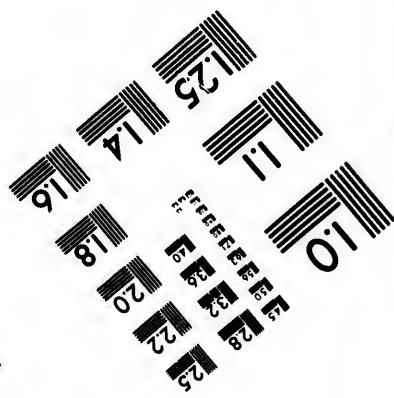
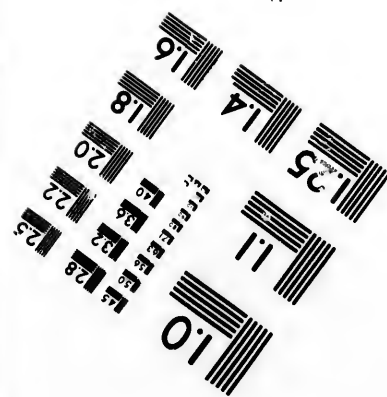
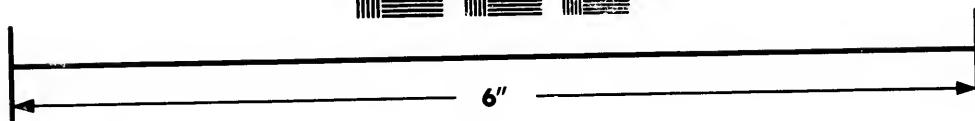
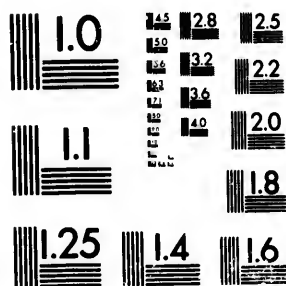


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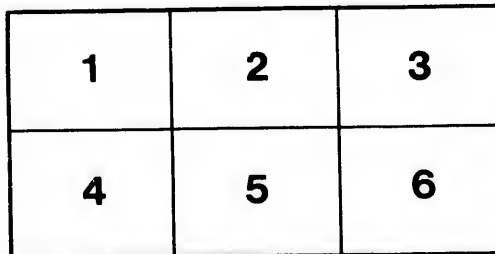
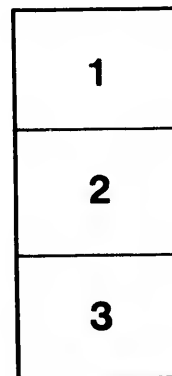
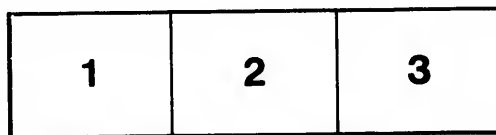
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A DISCOURSE
ON THE
CONDUCT
OF THE
GOVERNMENT OF GREAT BRITAIN,
IN RESPECT TO
NEUTRAL NATIONS.

WRITTEN IN THE YEAR 1758,
By CHARLES JENKINSON, Esq.
LATE EARL OF LIVERPOOL.

A NEW EDITION.

EDINBURGH:
THOMAS CLARK, LAW-BOOKSELLER.

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PREFACE.

It having been represented to me that the circumstances of the times, and the questions now in agitation, had induced the public to call for a new edition of my "DISCOURSE ON THE CONDUCT OF GREAT BRITAIN, WITH RESPECT TO NEUTRAL NATIONS;" I was at the same time desired to say, whether I would now think it proper to make any corrections in what I had formerly written on that subject. Three-and-forty years have now elapsed since I first composed that treatise. I have, on the present occasion, again attentively perused it, and, after the fullest consideration, I still continue convinced of the truth of every proposition and argument advanced in it. I have of course abstained from making the smallest alteration in any essential point; but I have corrected the style in some parts, where a more mature judgment has induced me to think the expressions not sufficiently accurate or forcible.

As the claims of neutral nations, particularly of the Dutch, during the war which commenced in 1756, gave occasion to the following treatise, the facts then in existence are necessarily stated in it, though they may not have any immediate reference to the present times. The reasons, however, on which I founded my opinion in many of these cases, apply to similar facts that have lately happened, and will therefore contribute to assist the reader in forming his judgment concerning them. Besides, I did not think it right to erase any thing from a work of which the public have long been in possession.

I must, however, confess, that I was induced to authorize the republication of this work from a motive which

appeared to be in the present moment of great importance—I wished to shew that many of the claims of late years advanced by some neutral nations, had not occurred to any writer on the law of nations, at the time when this discourse was written and published; and that these claims were not even in the contemplation of those powers who resisted the maritime rights of Great Britain, at the period when this work first appeared. It was my intention to have given a short account of these new claims, and of the transactions to which they gave birth; but the present infirm state of my health has disqualified me for an undertaking of this nature; and I find that this subject has been treated with competent information and great judgment, in a course of letters, signed Sulpicius, first published in a morning paper, and since collected into a pamphlet, so that any thing I could now write would be useless repetition.

In addition to the public documents which have appeared on these occasions, and which have been lately collected and reprinted,* some pamphlets have also been published at Copenhagen and Paris, written probably not without some degree of authority from their respective governments, in support of the present claims of neutral nations; which evidently shew, that the enemies and rivals of this country, finding they were no longer able to resist the great superiority of our naval force, which has been so conspicuous during the present arduous contest, are determined, if possible, by establishing new principles of maritime law, to sap the foundation of our maritime power and glory. The authors of these pamphlets appear disposed no longer to resort to those sources and authorities on which the rights, either of neutral or belligerent powers, have hitherto been understood to be founded; they seem, indeed, thereby to confess, that their claims cannot on this ground be defended, and to admit, that the principles of maritime law, laid down in

* See a Collection of Public Acts and Papers relating to the Principles of the Armed Neutrality, printed by A. Strahan, for J. Hatchard, 173 Piccadilly. 1801.

the following work, cannot be controverted. This work, soon after it was published, was translated into almost every European language, and has never, as far as I am informed, received an answer. It is singular, that though so much has of late been heard in all political discussions of natural rights, those who now stand forth in defence of neutral nations, appear to reject all the principles of the law of nature, founded on the right of self-defence, so far as that law is applicable to the conduct of nations in their contests with each other.

