was navigated from Maracaibo to Curaçoa by Alfaro, a Cuban. Smith knew no one as owner but Quesada and Alfaro. After

Smith left her, we know but little of the details of her movements and operations, beyond the fact that she was still in the employment of the Cuban insurgents. But from the time of her appearance at Kingston in October, 1873, where she came to receive a military expedition that had been brought out from New-York, her course can be distinctly traced.

In September, 1873, a band of nearly one hundred men, among whose names there was not one that did not indicate a Cuban or Spanish origin, were gathered and drilled at a certain rendezvous in the city of New-York. They were embarked for Kingston on the steamer Atlas, without having their names put on any passenger-list; and before they left New-York, they were told that at Kingston they would be put on board the Virginius for Cuba. Several of the well-known Cuban leaders who were afterward executed at Santiago de Cuba, embarked with these men on the Atlas. At Kingston, the men were put into barracks, and drilled as soldiers for about two weeks. They were then put on board the Virginius, which left Kingston on or about the 24th of October, having also on board the Cuban leaders of the expedition, and another band of men, about eighty in number, who had been separately collected somewhere. From Kingston, the Virginius went to Jeremie, a port on the southern side of the south-eastern promontory of the island of Santo Domingo. She remained at Jeremie twenty-four hours, when the local authorities ordered her to leave. She then went to Port-au-Prince, where she took in, during the night, a large quantity of arms and ammunition, much more than enough to supply the forces on board. She then steamed to Comito, and there took in more military supplies, together with shoes and clothing for the men. From Comito she arrived off Point Maisi, on the coast of Cuba. Here some of the party wished to go to Punta Simones, to get two guns that they said had been buried there. But Ryan, one of the leaders afterward executed, objected that the ship was leaking too badly, and that no time was to be lost. They then sailed along the coast of Cuba, eastward, seeking for a good landing-place. When they arrived off the headland of Quantonomo, they prepared a party to go in boats and explore for a landing-place. At this time the Virginius was about

six miles from the land, with the hills of Quantonomo in sight. At one o'clock in the afternoon, before the landing party had left the vessel, the Spanish cruiser Tornado came in sight. The Virginius immediately fled in a northerly direction toward Jamaica, chased by the Tornado. At nine o'clock in the evening, the Tornado fired her first gun. Seeing that escape was impossible, orders were issued to throw overboard every thing that would indicate a military expedition. It was a moonlight night, and with good night-glasses, the operation of discharging a large amount of something into the sea, might have been seen from the Tornado. This operation having been effectually accomplished, the Virginius surrendered, the Cuban leaders on board supposing that the American papers of the vessel, and the American flag, would be their protection. What followed is well known.

These facts abundantly show that this vessel had no national character at the time of her departure from New-York; that she had none at the time of her seizure by the Spanish cruiser, Tornado; that when she was first sighted and chased, she was on the coast of Cuba, for the purpose of landing a military expedition to take part in an insurrection, as a vessel belonging to or controlled by Spanish subjects, engaged in an effort to promote that insurrection. But this is not all that marks her true character. There is reason to believe that, from the first and all along, she was intended by the Cubans who controlled her to be used in the capture and confiscation of Spanish merchant-vessels and their cargoes on the high seas, at any favorable opportunity. Sheppard has sworn that such chances for making money were held out to him by Mora and Quesada, as inducements to becoming her captain; and on the voyage to Curaçoa, having descried a merchant-vessel which was believed to be Spanish, Quesada proposed to Captain Sheppard to capture her, and this scheme was abandoned only because the vessel was found to be sailing under the English flag. Smith has sworn that, on the voyage from Puerto Cabello to Maracaibo, Quesada proposed to him, through Alfaro, "to arm the Virginius, and capture one of the Spanish mail-boats."

The statements of these witnesses, although sworn to in an investigation conducted only between Spain and the United

States, after the seizure of the Virginius, are not grossly improbable, when we consider the avowed object of her employment. At all events, Spain could have offered before a court of admiralty, or a court of arbitration, to prove that this vessel was cruising with intent to depredate on Spanish commerce; a fact which, if believed, would have put her in the predicament not only of transporting Spanish subjects to make a civil war on the island of Cuba, but of making war upon every thing Spanish at sea which she might have dared to attack. In this predicament, she would, to put the mildest test of her condition, have just fallen short of the true character of a pirate, because she was cruising against but one nation. But the question to which all the circumstances attending her true character, while it was perhaps without precedent, gave rise, was one that ought to have undergone investigation in a court of the law of nations, or at least in a court of arbitration. Spain should have been allowed an opportunity to justify the seizure. She desired and offered to submit her justification of the seizure to arbitration. To this the United States answered, through Mr. Fish, that "the question of an indignity to the flag of the nation, and the capture in time of peace, on the high seas, of a vessel bearing that flag and having the register and papers of an American ship, is not deemed to be one which is referable to other powers to determine; that a nation must be the judge and the custodian of its own honor," etc. This answer was made on the 21st of November. It kept up the assertion of the American character of the Virginius, when that character was the very point of the question whether our national flag had suffered any indignity, and when our government had the gravest reason to doubt the nationality of the vessel. In such a case, we can see no solid reason for saying that a nation must be the judge and custodian of its own honor. We regret the answer.

