

has been suggested that the exercise of the prerogative in possessions enjoying responsible (or constitutional) government is of a more limited character than it would be in the mother-country, but where the objects of its application correspond, there can be no doubt, in my opinion, that the sovereign authority in the colonies is the same as it is in Great Britain, where in truth 'responsible government' is more amply and absolutely enjoyed than it is in the colonies themselves. 'There can be no doubt the Queen's prerogative is as extensive, valid and effectual in New South Wales as in this county of Middlesex,' observed Vice-Chancellor Bacon (*In re Bateman's Trusts*, 42 Law J. Rep. 554). For the defendant it is, as I have said, contended that the fact of a *modus vivendi* having been concluded is sufficient without reference to the specific treaties or any provisions of the treaties upon which it is said to be founded, that the *modus* was in itself a treaty, and that the sovereign possesses absolute power to enter into an international agreement of this kind so as to bind the entire community and every individual subject's right; that Parliamentary impeachment is the only mode in which its propriety can be called in question, and that, if the defendant had failed to fulfil the duty cast upon him by the State, the nation would have been held responsible by the other contracting Power for his want of action; that as the terms upon which peace is made are in the absolute discretion of the sovereign, so the right to enter into an agreement to maintain peace and prevent war is equally so. Counsel for the defendant, after citing several text authorities upon international law, and referring to many decided cases, say that they rely particularly for the position they assume upon *Buron v. Denman*, 2 Exch. 157; *Conway v. Gray*, 10 East, T. R. 536; and *Rustomjee v. Reginam*, 2 Q. B. Div. 74. The first named of these cases was one in which the plaintiff (a Spaniard) sought to recover from the defendant, a British naval commander, damages for taking possession of a barracoon belonging to the plaintiff, and carrying away and liberating his slaves. The defendant had instructions to suppress the slave trade, but the authority of which, without further

instructions, he would have been possessed under the terms of the treaty with Spain would have extended only to the stopping of ships on the high seas. The action of the defendant was, however, confirmed and ratified by the English Government, and it was held that this subsequent ratification was equal to a prior command, and that the defendant was not amenable in a British Court of justice at the suit of the plaintiff, because the act of the defendant, whether originally authorised or afterwards ratified, was 'an act of State.' In the second of the cases cited (*Conway v. Gray*), in which the plaintiff, although a British subject, sued under a policy of insurance for the benefit of a foreigner, it was held that a foreigner insuring in England a ship or goods is not entitled to abandon upon an embargo laid on the property in the ports of his own country, as his assent is virtually implied to every act of his own Government; in other words, that a foreigner could not recover from a British subject in an English Court damages arising out of an act of the plaintiff's own Government. In this case Lord Ellenborough, C.J., in the course of his judgment, referring with approval to *Tonteng v. Hubbard*, 3 B. & P. 291, says: 'The Court was of opinion that, if that had not been the case of a Swede against a British subject, the plaintiff would have been entitled to recover, but as the embargo was produced by the acts of the Swedish Government, it was in effect the plaintiff's own act that the vessel was detained.' I cannot see how either of these cases makes for the defendant against the principle that there can be no 'act of State,' so as to supersede or exclude the operation of the municipal law in the case of subjects of the same State. But for the defendant still another case was cited, which, it was maintained, distinctly (if for the first time) introduced a different rule. This was the case of *Rustomjee v. Reginam*, which was a proceeding by petition of right in which it was sought to make the Crown responsible as an agent or trustee for the suppliant as one of a class in respect of money paid, under a treaty of peace between the Queen of England and the Emperor of China towards the discharge of debts due to British subjects from certain Chinese merchants, and it was held that the