They pay also no attention to the respected authorities of all ancient writers on the same subject, such as Grotius, Puffendorf, Bynkershoek, Vattel, and many others, because they find that the decisions of these writers are uniformly unfavourable to their pretensions; they pay as little attention to the principles which have immemorially governed all courts of maritime jurisdiction through a succession of ages, and which have been handed down in a series of records, or authentic documents, published during the course of many centuries. In short, they appear determined to establish a new code of maritime jurisprudence, better adapted to their own views and present interests; and they wish, therefore, to have it understood, that there are no maritime laws but such as are founded on compact or convention, that is, on treaties made between the respective contracting parties. With this view, these enemies and rivals of the naval power of Great Britain have entered into treaties, laying down certain rules which they wish to have observed, and to the observance of which they think they have a right to compel Great Britain, though no party to them. By clamour and combination, they endeavour to obtain our consent for imposing restraints on the exertions of that particular force which the God of nature has given us for our self-defence and security. They wish to prescribe in what manner we shall in future be at liberty to employ it; for they know that then, and then only, they can entertain any hopes of being able to resist the naval power of this country.

The writers before mentioned have, therefore, not only

insisted that neutral ships have a right to carry, and protect from capture, the property of the nations who are at war, or, in other words, that free ships shall make free goods, but they claim,* as a right inherent in every sovereign who professes neutrality, that all mercantile ships, under the convoy of his ships of war, shall be exempted even from search and visitation. A claim of this sort was indeed brought forward in the middle of the seventeenth century, but it was then resisted by the Government of Great Britain. This claim did not form any part of the convention for an armed neutrality in 1780, though it has been inserted in that which was signed at Petersburg the 16th of December 1800. As far as I am informed, it was first made a positive stipulation, and inserted in the treaty between America and Holland in 1782.† In short, after having been suffered to sleep for more than a century, it was revived towards the conclusion of the late war with America; and some of the powers of the North have been taught to believe, that the honour of their respective sovereigns, as well as the interests of their subjects, required that they should give it all their support; but the Government of Great Britain has again resisted this claim, as not founded on any principle of maritime law, nor supported by any eminent writer, nor consistent with those rights which every belligerent power, for his own security, is authorized to exercise and enforce. In short, such a claim, if it were to be established, would have the effect of preventing all capture of mercantile vessels belonging to neutral states, though they may be carrying enemy's property, or even contraband goods; it would have the effect of giving a right to a government calling itself neutral, to protect the property of the subjects of both the belligerent powers,—a right, however, which would probably be exercised only in favour of that power whose interests it may wish to promote. If no examination is permitted of mercantile ships sailing under

* See Professor Schlegel's pamphlet, *Sur la Visite des Vaisseaux Neutres sous Convoi*, published at Copenhagen in 1801.

† Article 10, Mart. Tr. V. 2. p. 255.

convoy, all the stipulations in subsisting treaties, which authorize the detention and capture of contraband articles, such as military or naval stores, would be thereby annulled or rendered nugatory; and from henceforth, every belligerent power must rest wholly on the good faith of the officers of a neutral government, who have no sufficient interest in detecting frauds, and who, on the contrary, may have an interest, from pecuniary motives, to protect and even to encourage transactions the most injurious to a belligerent state in a contest, not merely for its honour, but its preservation. It is certain, that, if this doctrine be admitted, the smallest state may lend its flag, and by hoisting it on board a cutter or sloop, may protect any number of ships under its convoy, from all the activity and enterprize of the whole naval power of Great Britain.

These writers wish also to narrow the right of belligerent powers, in the detention or capture of ships going into ports blockaded, by establishing a definition of what shall henceforth be understood to be a port blockaded. It is proved in the following discourse, that no nation has ever exercised this right of stopping and making prize of ships going into blockaded ports, with so much moderation as Great Britain. It must, however, be acknowledged, that the fact, whether a port is blockaded or not, may frequently be a question of difficulty; but it can only be decided by the jurisdictions to which all cases of this sort have universally and immemorially been amenable.

It has ever been the anxious wish of the Government of this kingdom, that the office of Judge of the British High Court of Admiralty should be filled by a civilian of the greatest knowledge and integrity; and the duties of this most important office have at no time been more eminently discharged, than by the distinguished person who now presides in that court, and who, from a conviction of the rectitude of his decisions, has suffered them, together with the reasons on which they are founded, to be published, in order that the world may determine on the

truth of those principles, which, on all occasions, influence and guide his judgment.

A French writer* has carried the claims of neutral nations still farther,—he proposes, as a maxim to be adopted in future, that all capture shall hereafter cease; his words are, "*La course est abolie*," and then he adds, "*En tems de guerre la souveraineté de territoire est transportée avec tous ses droits sous le pavillon des états qui ne prennent point de part à la guerre.*"

From these expressions, it may fairly be inferred to be the object of this writer, and of those who employ him, that the detention and capture of such ships only as belong to neutral nations, in time of war, should wholly cease; I think it must be allowed that this proposition, so interpreted, is wholly new, for such a doctrine will prevent the capture of all contraband goods, as well as the property of the enemy found on board neutral ships. If such a doctrine were to be admitted, one branch of the naval power of this country will be in a great measure annihilated, for, in all maritime wars, the people arm in their own defence, and it is not the government alone, but individuals under the authority of the government, who arm and equip vessels against the enemies of their country, for the purpose of reducing them to reasonable terms of peace; the means they employ are, the capture of all the property of the enemy, and the destruction of his commerce, carried on under any pretence or disguise whatsoever. The principle, also, on which this doctrine is founded, is as novel as the doctrine itself; for it is pretended that the right of sovereignty belonging to each neutral state should be transferred to every merchant vessel employed by the subjects of it. It has hitherto been understood that there can be no sovereignty exercised on the main sea or ocean; that the sea is the common road of the universe; that the law by which all transactions

* See a pamphlet entitled, *de l'Etat de la France, à la fin de l'an 8me* à Paris, chez Henrici, rue de la Loi. This pamphlet is said to be written by Citizen Henterville, who is employed by the French government in the Department of the Secretary of State or Foreign Affairs.

are there to be regulated, is the law of nations, that is, the law of nature, so far as it is applicable to the conduct of nations, and any particular conventions by which different states may have bound themselves; such at least are the principles which all eminent writers have hitherto acknowledged. If this sort of floating sovereignty were to be admitted, I wish to know in what manner piracy and murder upon the main sea are in future to be prevented or punished? Is it to be understood that the punishment of these crimes is to be confined, under this pretence of sovereignty, solely to the jurisdiction of the governments of those countries to which any such ship may happen to belong? I need not state what would be the necessary consequences of admitting this doctrine into any code of maritime jurisprudence.