While we can easily conceive of cases in which an affront to the national dignity ought not to be made a subject of arbitration, we do not think that the seizure of the Virginius presented such a case. There was no reason whatever to suppose that any indignity to our flag was intended. All that Spain asked was, that the United States would not be so precipitant

as to require Spain to surrender a vessel whose right to wear the American flag was in doubt, before that right had been ascertained. In such a case, there could be no derogation from the national dignity in submitting to a suitable arbitrator, to try the national character of the vessel. It was entirely apparent that, if she was not entitled to the character of an American vessel, we had no ground for complaint, so far as the vessel herself was concerned. The United States asserted her American character, when they knew that it was extremely doubtful; and they refused to Spain an opportunity to show, to any friendly sovereign, that the seizure was rightful because the vessel had no right to wear the American flag, and because she was wholly controlled by Spanish subjects, who were fraudulently using that flag to cover an expedition against the dominions of their own sovereign. According to the view which we shall take of the seizure, an arbitrator must have decided not only that the American flag had suffered no indignity, but that the right of Spain to hold the vessel was unquestionable.

It will be seen that we have left untouched the question of the actual ownership of this vessel. She can not be regarded as a regularly documented American ship, engaged as a transport in carrying insurgent forces destined to incite a civil war in Cuba. It is immaterial whether she was bought and paid for with money furnished by the Cuban leaders, or by what sort of paper title, or secret trust, they held or used her; for it is beyond question that they controlled her, and that she was for years entirely and exclusively engaged in their service. If the insurrectionary party in Cuba had been an acknowledged belligerent at the time of the seizure of the Virginius, she would, notwithstanding any disguises or secret titles, have been enemy property, by the mere fact of her employment in the hands of Cubans. If such a case, under the same circumstances, had been brought into an English or an American prize court, Marshall or Stowell, Story or Lushington, or any of the other great judges of modern times, accustomed to administer the law of nations, would have stripped off every rag of paper title, every shred of ownership, legal or equitable, and would have gone straight to the fact that the vessel was

in the employment and control of the enemy. This fact would have stamped her as enemy property, beyond all possibility of a neutral claim. How thin, then, is the distinction between what a belligerent may do, when a vessel is thoroughly incorporated into the service of his enemy, and what a nation at peace ought to be permitted to do, in defending its dominions against a vessel in the hands and employment of its own subjects!

All that we have now said is but introductory to the interesting and important question which we propose to discuss. Of course that question is not whether Spain could assume to enforce the neutrality or navigation laws of the United States. She never assumed to do any thing of the kind; notwithstanding the Attorney-General of the United States seems to have supposed that she had assumed, by the seizure, jurisdiction over the question, whether the Virginius was engaged in violating a law of the United States. The enlightened persons who composed the Republican government of Spain at the time of this occurrence, were perfectly well aware that the offence committed by the reputed or real owners of this vessel against the municipal law of the United States, was one thing; but that the right of Spain to seize and bring her in and subject her to forfeiture, as a vessel either owned by Spanish subjects or used by them to make incipient war upon the dominions of Spain, was a totally different thing. The President, in his message to Congress, referring, we presume, to the municipal offence only, observed that "if her papers were irregular or fraudulent, the offence was one against the laws of the United States, justiciable only in their own tribunals." This is perfectly true, in regard to any offence against the laws of the United States. But quite beyond this, and altogether independent of the authority of the United States to punish for infractions of their own laws, lies the case of a vessel owned or controlled by Spanish subjects, sailing under color of papers to which they had no lawful right, and making incipient war upon the Spanish dominion in Cuba. Could such a vessel be seized by Spain on the ocean, be taken in and condemned, without incurring any liability to the nation whose papers were thus abused?

In considering this question, it is important to have clear and accurate conceptions of the kind of jurisdiction which nations may exercise on the ocean, in time of peace. Notwithstanding the respectability of the names that may be cited for it, the doctrine that the ships of a nation at sea are floating fragments or extensions of its territorial jurisdiction, is not correct. If it were, there could be no exercise of the belligerent right of visitation and search, in time of war, nor could the goods of an enemy be taken from a neutral ship; for the state of war confers no right on either belligerent to pursue his enemy into neutral territory, or to use therein any kind of force, excepting in the case of an overwhelming and instant necessity for the purpose of self-defence. Accurately speaking, the jurisdiction of a nation is of two kinds; the one is territorial, the other is personal. The territorial jurisdiction is the right of sovereignty that is over the national dominions, and that extends into the sea to the distance of cannon-shot from the shore. The personal jurisdiction of a nation is that which accompanies the persons and property of its members wherever they are upon the globe, whether at sea or within the dominion of another nation. It is the right which enables a nation to extend its protection over the persons and property of its members, wherever they are, by requiring that they shall be subjected to no injury, restraint, or forfeiture, save what may be inflicted by public law, if they are on the ocean, or by municipal law if they are within a foreign dominion. The regular ships of a nation at sea are within its personal jurisdiction, and they are without its territorial jurisdiction. The flag that is over them is the emblem of the personal jurisdiction; but it is no emblem or sign of the territorial jurisdiction.

Although some of the older as well as some of the more recent publicists have used language which implies or asserts that the ships of a nation at sea are parts of its territory, it is quite apparent that the examples which they adduce in proof of the statement should be referred to the personal and not to the territorial jurisdiction. Thus Vattel says that children born in a vessel at sea, or in parts of the sea subject to a foreign dominion, "may be reputed born in its *territories*;

for it is natural to consider the vessels of a nation as parts of its *territory*, especially when they sail upon a free sea, since the state retains its *jurisdiction* over those vessels."* It is obvious that Vattel here confounds the personal and the territorial jurisdictions. The reason why children born in a vessel at sea are considered as born members of the nation to which the vessel belongs, is not because they are born in the territory of that nation; for they are not so born, even by a fiction of law; but it is because they are born within the personal jurisdiction of the nation, which extends over the floating vehicle in which the birth occurs. But in order to make such children members of the nation to which the vessel belongs, the parents must also belong to that nation. The children of foreign parents born at sea in a vessel of another nation take the national character of their parents, and not that of the vessel. Judge Story expresses the rule thus: "Children born upon the sea are deemed to belong [to] and to have their domicil in the country to which their parents belong;" † and although he refers in a note to the passage of Vattel above cited, he clearly does not mean to rest the national character of children born at sea upon the idea that the vessel is a part of the territory, but he rests it on the personal jurisdiction of the nation to which the parents belong, which may be the same with, or different from, the jurisdiction over the vessel, according to circumstances. At the same time, children of foreign parents born at sea are temporarily under the protection of the nation to which the vessel regularly belongs, because the personal jurisdiction of that nation extends over the vessel and the persons who are on board.

Grotius makes the accurate distinction between the two kinds of national jurisdiction (*imperium*) or *lordship*, as Whewell translates him. "Lordship," he says, "has two kinds of matter subject to it; primary, *persons*, which matter alone sometimes suffices; . . . and secondary, a place, which is called a *territory*."‡ This distinction he very properly applies to the jurisdiction which a nation may acquire at sea, namely, "as belonging to a person, or as belonging to a territory."

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* Book i. ch. 19, § 216.

† Conflict of Laws, § 48.

‡ Whewell's Grotius, lib. 2, ch. 3, § 4.

He restricts the latter to that part of the sea itself which a nation commands by its fleet, on its coasts; and he does not apply it to the scattered ships of the nation at sea, as if they were parts of its territorial dominion.* Wheaton, although he cites the opinion of Vattel that the vessels of a nation at sea are parts of its territory, evidently does not adopt it. He makes the proper distinction between the territory of a nation and its rights which do not depend upon territory, but which follow its movable possessions; and he defines the right of a nation at sea as "a mere temporary right of occupancy in a place which is common to all mankind, to be successively used as they have occasion."† In the case of The Marianna Flora, Judge Story, speaking for the Supreme Court of the United States, distinctly repelled the idea of a "territorial jurisdiction on the ocean, like that which is claimed by all nations within cannon-shot of their shores, in virtue of their general sovereignty."‡

It follows from the nature of the personal jurisdiction over the vessels of a nation at sea, that this jurisdiction can rightfully attach only to vessels that are truly national; and therefore that in such a case as that of the Virginius, the United States could assert no jurisdiction, excepting upon the assumption that she was an American vessel, which assumption was contrary to the fact. Whether it was necessary to make this assumption; whether it ought to be made in every case where there is a register on record in the name of an American citizen; and whether, without regard to the fact of nationality, a foreign government ought to be held responsible for what it may have done, as if the fact of nationality existed—depends upon the rights of that foreign government which are displaced by advancing such a claim. If it is true that national jurisdiction over the persons and property of subjects exists, for some purposes, wherever they are—and this is the real basis of the relations between a national vessel at sea, and the nation to which it belongs—it follows that a nation which has subjects cruising at sea, in a vessel that is wholly

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* Ibid. § 13.

† Lawrence's Wheaton.

‡ Wheaton's Reports, vol. xi. p. 1, 43.

under their control, which has no national character, and which those subjects are using to make incipient war upon their sovereign, may have rights of prevention, which depend not upon territorial but upon personal jurisdiction. Whether those rights can be exercised on the ocean, or only within the territory of the nation that needs to exercise them, depends upon the character of the ocean, upon the practicability of exercising on it a right of self-defence without interference with the rights of others, and upon the solid reasons why such a right of self-defence should be admitted rather than denied.

It does not advance such a question to just solution, to refer to the general right of navigating the ocean unmolested. What may be called the universality of the ocean, or the common right of all nations to occupy it as a highway, is by no means inconsistent with the right of any particular nation to put in force on that highway the great law of self-defence. We know, for example, that a pirate can be seized anywhere on the ocean by the cruisers of any nation. It has sometimes been said, we are aware, that the reason for this is, that pirates are the enemies of all mankind ; that all nations are at war with them at every moment, and therefore that the cruisers of any nation may capture them anywhere out of the territorial jurisdiction of any other nation. But this reason is rather more fanciful than sound. There is no analogy between the legal *status* of a pirate and the legal *status* of an enemy with whom we are at war. The one is within, the other is without, the pale of the law of nations. The one has rights, even against the enemy who has a right to attack him ; the other has no rights of which the public law takes the least cognizance. The one may demand to be regularly captured, brought in for adjudication, and to have the persons on board dealt with as prisoners of war, according to the laws of war. The other may be destroyed on the ocean without capture, without adjudication, as we destroy wild beasts ; for although it is usual with civilized states to bring in pirates and proceed against them judicially, it is competent to any state to instruct its cruisers to exterminate a pirate ship on the ocean with all on board. The reason why this is not generally done is in order to avoid the risk of destroying those who are not pirates,

thereby incurring responsibility to those whose vessel has been mistaken for a pirate. Moreover, in a regular war between enemies, there are neutrals, with certain large and acknowledged rights. In regard to pirates, there can be no neutrals, and for this, as well as other reasons, it is incorrect to treat the relation between pirates and the cruisers of all civilized states as a relation of war. We must look for another principle as the source of the right to seize or to destroy them. That principle is the right of self-defence; the right to protect our own commerce and to defend our own people, on the great highway of nations, against freebooters who are cruising with felonious intent against the commerce and the people of every nation on the globe.