The next principle which this French writer* endeavours to establish is of a still more extraordinary nature; he proceeds to say, "En tems de paix, la navigation de peuple à peuple est affranchie de toute loi de prohibition: il n'y aura d'exception que relativement au cabotage d'un port à l'autre, appartenans au même pays, et à la navigation entre les colonies et leur métropole." This most presumptuous attempt to regulate the commerce of other countries, has indeed no reference to a state of war. In truth, it lays down a doctrine which is to govern all nations in their commercial intercourse during *time of peace*: It interferes with the exercise of a right which belongs to every sovereign upon earth; for it prescribes a rule by which its commerce and navigation shall in future be regulated. The writer, however, admits of two exceptions, which are in contradiction to the very principle advanced by him, and so far he clearly acknowledges the right of every sovereign to make regulations of this nature; for he is of opinion that this rule should not extend to the cabotage, or coasting-trade, from one port of any country to another port of the same country, or to the commercial intercourse between any country and its colonies. I cannot help observing, that these two exceptions apply to branches of commerce, with re-

* See the French writer last quoted.

spect to which alone the French Government has ever been able to make any restrictive regulations in their laws of navigation. It was once, indeed, the intention of their great minister, Monsieur Colbert, to adopt, with respect to the shipping in which the European commerce of France is carried on, regulations similar to those to which the commerce and navigation of Great Britain with the other countries of Europe are now subject; but he found on inquiry, that the mercantile vessels of France were not adequate to the carriage of the great quantity of articles in which that kingdom then dealt with other European nations, in consequence of the extensive trade already acquired under the protection and encouragement, by which he had successfully promoted the manufactures and general commerce of his country. He was convinced, therefore, that the commerce of France would be restrained and diminished, if he endeavoured in this manner to encourage and increase its mercantile marine; he relinquished, on this account, his design, preferring the interests of commerce to those of navigation. It is evident from hence, that the proposition now advanced is nothing less than a direct attack on the British laws of navigation, with a view to deprive Great Britain of an advantage which France is not qualified to enjoy. The principle on which these laws of navigation are founded, and which is thus attacked, is no less consonant to justice than to true policy; in its utmost extent, it goes no farther than to establish as a rule, that the trade between Great Britain and all the countries of Europe shall be carried on only in ships either belonging to Great Britain, or to those belonging to the country from which any article may be imported; and not to suffer Holland, or any other power, to derive an advantage, from becoming the carriers, in a commercial intercourse with other countries, in which they have no right to be concerned; such was the rule generally adopted in the law which was first enacted for this purpose in the middle of the seventeenth century, during the usurpation of Cromwell. When this law was re-enacted at the Restoration, some

modifications or exceptions were made, which subsist to this day.

This wise system of policy may be traced back to as early a period as the reign of Richard II., when two* laws were passed, founded on the principles before mentioned. It is not surprising that, during the civil wars, which prevailed for almost a century subsequent to the death of that unhappy prince, no further progress should have been made in extending and confirming this system; but as soon as the contest between the houses of York and Lancaster was at an end, by the accession of Henry VII. to the throne, it was immediately resumed by this wise monarch,† who expressly assigns as a reason for passing a law for this purpose,‡ that it was to “prevent the decay of the navy of the realm.” Queen Elizabeth§ first assumed the right of confining the coasting trade of the kingdom to British ships only, and the system was brought to perfection by the famous act before mentioned, passed in the year 1651. I have given some account in the following discourse of the causes which induced those who then governed this country to pass this memorable law, and of the contest which it produced with the Republic of Holland, whose subjects thought they had a right to be the carriers of all the world, and to raise themselves, by the number of their ships and sailors, to a degree of maritime superiority, which it was not at that time easy to resist. It cost Great Britain many severe conflicts to affirm the right which she had thus asserted and established, and of which it is the intention of the enemies of this country to endeavour now to deprive her; all the laws which have since passed on this subject are merely in affirmation and support of the principles established in what is commonly called the Act of Navigation. This excellent system of laws has in truth been the foundation of the great naval power which this kingdom at present possesses, and on which her security depends. The reader will see, in the following discourse, the low state of the

* 5th Richard II., stat. 1, ch. 3. 14th Richard II. ch. 6.

† 1st Henry VII., ch. 8.

‡ 4th Henry VII. ch. 10.

§ 5th Elizabeth, ch. 5. sec. 8.

mercantile shipping of Great Britain previous to the passing of the act of navigation, on no less authority than that of Sir Josiah Child. All the world knows to what a degree of maritime pre-eminence Great Britain has gradually risen, by the operation and under the influence of the law before mentioned. By the last account that was taken of the British ships registered in the different parts of his Majesty's dominions, it appears that the number of mercantile vessels owned and navigated by British subjects, amounts to 17,205, that their tonnage amounts to no less than 1,666,481 tons, and that the number of men by which they are navigated, allowing at an average one man for every two've tons, amounts nearly to 129,546 men. This is certainly the greatest mercantile marine belonging to one nation that ever existed in the world; it is the foundation and support of our military marine, and consequently of our naval power.

I am sensible of the absurdity as well extravagance of many of the claims which I have thus endeavoured to combat; but I thought it right that the people of this country should be apprized of the extent of these claims, and of the attempts that are now making to undermine and destroy that maritime greatness, which is the pride and glory of every Briton, who loves his country, and in which he trusts with confidence for security against France and all her allies; while many of the other nations of Europe are submissive and crouching to the power, which that republic has lately acquired by the success of her armies on the continent—

*Cecidit animi, nec jam amplius ARMIS,
Sed votis, precibusque jubent exposcere pacem.*

VIRGIL. *ÆNEID.* lib. 3.

I have said already, and will again repeat, that it is the intention of the enemies and rivals of Great Britain to sap the foundation of our naval power, because they are no longer able to resist it; they wish to diminish the sources of our maritime greatness, by obliging us to repeal our laws of navigation, and to restrain the full exercise of so much of it as they may think proper to leave

us, by forcing us to adopt a new code of maritime law. I am astonished that other nations are not sensible of the consequences which would naturally result from their success in this attempt, and that they should blindly contribute to place in the hands of the same government a decided superiority by sea as well as land, which would necessarily terminate, as it did, when Rome was at the height of its power, in the subjugation of mankind.

Independent of the arguments already adduced in support of the rights which Great Britain as a naval power claims to enjoy, there is one circumstance which ought to convince every reasonable man, that she has always acted, and still continues to act, upon the true principles of maritime law; for her conduct has ever been uniform, and her system always the same; while the other nations of Europe have of late years varied their systems, or at least their practice, as motives of policy or of interest have appeared to require. In all situations, whether neutral or belligerent, Great Britain has never departed from those principles which she now asserts; in a moment of great difficulty, when engaged in a war with her own colonies, and with France and Spain, though pressed by those governments who were parties to the armed neutrality of 1780, she never could be induced to renounce any one of her maritime rights, but, on the contrary, even then asserted them: * In two or three instances she has indeed consented to an express stipulation in her treaties with other powers, that free ships should make free goods, perhaps unadvisedly, but always in cases where her interests could not suffer from the concession: It is true also that France, as well as all the other powers of Europe, formerly acted upon nearly the same system: The ancient ordinances of France are upon the whole in conformity to those rules of maritime law which Great Britain now maintains; in one or two points only these ordinances establish regulations less liberal. But, from the time of the armed neutrality in 1780, France has thought

* See the Declaration of the Government of Great Britain to Russia of the 23d April 1780—to Denmark of the 25th July 1780—to Sweden of the 3d August 1780.

it right, from motives of policy, to pursue a different line of conduct. To gratify and allure those governments which were parties to that armed neutrality, France then first began to profess her attachment to what she called the freedom of navigation, and to declare that she would maintain the rights of neutral states, as they are announced in the declaration of the late Empress of Russia.* In the present war, those who have successively exercised the powers of government in France, have, in their conduct towards neutral nations, varied their system with almost every change of government; they have at no time, however, acted upon the principles of the armed neutrality before mentioned till of late, when, from obvious reasons, they are become zealous to establish the rules of that convention which has lately been signed by the northern powers. The merchants of the United States of America complain that they have been robbed, during the course of the present war, of nearly L. 5,000,000 of property by the outrageous conduct of the French cruizers, contrary to every principle of maritime law, and to the express stipulations of treaties; and, in a late negotiation, the French Government has contrived to evade any stipulation or engagement for the present payment of this debt. In 1797, the rulers of France ordered that all neutral ships should be taken and condemned, in which were found *any British produce or manufactures*; and upon this principle they have continued to act till the present moment, when they have thought it for their interest to assume an appearance of moderation.

In Russia, the system which has prevailed, in practice at least, has also been contradictory to the principles asserted in the convention for an armed neutrality in 1780. The late Empress Catherine II. was of opinion, that any regulations of this description in favour of neutral commerce should not be extended to the subjects of the Ottoman empire, which she affected to consider not as a

* See the Answer from the King of France to the Declaration of the Empress of Russia, April 25. 1780.—See Declaration of the Empress of Russia to the Courts of London, Versailles, and Madrid, March 1780.

civilized state, and not entitled on that account to any privilege, contrary to the strict laws of war. For a reason something similar, she was also of opinion that the new rules of maritime law which she had adopted did not apply to the subjects of the lately established Republic of France, whom she termed miscreants, asserting that they had overturned all the duties which ought to be observed towards the Almighty as well as their sovereign, whom they had deprived of his crown and life; and for that reason the empress entered by treaty into engagements with the British Government, not only inconsistent with the convention of 1780, but of a directly opposite nature; in which treaty* it was stipulated that she would "unite" with us "all her efforts to prevent other powers not implicated in this war, from giving any protection whatsoever, directly or indirectly, in consequence of their neutrality, to the commerce or property of the French, on the sea or in the ports of France." And, in execution of this treaty, she sent a fleet into the Baltic and North Seas, with express orders to her admiral† to search all Danish merchant ships sailing *under convoy*; and as late as the year 1799, her son and successor, Paul I., acting upon the same principles, actually threatened the Danish Government with immediate hostilities on account of its partiality to France; one symptom of which he stated to be, that the Danes gave assistance and protection to the trade of France, under colour of the Danish flag: And the execution of these threats is said to have been prevented by the interference of Great Britain.

Sweden, another of these northern confederates, has been engaged in only one war since the signature of the convention for an armed neutrality in 1780, and yet according to the evidence of the Danish civilian, Dr Schlegel,‡

* See the Convention between his Britannic Majesty and the Empress of Russia, signed at London the 25th March 1793.

† See the instructions to Admiral Tchitchagoff, of 24th July 1793.

‡ See page 17 of the English translation of Dr Schlegel's work, before referred to.

the government of that country then violated the very system of neutral rights, which, as this Danish writer observes, it had heretofore "so laudably and valiantly maintained." And in a convention made between Denmark and Sweden in 1794, these powers declare "that* they do not claim any advantage which may not be clearly founded on all their respective treaties whatsoever, with the different powers at war;" and they also "reciprocally bind themselves to each other, and to all Europe, not to claim in such cases as are not expressed in treaties, any advantage that may not be founded on the universal rights of nations hitherto recognised and respected by all the powers and all the sovereigns of Europe." Now, in the treaties still subsisting between Sweden, as well as Denmark and Great Britain, there are express stipulations directly contrary to the principles established by the convention for an armed neutrality in 1780; and the principles of this convention, as well as of that lately signed, have not yet been "recognised by all the powers and all the sovereigns of Europe:"—They certainly have not been recognised by Great Britain.

If we wish to know the character of the Danish Government in commercial matters, we have it on the authority of the late Empress of Russia, Catherine II:† In her instructions to her admiral in the year 1793, she says, that the Court of Denmark, with its accustomed weakness, prefers ideal gain to the sound considerations of policy. The rescript, however, which the Government of Denmark published at the commencement of the present war, for pointing out to the Danish merchants the nature and limits of their neutral trade, expressly enjoins all Danish subjects not to attempt to carry in neutral ships any property belonging to the belligerent nations. No one can doubt that this injunction at least is directly contrary to the principles asserted in the armed neutrality of 1780, as well as in that lately signed.