When we seize or destroy a pirate, therefore, we do not exercise a belligerent right, although in a certain sense we make very effectual war upon him. When we adjudge his ship to forfeiture and his life to the gallows, we do not execute the laws of war. We exercise the right of self-defence against a public and general robber, whose offence is a crime against the law of nations; and in exercising this right we enforce the law of nations in a locality where it gives us the power to act in defence of our own property and persons against the probable or possible attacks of an outlaw who is under the ban of the civilized world. In seizing or destroying a pirate on the ocean, so far as we act in the interest of all nations, we may be said to exercise a kind of police power over the ocean, which is undoubtedly conceded by all civilized nations to each other; but the reason why this power is conceded by all in favor of all, is, that each nation may protect its own commerce and people against a public robber, by the natural law of self-defence.*

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*That ancient and most respectable authority, Sir Leoline Jenkins, although he applies to pirates the expression *hostes humani generis*, evidently does not mean to put them in the category of belligerent enemies. He calls them enemies of all mankind because they prey indiscriminately upon all. "This power and jurisdiction," he says, "which his majesty has at sea in those remoter parts of the world, is but in concurrence with all other sovereign princes that have ships and subjects at sea; and it is on this special regard that pirates are called *hostes humani generis*, in that, as they do give themselves the liberty of making a prey without distinction of all nations, and all manner of people; and do, as much as in them lies, hinder that

The case of the pirate, therefore, shows that there may be exceptions to the general right in time of peace of navigating the ocean unmolested; that there is a right of capture or rather of seizure (since capture is a word of technical meaning, strictly applicable to belligerent seizures only), which may be exercised on the open ocean, and upon the great right of self-defence; and the question is, whether the case of the pirate, strictly so called, is the only exception to the general right of freely occupying or navigating the ocean in time of peace. The application of a right of seizure in the cases of slave-traders, when such application was attempted in the absence of treaties, proceeded upon the same general doctrine as the right of seizing pirates; for in such cases, the seizure was grounded on the assumption that the slave-trade was an offence against the law of nations, analogous to the offence of piracy in this, that the cruisers of any nation could seize a slave-trader in the exercise of a right supposed to be common to all nations to prevent a traffic in human flesh. Although the offence of slave-trading, as a supposed offence against the law of

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mutual amity and supplies, which Providence has ordained as the means to cherish and preserve that humanity and sociableness which distinguishes not only Christians, but all men, from savages and beasts of prey; so all nations and sovereign princes that meet with them have a just and competent authority *to execute the law upon them.*" Does he mean the law of war? Clearly not, for that law would admit them to certain rights. He proceeds in the same immediate context to say, "And they are therefore esteemed to be put out of the protection of all princes, *and of all laws;* because every magistrate that bears the sword for the terror of those that do evil, is to draw it against them, and is made a minister to execute justice upon them, whenever they can lay hold of them." (Sir L. Jenkins's charge at the Old Bailey.) What the worthy old judge means by the *law* which all nations may execute upon pirates, is the law of self-defence against public robbers and outlaws, and not the law of war. Mr. Wheaton rests the authority of all nations to punish piracy upon the ground that it is a *crime* against the law of nations. Yet how could it be punishable as a *crime*, if the seizure and jurisdiction depended upon the idea of *war?* (See Lawrence's Wheaton, p. 209; Dana's Wheaton, p. 107.) We have followed in the text the common definition of a pirate as an aggressor upon the rights of *all* nations, because it answers the purposes of our illustration of the law of self-defence as well as any other. But see a learned and elaborate note by Mr. Dana, on the definitions of piracy *jure gentium*, in his edition of Wheaton, p. 193.

nations, was sometimes spoken of as *piracy* under the law of nations, the analogy which it bore to "piracy" proper, was simply, that the slave-trader might be deemed to violate the rights of all mankind by the nature of his employment, because he dealt in human beings, although in fact his trade was confined to a particular race, the barbarous inhabitants of Africa. We refer, however, to the case of the slave-trader in this connection, not because it was ever supposed that it constituted a distinct exception to the general right of navigating the ocean unmolested, but because it is obvious that if the judges and jurisconsults who held that it was an offence punishable under the law of nations had been right in that postulate, it would necessarily have followed that the cruisers of any nation could seize, and the courts of any nation could punish for that offence, by an exercise of the right of self-defence.

Now, let it be observed here that in the case of the pirate, strictly so called, there is necessarily no relation of allegiance between him and the nation that undertakes to punish him. The jurisdiction over him depends either for seizure or for punishment, not on the relation of subject and sovereign, but on the right of self-defence against a general robber. But in the kind of case we are considering, the personal relation of sovereign and subject exists. The Cubans who were on board the Virginius, and the vessel itself, as their property, or as property thoroughly incorporated into their service, were subject to the personal jurisdiction of Spain; and subject to it on the ocean just as much as within the territorial waters of the island of Cuba. But it has been urged that this personal jurisdiction, for the purposes of seizure, ought not to be allowed practical exercise on the ocean, because it would draw after it, in time of peace, an exercise of the belligerent right of visitation and search, and so become vexatious and intolerable to other nations.

We have no occasion to dispute the principle that there is no right of visitation and search, in time of peace, to be exercised for the purpose of ascertaining the national character of vessels at sea, or the nature of their cargoes, or the objects of the voyage, or the purposes of those on board. The right,

which is the subject of our present inquiry, if it exists, is wholly independent of any right of visitation and search, such as was involved in the controversy of thirty years ago, between Great Britain and the United States, respecting the slave-trade, or that which was asserted earlier in relation to the impressment of British seamen from our vessels. We are here dealing with the case of a vessel which had no national character whatever, and in regard to whose employment the Spanish naval authorities had long been informed, before the seizure was made. When they discovered her on the coast of Cuba, they needed to make no visit and no search. Her flight, and what he could see her throw over her sides, certified to the commander of the Tornado that she was this very Virginius for which he was watching.* He did not need to stop her for the purpose of obtaining evidence. He could seize her on evidence obtained *aliunde*. Undoubtedly, he must make the seizure at his peril; at the peril of making his government responsible, if the event proved that he had made a mistake. But if the event proved that he had made no mistake, the seizure, made without any visitation and search, would be grounded on the right of a nation to avail itself of the great law of self-defence, and would entail no responsibility to any other power. Holding this to be clear, upon the facts of the case, we shall now adduce some other illustrations of the very great prominence which the law of nations assigns to the right of self-defence. These illustrations, by enabling us to appreciate the modes in which that right may be exercised, will help us to make a just application of it to the case of the Virginius.

In the law of nations, there is an offence denominated "piratical aggression." It is a distinct offence from piracy proper; for it may be committed *sine animo furandi*—without any intent to plunder. It comprehends any tortious attack by one vessel at sea upon another; an act that is like private unauthorized war upon the land. "*Publicum bellum est, quod auctore eo agitur, qui jurisdictionem habet; privatum, quod*

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* The commanding officer of the Spanish fleet had issued orders to take her wherever found.

aliter." This succinct definition by Grotius informs us that public war is that which is carried on by the authority of some power that has jurisdiction to make war; and that private war is that which is carried on without such authority. When acts of private war are committed by one vessel at sea upon another, the offence which the law of nations regards as "piratical aggression," is perpetrated. This offence, when committed by foreign vessels upon any vessel of the United States, is expressly recognized in our Act of March 3d, 1819, which was passed "to protect the commerce of the United States, and punish the crime of piracy," under that clause of the Constitution which authorizes Congress "to define and punish piracies and felonies committed on the high seas, *and offences against the law of nations*."

In the year 1821, the United States armed schooner Alligator, commanded by Lieutenant Stockton, and a Portuguese merchant vessel, named the Marianna Flora, mutually descried each other at sea, at the distance of about nine miles. They had approached within about four miles of each other, by the converging courses on which they were respectively sailing, when the Portuguese vessel showed a signal of distress. Lieutenant Stockton immediately changed his course and approached nearer. When the Alligator had come within long shot of the Portuguese ship, the latter fired a cannon-shot ahead of the Alligator, and exhibited the appearance and equipment of an armed vessel. Lieutenant Stockton immediately hoisted the United States flag and pendant. The Marianna Flora then fired two more guns, one loaded with grape, the other with round-shot, which passed over and beyond the Alligator. Believing, from these acts, that he had to deal with a pirate, Lieutenant Stockton bore down, until he came within musket-shot, the Marianna Flora continuing to fire. A broadside from the Alligator silenced her. At this time, and not before, the Portuguese vessel hoisted her national flag. Lieutenant Stockton then ordered her to surrender, and send her boat on board. The Portuguese master came on board the Alligator, and excused himself by saying that he did not know the latter to be an American ship of war, but took her to be a piratical cruiser. Lieutenant Stockton thereupon, without much exami-

nation of the papers or the voyage of the Portuguese ship, took possession of her and sent her to the United States, to be proceeded against for what he deemed a piratical aggression.

Here, then, there was no previous visitation and search to ascertain the character of the vessel before ordering her to surrender; but as a Portuguese vessel, with the Portuguese flag flying in her rigging, she was ordered to surrender on the spot, for an alleged piratical aggression, that was supposed to be punishable, as an offence against the law of nations, under an Act of Congress, which authorized the cruisers of the United States to seize foreign vessels when committing that offence upon any vessel of the United States. When the Portuguese vessel reached Boston, she was libeled for the offence of piratical aggression, under the Act of Congress. The case was carried up from the District to the Circuit Court, where Judge Story permitted the libel to be amended so as to charge a gross violation of the law of nations, on the high seas, independent of the Act of Congress. In due course, the case went to the Supreme Court of the United States, where Judge Story himself pronounced the final decision, which held that, the combat having arisen out of a mutual mistake, there ought to be no forfeiture as for a piratical aggression, either under the Act of Congress or under the general law of nations. But the Portuguese claimants had in the court below become actors, by demanding damages against Lieutenant Stockton for an unjustifiable seizure, and for afterward sending their vessel in for adjudication without reasonable cause. This rendered it necessary to decide the rightfulness of the seizure. Its rightfulness was fully affirmed. Judge Story, speaking for the Court, held the general law to be, that "for gross violations of the law of nations the penalty of confiscation may be properly inflicted upon the offending property; . . . and a piratical aggression by an armed vessel *sailing under the regular flag of any nation*, may be justly subjected to the penalty of confiscation for such a gross breach of the law of nations." Although he did not consider this to be such a case, on account of the mutual mistake out of which the combat arose, he said in the most unequivocal terms, that when such an attack "assumes the character of private un-

authorized war," it "may be punished by all the penalties which the law of nations can properly administer."

This case, it is true, was the case of an attack by one vessel upon another, at sea. But let it be observed, that the whole foundation of the right of seizure in such a case is the national right of self-defence. The law of nations recognizes this right, by authorizing force to be repelled by force, in such cases; and our Act of Congress, by authorizing a seizure in the name of the nation, proceeds upon the right of the nation to defend its own possessions. Now let us see whether the same right is not to be extended to the defence of national dominions; and whether such defence may not be made upon the ocean, in the case of such a vessel as the Virginius.