I have already stated the substance of the convention

* See Articles II. and III. of the Convention between Sweden and Denmark of the 24th March 1794.

† See her instructions to Admiral Tchitchagoff.

between Denmark and Sweden in 1704; the engagements there taken bind Denmark as well as Sweden, and are certainly directly contrary to the principles of both the armed neutralities. But, notwithstanding all its professions, the Government of Denmark suffered Bergen and Christiana to be the regular stations for French privateers, which sallied out from thence to capture British merchantmen navigating the adjoining seas; and, in the ports before mentioned, a French consul was permitted to exercise maritime jurisdiction, contrary to the established usage and principle of maritime law, and to condemn the ships so captured. No less than one hundred British merchantmen were so condemned, and the remonstrances of the British Government to prevent this practice were of no avail. During the course of the present war the Court of Petersburg has had frequent occasion to manifest its displeasure at the conduct of the Danish Government for having availed itself of every pretence to escape from the engagements which it had solemnly taken, not to permit its subjects to cover the property of the belligerent powers, under the colour of the Danish flag. At last, however, the Danish ministers gave this sort of commerce a more avowed support, by appointing a convoy for its protection.

It cannot but appear most extraordinary that the minister of Denmark, in the note delivered by him to Mr Drummond, on the 31st December 1800, should assert that the object of the Court of Denmark in signing the new convention for an armed neutrality lately concluded at Petersburg, was nothing more than a *renewal of the engagements* which were contracted in the years 1780 and 1781, and which were then made known to every Court of Europe; and that the parties to this convention intended to re-establish those engagements in their *primitive form*, when it appears by a comparison of the two conventions, that an article has been inserted in the last of them which was not in the first, and which is certainly more hostile to the maritime rights of Great Britain than any of those claims which had hitherto been advanced, viz. "That the declaration of the officer who shall com-

mand the ship of war of the king or emperor, which shall be convoying one or more merchant ships, that the convoy has no contraband goods on board shall be sufficient ; and that no search of his ship or the other ships of the convoy shall be permitted." This new claim, of not permitting ships to be searched that are under convoy, is perhaps the greatest innovation on the established system of maritime law that has hitherto been attempted ; for, as before observed, it in effect annuls all maritime rights whatsoever, for no right of this description can be exercised by a belligerent power, if the right of search is to cease ; and I believe I may assert, without danger of contradiction, that this extraordinary claim cannot be supported on the authority of any one eminent writer, or on any precedent recorded in any court of maritime jurisdiction. It cannot but appear equally extraordinary that the same minister should assert, that the engagements then contracting could not be considered as contrary to the previous convention entered into with Great Britain so late as on the 29th August 1800, when, by this last convention, his Danish Majesty engaged, in order to prevent similar *rencontres* to that which had so lately happened with the Danish frigate the *Freya*, to suspend his convoys, until "ulterior explanations on this point shall have effected a definitive convention." These ulterior explanations most clearly refer to a negotiation for that purpose with the British Government, and yet in the article of the convention, signed at Petersburg before mentioned, this question is prejudged, and in effect decided, without the knowledge or consent of the British Government ; and it is further stipulated, in the ninth article of this convention, "that if any of the contracting parties, on account of, or from dislike to, the present convention, or any circumstance connected with it, should be disquieted, molested, or attacked," the parties shall make it a common cause mutually to defend each other. And in the fourth article of the same convention, the parties agree to equip a number of ships of war, to enforce the rights claimed under this convention.

Such is the state of this business, according to the

papers which have hitherto been given to the public. If the Danish Government have any way of reconciling the apparent inconsistency (to use no harsher term) of its conduct on this occasion, it may fairly be presumed that, for its own credit, it would before now have given a satisfactory explanation.

With respect to the powers that have made themselves parties to the convention for an armed neutrality, lately signed at Petersburgh, I have only to add, that the court of Berlin, in a treaty signed at Mayence, on the 14th July 1793, engaged to "unite all its efforts to prevent other powers, not implicated in the war, from giving, in consequence of their neutrality, any protection whatever, directly or *indirectly*, to the commerce or property of the French, on the sea, or in the ports of France."

There were treaties with other powers of Europe, similar to that last mentioned.

It is evident from the foregoing deduction, that Russia and Sweden, in the wars they have waged since they concluded the convention for an armed neutrality in 1780, have not conformed to the principles therein established, and that all the powers who were parties to this convention have renounced and abandoned, by solemn treaties, the principles of that convention, at least during the continuance of the present war. It is proper to observe, that all the treaties by which the principles of the armed neutrality are so renounced, are now in existence, unless it is alleged that one party to a treaty is at liberty at any time to annul it without the consent of the other.

It may fairly be presumed, that these northern powers never entertained a thought of re-establishing and again asserting the principles of the armed neutrality of 1780, till they were instigated by the enemies of this kingdom to direct this blow against its clearest rights, and against the exertions and interests of the navy of Great Britain. For it is singular, that all neutral powers, except the United States of America, have passively acquiesced in the many violent and outrageous acts, which, during the present war, the Government of France has from time to time exercised against their commerce. They never made

any resistance, and the public at least are not informed that they ever made any remonstrance. It does not appear, that the Court of Denmark, in particular, ever made any representation against that most unjust and violent decree, by which the French Directory, in the year 1797, directed that all neutral vessels on board of which British manufactures should be found, whether the property of enemies or neutrals, should be condemned.

In the year 1798, when the same Directory first projected the invasion of Egypt, they seized upon more than a hundred neutral vessels, then in the ports of France, without which they could not have transported their army to Alexandria; it does not appear that any of the neutral powers, who suffered by this injury, ever made any representation against this flagrant violation of their rights.

It happened, however, that soon after the ever memorable victory of Aboukir, when Lord Nelson with his fleet blocked up the port of Alexandria, a Danish merchantman was detained, in consequence of this blockade, in that port. Though this detention was the necessary consequence of war, and justified by immemorial usage and practice, the Danish Government was not restrained by any sense of justice or decorum from directing its minister in this kingdom to make a formal application for the release of this ship, as well as for full compensation for the loss sustained by her detention; or, in case of total loss, a sum of money equal to the full value of the vessel and cargo.

It is clear therefore that these neutral powers, who so patiently acquiesced in every arbitrary proceeding of the enemies of Great Britain, have always been ready to pour forth their complaints against every act of the British navy, however justified by the laws of war; and that their jealousy and hostility are in fact solely directed against the naval power of this country.

But whatever may be the intentions or the conduct of these neutral powers, it would indeed be strange if, after a war of more than nine years' continuance, in which the officers and seamen of the British navy have distin-

guished themselves even in a greater degree than in any former war, and have destroyed, or at least so far reduced, the fleets of almost all the enemies of this kingdom, that they dare not meet the British squadrons in open conflict, and their merchants can no longer carry on in security any commerce on the ocean; I say it would indeed be strange, if the Government of Great Britain should choose such a moment voluntarily to consent to any regulations, which should in the least degree diminish the force, or discourage the exertions of a navy, to which it is indebted for its security, and for the glory resulting from its victories. I repeat, it would indeed be strange, if, at a moment, when the enemy has reduced almost every other power to such terms of peace as he has thought fit to dictate, and is thereby at liberty to direct all his force against Great Britain, the Government of this country should submit to have shackles imposed on the efforts of our gallant officers and seamen, on whom our security, in such a crisis, must principally depend. I am fully persuaded, that if the enemy should be able to land on our coasts any part of the numerous armies, which for want of other employment he can now so well spare to invade this kingdom, the British army will fully discharge its duty, and the British people will rise, almost to a man, in defence of their country;—but it is certainly of the greatest importance, that we should be able, by the superiority of our naval force, to prevent any such invasion, and that, having two means of defence, we should in no respect weaken that in which we principally excel; and that instead of suffering this happy island to become in any degree the seat of war, we should preserve it, as it has hitherto been preserved, in a state of internal tranquillity,—carrying on and extending its commerce, and exercising and promoting all the arts of peace, as if no war even existed. In the course of the present war, experience has fully shewn what is to be expected from the tender mercies of a French army, wherever it has once gained a footing; especially when it is remembered, that the commanders of these armies have taught them to draw the whole of their pay, as well

as their subsistence, from the conquered countries, as those of Rome did in ancient times.

But it is not the security of Great Britain only, and of all its external dominions, which principally depend on the superiority of the navy of this country; it is no less for the interest of other nations, that Great Britain should retain its present naval superiority, and that it should not be transferred to the navy of France. I must on this occasion revert to an idea which I have slightly touched already:—if the power of the French Republic should become predominant at sea, as it is now at land, there will, in my judgment, soon be an end of the liberties of mankind. The armies of this enterprising republic have hitherto been but too successful: they have extended the boundaries of what they properly call their territories, to the Alps on the south, and on the east to the Rhine, through the whole of its course: They have subdued the spirit at least of the German empire; the head of that empire has told the Diet,* in terms sufficiently explicit, that he can no longer afford it protection, and that the several states must convey their complaints to the Government of the French Republic, manifesting thereby, that it is on the decision of that government, that their future existence and situation, whatever it may be, must depend: The king of Prussia, the only prince of the German empire who still commands any considerable force not yet subdued, having by the fatal policy which dictated the treaty of Basle obtained a short but precarious respite, is now more exposed than ever, by the subjugation of Austria and all its co-estates to the south; and the successor of that great monarch, who once resisted the power of France, Austria, and Russia united, being now left to himself, and controlled by the power of France and Russia, now acting perhaps in con-

* See the Note of the 12th February, addressed to the different states of the empire, from the Chancery of State at Vienna: The words are, "mais s'il arrivait que le resultat ne fut pas conforme à ses desirs ce seroit la consequence des circonstances defavorables dans lesquelles il se trouve, et les etats qui eroiront avoir lieu de se plaindre, devront s'adresser directement à la Republique Francaise."

cert, no longer finds the safety which he expected to derive from his neutrality: The French Republic, equally politic as enterprising, has been careful to surround itself with smaller states, most of them of its own creation, and which are wholly directed by it: As Flanders is now become a part of the French territory, so Holland is in effect governed in such a manner as France thinks proper to direct; and the French armies, under pretence of affording it protection, are in truth masters of the country: The whole of Switzerland is formed into a republic, governed by French agents or pro-consuls; and that once warlike country, long the seat of liberty, and the barrier of Italy against French invasion, is absolutely at the disposal of the French Republic: The adjoining parts of Italy are formed into subordinate republics, according to the French model, and totally under French influence and direction; and every state of Italy to the south, continues to subsist under such form alone, and subject to such conditions as the French Government thinks proper to prescribe: The Spanish Government is wholly under French direction, and there is at present hardly a state in Europe which is not exposed to its influence, and apprehensive of the effects of its power. If it be asked, What has at present prevented the further extension of the French conquests? I answer, not its moderation, for when was moderation to be found in a military republic, governed by adventurers of talents and activity, who must persist in the same course, to maintain their character, importance, and situation? The French Government may have suspended its conquests, because it is apprehensive perhaps of difficulties in the present moment, in attempting to penetrate further; or it may have suspended them only in one quarter, in order to direct their force to other objects: If France, however, should once become superior at sea, as well as at land, and the protection now afforded by the British navy should be removed, there would in such case be no maritime town or country, which would not be exposed to its attacks, and in danger of being subdued.

In such a state of things, what sort of maritime rights

the French Republic would think proper to establish and exercise, I leave to the determination of those who have read the foregoing pages, and who know how to appreciate the nature and character of a government like that of France. I repeat, therefore, with confidence, that it is not the security of Great Britain alone, which depends on the valour and superiority of the British marine, but that the fleets of Great Britain are now the principal bulwark, of all that yet remains of national independence in the world. It appears to me, therefore, incontrovertible, that these Northern Powers, who are now aiming at the subversion of the naval superiority of Great Britain, and are endeavouring to transfer it to France, are acting as much in contradiction to their own interests, as to those of this country. I know there have been even British statesmen, who have been willing to relinquish those maritime rights, which I have endeavoured now, as well as through the whole course of my political life, however feebly, to defend ; but I trust that on due consideration, they will be induced to alter their opinions : At all events I know, that, in the present crisis, we may place in a vast majority of the people of Great Britain that confidence to which, from their good sense and spirit, they have always shewn themselves fully entitled :—I am persuaded, that they will support to the utmost the just rights of the navy of Great Britain, to the exertions of which they are indebted, not only for their happiness, safety, and independence, but for the national glory which now surrounds them, and for the high character, which their government holds in the estimation of mankind.