One grand objection to the right of seizure at sea, in such cases as we have described the Virginius to have been, has been drawn from that untenable principle that a regular ship of any nation is a floating part of its territory; and hence it has been said that to admit a right of seizure on the ocean, in time of peace, would expose the commerce of all other nations to the exercise of rights that can not be distinguished from the belligerent rights, and would lead to invasions of national territory. We need not here repeat the answer we have made to the supposed *territorial* jurisdiction of a nation over its vessels at sea. But even if we admit the correctness of that supposition, it will be found that there is a very important exception to the absolute inviolability of national territory: an exception that is grounded on the very law and necessity of self-defence which we have here undertaken to develop.

In 1837, there occurred the most remarkable technical violation of national territory that has happened in modern times between nations capable of applying to such an occurrence the proper rules of international law. We refer to the case of the Caroline, of which the following are the precise facts. There had been some tumultuous proceedings in Upper Canada of an insurrectionary character, which were suppressed by the militia of the country. The persons concerned in them fled into the State of New-York, and being there joined by considerable numbers of American sympathizers, they invaded the territory of Canada, took possession of Navy Island,

erected there a battery of twelve pieces of cannon, and began to fire upon the inhabitants of the Canadian shore. No American authority interfered, although there was an American militia regiment stationed at the time on a neighboring American island. The force assembled at Navy Island had in their pay and as part of their establishment, the steamboat Caroline, which was used in hourly increasing their numbers and arms. On the night of December 29th, an armed expedition left the Canadian shore, for the purpose of capturing this vessel, which was expected to be found on Canadian territory, at Navy Island. When the British officer came round the point of that island, he discovered that the vessel was moored to the American shore, at the town of Schlosser. He thereupon crossed over to the American side of the river, with his men, seized the vessel, and the strength of the current not permitting her to be carried off by the means they had at command, they set fire to her in the stream, and she was left to be carried over the falls of Niagara.* This act was publicly avowed by the British government to have been done by national authority as a necessary act of self-defence.

Nearly five years passed away, before any settlement of this grievance was made between the United States and Great Britain. But in the summer of 1842, Lord Ashburton came to this country, as a special Minister, to settle all pending controversies between the two countries which then admitted of settlement; Mr. Webster being the American Secretary of State. This unredressed violation of national territory was then an old sore, which needed to be healed by careful and accurate surgery. All that was necessary to be done, however, was to settle the principle that ought to be applied to it; and whatever was agreed to as the true principle between such representatives of their respective nations as Lord Ashburton and Mr. Webster, must needs be regarded as of great authority. Mr. Webster, before the arrival of Lord Ashburton, had, in a note addressed to Mr. Fox, the resident British

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* This brief statement of the facts is taken from Lord Ashburton's letter to Mr. Webster of July 28th, 1842; which was not, as to these facts, controverted by Mr. Webster, and is therefore now to be taken as historically correct. The account agrees with what was notorious at the time.

Minister at Washington (on the 24th April, 1841), laid down the rule to which he intended to hold Great Britain, in regard to this case of the Caroline. "It is admitted," he said, "that a just right of self-defence attaches always to nations as well as to individuals, and is equally necessary for the preservation of both. But the extent of this right is to be judged of by the circumstances of each particular case; and when its alleged exercise has led to the commission of hostile acts *within the territories of a power at peace*, nothing less than a clear and absolute necessity can afford ground of justification." . . . . "Under these circumstances, and under those immediately connected with the transaction itself, it will be for her Majesty's government to show upon what state of facts and what rules of national law the destruction of the Caroline is to be defended. It will be for that government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation." And after having referred to some of the circumstances of the transaction as he then viewed them, he ended by saying, "A necessity for all this the government of the United States can not believe to have existed."

After the arrival of Lord Ashburton, Mr. Webster opened the discussion in regard to the case of the Caroline, by inclosing to his lordship a copy of his note to Mr. Fox, and by calling upon his lordship to show a justification for the violation of the soil and territory of the United States, which he said was equally a wrong, whether the employment in which the Caroline was engaged was lawful or unlawful. The answer of Lord Ashburton, which was written with consummate ability, shows in the clearest manner, that he agreed substantially to the principle laid down by Mr. Webster, with regard to the degree of necessity that must be shown for such an invasion of national territory; and Mr. Webster's reply, which closed and settled the whole controversy, shows with equal clearness that he in his turn accepted the slight modifications of that principle on which Lord Ashburton insisted. The result of the discussion was, that the two governments were agreed upon the principle that ought to be applied to the case, and that they differed only upon the question whether the

facts alleged as a justification made out a case of necessary self-defence such as the rule demanded. It is quite evident, however, that Lord Ashburton's presentation of the case impressed Mr. Webster so much that he was willing to consider the whole affair as reduced to a technical and unintentional violation of the national territory, in respect to which a mere expression of regret was all that was required.

Now, what was the rule, as laid down by Mr. Webster himself, in regard to a very striking violation of the *territory and soil* of a friendly nation? a violation of national rights and dignity, that at least equals in gravity any supposable case of seizure of a ship at sea. The rule, as stated by Mr. Webster, is, "That while it is admitted that exceptions growing out of the great law of self-defence do exist, those exceptions should be confined to cases in which the necessity of that defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation." Let this rule be applied to the Spanish seizure of the Virginius, with all the exactness that is possible, but with due consideration of the locality and circumstances of the seizure, and recollecting the fact that the Virginius, without any national character of any sort, was either owned or wholly controlled by Spanish subjects.