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ON THE CONDUCT

OF THE

GOVERNMENT OF GREAT BRITAIN.

1758.

It is unhappy for the race of mankind, that those collective bodies into which it is divided, should be subject to the same passions and animosities, as the individuals of which they are composed, and not have, like them, some visible superior tribunal, which might hear and compose their dissensions : this might perhaps prevent those appeals, which are too frequently made to the sword ; where the events of war alone decide the cause, and the sentence, which passeth on the transgressor, brings also to the injured party a large share of misfortunes, in the execution of it. The welfare of mankind however requires, that this necessary evil should be confined within the narrowest bounds ; and that a trial, where the proceedings are so destructive, should be made as short, and as equitable, as the nature of it will admit : it is the du-

ty therefore of all those who are not called upon by some just motive to concern themselves in the dispute, to be extremely attentive to their conduct, that they may not thereby contribute to render the contest unequal : As far as man is concerned, it is force alone, on which the decision depends ; to add therefore by any means to the power of one party, is manifest injustice to the other, and besides is highly injurious to the rest of mankind ; since it necessarily tends to spread discord among nations, and from a single spark of contention to light up a general flame.

It might be hoped, that a duty like this, enforced by such powerful motives, would be universally observed ; and that no private inferior interest could induce any power to transgress it : If some little profits, the object of greedy individuals, should perhaps arise from the violation of it ; can a nation in general reap a benefit, where public justice receives a wound ? To act in opposition to this in hopes of some present advantage, is to establish a dangerous example, which may hereafter prove injurious to ourselves ; it is to untie the only band, which holdeth nations happily together, and to banish mutual confidence from the various communities of the world.

Such, however, hath been the mistaken conduct of some neutral states during the present war.—France consented to the treaty of Aix-la-Chapelle, that she might the more securely pursue the objects of her ambition ; and that, under the disguise of peace, she might extend and fortify her possessions, in a part of the world where her arms, in time of open war, had

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always, till then, been unsuccessful : for this purpose she had artfully contrived, that the American rights should not be determined by that treaty, but be left to the consideration of commissaries, to whose decisions she never meant to pay any regard.—Canada was her vulnerable part : this, therefore, she resolved first to strengthen, and then to enter again, with more confidence, into war. While we were employed in debating our rights, she took more effectual means to end the contest in her favour ; she sent frequent supplies to America ; she seized and fortified the passes and navigable rivers of that country, drove the English from their possessions, and built forts on the dominions of Great Britain. When the design was thus far advanced, England saw it in all its terrors, and with spirit determined to support her just rights : though forsaken now, in her distress, by those allies who owe their independency to her protection, she feared not, in such a cause, to stand alone against all the efforts of France ; she sent forth her naval strength, but the enemy soon rendered the attempts of that ineffectual, by resolving never to try its force. In what manner was she now to employ it ? One only object remained worthy of its attention, and that was to destroy the trade of the enemy, and to intercept the succours which she sent to her dominions in America. Though this would not crush at once the evil, it would stop at least the sources that fed it, and might in the end contribute to induce the enemy to consent to a reasonable peace.

France endeavoured again to obviate this stroke by

her policy. She took off the tax of 50 sous per ton, which she always chuses to keep on foreign freightage; she opened even her American ports, and admitted other countries to that choice part of her commerce, which, by her maritime regulations, she hath at other times so strictly reserved to herself. Neutral nations seized at once on the advantage, and opened to the enemy new channels for the conveyance of those riches, by which the war was to be nursed and protracted. Under the banner of friendship, they thus served the cause of the adversary, whose wealth, secured by that protection, would have passed safe and unmolested through our fleets; if Britain, again raising her spirit, had not resolved that by this means her naval power should not be rendered useless, and seized on the property of the enemy which she found on board neutral ships. It is well known, however, that her conduct in this respect hath not been universally approved, and that some neutral nations think they have a right to carry in their vessels unmolested the property of our adversaries. As I here differ with them in sentiment, this is the point on which I intend to discourse.

Great and wise governments have always been jealous of national glory. It is an active principle, which, properly cultivated, operates in virtuous actions, through every member of the state; to preserve this, therefore, in its purity, is the duty of every one who loves his country. Can it then be wondered, that the native of a kingdom, always celebrated for its public spirit, and its upright faith, at a time when

these are called in doubt, should interest himself in its defence? No indecent charges shall here be urged against other countries; it is meant only to vindicate the honour of our own. It is to be lamented that the necessity of affairs should at such a season have given occasion to this dispute, particularly with that ancient ally of England who hath so often fought with her under the same banner, in support of the just rights and privileges of mankind. The zeal of any government to encourage the industry of its people, is what a British pen can never disapprove; the principle is noble, and merits even our applause, I only mean to shew that the present object of it is not just.

I shall therefore examine the right which neutral powers claim in this respect, first, according to the law of nations, that is, according to those principles of natural law which are applicable to the conduct of nations, such as are approved by the ablest writers, and practised by states the most refined. I shall then consider the alterations which have been made in this right by those treaties which have been superadded to the law of nations, and which communities, for their mutual benefit, have established among themselves.

The right of protection, then, must have its foundation in some law, and when considered in relation to any particular case, it must be founded on that law by which the interests of the parties concerned are generally determined, and which hath force in that place where the right of protection is claimed. Thus, in the present case, if neutral nations have any

right to protect the property of the enemy, it must take its rise from those laws which are the established rules of conduct between nations, and particularly on that element where this right is supposed to be exerted. No civil or municipal institutions, and much less the privileges arising from them, can here take place; they have no force but under the dominion of those who agreed to their establishment. The question then is, How far, according to the law of nations, doth this right of protection extend? To answer this clearly, we must observe, that governments can have succeeded to no other rights but such as their respective members enjoyed in a state of individuality; and that one nation is now to another as it were in a state of nature, that is, in the same condition in which man was to man before they entered into society; the right, therefore, of protection, which individuals would have enjoyed in such a situation, is the same which governments can claim at present. An individual, then, in a state of nature, would have had an undoubted right to protect his own person and property against any attack; but if I am engaged in contention with another, would he in such case have had a right to protect him against me? most certainly not, since he would thereby deprive me of a right which the law of nature, for my own security, would in this case give me, of seizing the property of this my enemy, and destroying his person. If he thought my conduct manifestly injurious, so as to call for general resentment, he would on that account become my enemy himself; but as long as he calls himself a

neuter, to act in this manner against me, would be no less absurd than unjust: such, therefore, and no more, is the right of protection which governments enjoy at present in those places to which their own dominion doth not extend; they have succeeded to the rights only of their respective members, and by consequence these alone they can protect.