In the first place, the seizure was not made within the territorial limits of the United States; nor did it in any manner touch the territorial jurisdiction of the United States. It was made on the ocean, where the law of nations prevails as the law which governs the rights of all, and where the right of self-defence against dangerous aggressions must sometimes be exercised far more promptly than they can need to be on land. It is an undoubted rule of public law, that in an aggression at sea, taking the character of private unauthorized war, force may be instantly repelled by force: and if this is so between one vessel and another, the necessity of defending the dominions and sovereignty of a nation against a hostile aggression may well extend to such a locality as the ocean all the rights of self-defence that belong to a nation. In such a locality, there is no danger that the exercise of the national right of self-defence will injure any individuals but those on board the offending vessel, as there is when that right is exercised on the

land within the territorial dominion of another nation, as it was in the case of the Caroline.

In the next place, that the carrying of men and arms, designed to become part of an insurgent force, by a vessel thoroughly incorporated into the service of insurgents, is an act of private unauthorized war, in which the vessel is the offending thing, is shown by the case of the Caroline. In the Message on that case sent by President Tyler to Congress (written by Mr. Webster), it was distinctly implied that the owners of that vessel "may have violated the municipal laws of the United States, *or have disregarded their obligations under the law of nations.*" "If," the Message continued, "it shall appear that the owner of the Caroline was governed by a hostile intent, *or had made common cause with those who were in the occupancy of Navy Island*, then, so far as he is concerned, there can be no claim to indemnity for the destruction of his boat which this government would feel itself bound to prosecute, since he would have acted *not only in derogation of the rights of Great Britain, but in clear violation of the laws of the United States.*" Certainly Spain could not enforce the neutrality or navigation laws of the United States; but she could enforce the law of nations on which those acts were founded. For more than thirty-five years, the writer of this paper has been in the habit of hearing United States judges, some of them men of great distinction and ability, charge grand-juries on the subject of our neutrality acts; and he has never heard one such charge, in which the jury were not told that those acts were passed to prevent and punish private unauthorized war, and that the offences denounced by those acts are some of the crimes of private unauthorized war, which are alike prohibited by the law of nations. If our neutrality laws are less comprehensive than the law of nations, it does not follow that the latter is unable to reach a case which the former may not include.

In the third place, this vessel (the Virginius) had long been an object of suspicion and observation to the Spanish authorities, and we regret to say does not appear to have been at all an object of suspicion or observation to the government of the United States. When the commander of the Tornado first de-

scried her on the coast of Cuba, he had no reason whatever from her past history and her past relations with the American navy, to expect that any American cruiser would even overhaul her and turn her back, much less that she would be seized by any American authority. What then was the Spanish commander to do? Was he to let her escape and take her chance of running into Cuba somewhere, when he had lost sight of her? Was he to follow her until she got into Cuban waters before he struck her? What if she could have out-sailed him? But she did not allow the Spanish gunboat to follow her *toward* Cuba. She turned and fled toward Jamaica. Was the Spanish commander bound to let her take shelter in British waters, whence she could again sally at the first opportunity? Clearly he was bound to wait for nothing, and to be assured of nothing but that she was a "fillibuster," which was indicated plainly enough by her flight. In our opinion, he was under a necessity to follow and to seize her; a necessity springing from the national right of defending the national territory; a necessity that was "instant, overwhelming, and leaving no choice of means, and no moment for deliberation," in a far stronger sense than was contended for by Lord Ashburton in the case of the Caroline. To make out of this seizure a deliberate insult to the United States, even if the vessel had been ever so fully entitled to wear the American flag, when she left her home port—supposing she had a home port—is in our judgment simply absurd. American vessels that obtain lawful registers, and a lawful right to sail under the flag, must take care what kind of voyages they embark in. Neither register nor flag will protect them from the consequences of violating their international obligations, when they pass into the absolute control of foreigners for such purposes as those for which the Virginius was used.

It will be seen therefore that we rest the seizure of this vessel on the great right of self-defence, which, springing from the law of nature, is as thoroughly incorporated into the law of nations as any right can be. No state of belligerency is needful to bring the right of self-defence into operation. It exists at all times—in peace as well as in war. The only questions that can arise about it relate to the modes and

places of its exercise. In regard to these, we have only to say that there is no greater inconvenience to be suffered by admitting that this right may be exercised on the ocean, than is constantly suffered by neutrals from an exercise of the belligerent rights of nations at war. In fact, the inconvenience is not nearly so great. In a time of war between any two maritime nations, neutrals submit to all sorts of vexations arising out of the right of visitation and search and the right of blockade. Neutral ships must lie to, at the order of any belligerent cruiser, receive the visit of an officer, and subject their papers, their cargoes, and every thing on board to his inspection. The penalty of resistance is confiscation in a prize court. What is it that prevents this from becoming an intolerable nuisance? It is the liability of the visiting cruiser to damages for an improper seizure, or an unreasonable detention. This is all the security that a neutral has; for although it shall have turned out that the voyage was innocent, it is not every case of mistake that will be visited with damages, or even with costs, under the law of prize. And are we to submit to all this, in favor of the rights of belligerents to do to each other all possible injury, and yet deny to nations at peace the right to defend their own dominions against inroads by sea, from vessels that are under the absolute control of their own subjects, because those subjects have chosen to assume our flag? If the responsibility of belligerents is a sufficient security for innocent commerce against the vexations incident to visitation and search, and detentions and broken voyages, why is not a corresponding liability, in time of peace, sufficient security against unjustifiable seizures, in cases in which the seizure does not need to be preceded by any exercise of a right of visit or a right of search? We are willing to go as far as any one in asserting the immunities which a national flag ought to be held to confer. We know how important to individual safety and to national dignity those immunities are, in their just extent. But we are not blind to the extravagance with which they are sometimes claimed for acts which the public law does not tolerate, and which it never intended should be sheltered by the sacredness of a flag.

It may, perhaps, be said that we submit as neutrals to the

inconvenience attending the exercise of belligerent rights on the ocean, because the public law, long since settled, has required positive acquiescence in those rights; but that it has not clearly and peremptorily required us to concede to other nations the exercise of their right of self-defence on the ocean, in time of peace. Perhaps this supposed distinction involves a begging of the question. The law of nations, if not a progressive system, in the sense of making new doctrines, is yet a system of principles which admit of development and of application to new cases. While it has no legislative origin, like that which gives existence and force to the systems of municipal law; while it depends for its rules upon the general consent of the great family of civilized states, and is evidenced by the opinions of publicists and the practice of governments, it yet has a body of principles that are universally acknowleged as true, and that are capable of application to new cases as they arise. If a case arises that is apparently without precedent, and it thus becomes necessary to ascertain whether the law of nations will reach it, it is to be solved, not by an arbitrary establishment of a new precedent, but by finding the already established principles which are sufficient, under a just application, to furnish the appropriate answer. In such an investigation, it will be necessary to find the full scope of some principles by discovering the proper limitations of others; and out of the whole process of adjusting one rule by the limitations of another, to deduce the result of a correct decision. It is thus that the law of nations expands to meet the exigencies of new cases, and to promote the peace and security of mankind. It is thus that we have endeavored to show that the right of self-defence, which the public law unquestionably recognizes for nations, as the law of nature recognizes it for individuals, may be exercised on the ocean, in such cases as that of the Virginius, without impairing the rights of others.

It remains for us to notice an objection which has been urged against the right of Spain to detain this vessel for inquiry and condemnation. This objection may be put in the language of General Sickles in his note of November 26th to Senor de Carvajal: "There is no judicial tribunal in Cuba by which the lawfulness of the capture can be determined. A

prize court can not have jurisdiction of the case, since prize courts exercise their powers only between belligerents, and belligerents and neutrals, in time of war. War is not recognized as existing in Cuba, and Spain has been the foremost in denying that either party to the conflict enjoys or is entitled to enjoy belligerent rights." We take it for granted that there is a court somewhere in the Spanish dominions, if not in Cuba, which corresponds fully to the admiralty courts of other countries; and of this General Sickles must have been perfectly aware. But his point was, that in the absence of a state of war, there could be no rightful adjudication in a Spanish court of the rightfulness of the seizure, because that adjudication could only take place in a *prize* court. But it is plain that the Spanish Minister could have replied—and but for the sudden turn in the negotiation he would have replied—that the *prize* jurisdiction of courts of admiralty is by no means the whole of their jurisdiction. At all times, in peace as well as in war, they are courts of the law of nations, capable of adjudicating any maritime seizure that is made, or claims to have been made, under any right which that law confers. Their jurisdiction over a foreign ship, which has been seized for a cause for which the law of nations admits that a seizure may be made, is just as unquestionable in a time of peace as it is in a time of war. In the case of the Marianna Flora, neither the District, nor the Circuit, nor the Supreme Court, of the United States, sate as a prize court. Each and all of them sate as Instance Courts of Admiralty, to adjudicate the rightfulness of the seizure of a foreign ship, that was beyond all controversy a national vessel of the Portuguese nation, sailing under the Portuguese flag.

But, while we deem the seizure of this vessel entirely justifiable, it is, we trust, almost superfluous for us to say that we have no words but words of the utmost condemnation, to apply to the conduct of the local authorities at Santiago, in putting to death a large part of the persons found on board, without waiting to know how the case would be regarded either at Washington or at Madrid. We consider it of no sort of consequence whether the lives of any or all of those persons

were or were not already forfeited by Spanish law. Whatever may be the stern necessities under which governments must administer their law of treason—when prisoners fall into the hands of any government under such circumstances as those attending the seizure of the Virginius, there arises a moral obligation to hear all that can possibly be alleged in the assertion of a right to be protected by the nation under whose flag they are seized, if that nation shall choose to interfere. The Virginius was sailing under the American flag and with American papers. The local authorities at Santiago could not possibly know that she was using that flag and those papers fraudulently. It might so turn out; in which case, the United States might feel no motive for interfering, excepting to secure the treaty rights of American citizens, and the Cubans would have been left to be dealt with under the law of their own country. Not a man should have been harmed, until the question of the national character of the vessel had been cleared up. It was quite otherwise, in regard to the seizure of the vessel; for she was seized under circumstances of the strongest suspicion, a suspicion fully justified by the event, and in the act of escaping after an attempt to land a military expedition. There would be no moral or international obligation violated, by preventing her from doing what she had undertaken to do. But to put the persons found on board to immediate death, in twenty-four hours after they were landed, without waiting to learn whether the United States would have any thing to say about the seizure, was an act of brutal haste, without even the excuse of military or political necessity. It was this cruel act that led the government of the United States to demand the extradition of a vessel for which it had no just grounds to claim the protection of its flag—a demand that, but for this bloody tragedy, would have had no national indignation to back it, and that could never have been rightfully enforced.