But, it will be asked, from whence then arises the right which governments always enjoy of protecting the property of the enemy within the precincts of their own country? It is a consequence of the right of dominion; unless, therefore, their dominion extends over the ocean, the right of protection cannot there take place. Dominion gives a right of enacting laws, of establishing new jurisdictions, and of making all (whether its own subjects or those of other countries) submit to these, who come within the pale of its power; here, then, the trial, which the law of nations gives, is, as it were, superseded, and any proceedings upon it would of course be unjust; but as soon as you are out of the verge of this particular jurisdiction, the laws thereof, and the privileges which attend them, cease at once, and the general laws of nations again have their force. Here the property even of an ally hath no other protection than what these laws allow it; being joined, therefore, to the goods of an enemy, it cannot communicate its protection to these, since the same law, which gives security to the first, allows you to seize and destroy the latter. These reasonings are exemplified by a common fact;—within the precincts of the dominion of any

government you are not at liberty to search the ships of any country; but is not this liberty universally and immemorially practised over all on the main sea? and wherefore is this search made, but that, according to the law of nations, all are here answerable for what they may convey.

There is something analogous to this in most civil governments. Few countries are without some places which enjoy a right of protection from the general laws of the state, such as palaces, houses of religion, and the like; and this right generally arises from some pretence to an exclusive jurisdiction. As long, therefore, as any particular property remains within the verge of these, however justly it may be the object of the law, it is not subject to the power of it. But suppose it conveyed from hence into the public roads, beyond the precincts of this particular palace or convent; the protection it received would vanish at once, and the general laws of the community would fully then have force upon it. Thus the protection which governments can give within their dominions extends not to the sea; the ocean is the public road of the universe, the law of which is the law of nations, and all that pass thereon are subject to it without either privilege or exemption.

If this manner of reasoning should not clearly establish my point, I can appeal in support of it to the ablest writers on public law, who will be found to have decided the question in my favour.

And, first, I will produce the testimony of that learned native of Delft who wrote so nobly on the

freedom of navigation to serve his ungrateful country. In one of the passages which are now before me, it is remarkable, how much he labours to give the greatest extent to the rights of commerce, and yet, with all his laudable bias to this favourite point, he is clearly of opinion that the ship of a neutral nation cannot protect the property of an enemy; he manifestly implies,* that the vessels even of allies are subject to condemnation, on account of the enemy's property, with which they are laden, when it appears that this property was put on board them with the consent of the owners of the vessels, but not otherwise. His words are, "*neque amicorum naves in prædam veniunt ob res hostiles, nisi consensu id factum sit dominorum navis;*" and producing several authorities in confirmation of this opinion, he afterwards adds, "*Alioqui res ipsæ solæ in prædam veniunt;*" but if the enemy's property should be found laden on board a neutral vessel, without the connivance of the owner, in such a case, "that property alone is lawful prize." And speaking again, in another place, on this point, he says, that if the wrong done me by my enemy is manifestly unjust, and that any one, by affording him succours, should encourage him in his enmity against me, "*jam non tantum civiliter tenebitur de damno, sed et criminaliter, ut IS, qui judici imminenti reum manifestum eximit.*"† A fine and animated manner of expression, which shews how clear the opinion of this great author was upon the question.

* Grotius de Jure Belli et Pacis, lib. 3. c. 6. sec. 6. in notis.

† Ibid. lib. 3. cap. 1. sec. 4.

To the testimony of Grotius I shall add that of Bynkershoek, a native also of Holland, and whose sentiments in point of maritime jurisprudence Barbeyrac often prefers even to those of the former; and what makes his opinion at this time of great importance, is, that he wrote principally for the use of the courts and states of the United Provinces, and generally confirms what he advances, by their judgments and resolutions. He speaks expressly in favour of my point. "*Ratione consultâ,*" * says he, "*non sum qui videam, cur non liceret capere res hostiles, quamvis in navi amicâ repertas, id enim capio, quod hostium est, quodque jure belli victori cedit.*" "Upon attending to all the reasons which occur to me on this point, I cannot discover why it should not be lawful to take the property of an enemy, though found on board the ship of a friend; for I take that only which belongs to the enemy, and which, by the rules of war, is always ceded to the captor." He then assigns this reason also for his opinion, that as it is lawful to stop on the ocean any vessel, though she carry the colours of a neutral nation, and to examine, by her papers, to whom she really belongs; and in case she appear to be the property of an enemy, to seize her as lawful prize; so he can see no cause why this rule should not extend to the effects which any ship may have on board; and, if the goods of an enemy should lie there concealed, why they also by the right of war should not be taken and condemned: he even declares it to be his opinion, that the owner of the neutral

* Bynkershoek *Questionum Juris Publici*, lib. I. cap. 14.

vessel should in such a case lose the price of the freight; a severity, which the English Courts of Admiralty never practise, where some particular circumstance doth not require it.

I shall add to these the opinion of Albericus Gentilis, esteemed the ablest writer on national jurisprudence, till Grotius bore the palm from him; and his fame in this respect was so great, that Philip III. of Spain appointed him perpetual advocate for his subjects in all causes which they might have depending in the courts of England. This author states a case, where the Tuscans had taken the effects of the Turks, at that time their enemies, which they found on board some English ships; and he determines, that the Turkish goods are legal prize, but that the captor must pay the freight to the English. "Transseunt res," * says he, "cum suâ causâ, victor succedit in locum victi, tenetur etruscus pro toto nanlo." The property of the enemy passeth to the captor, but all its consequences attend it; the goods justly belong to him, but he must pay to the freighter all, which the enemy would have paid, to whose right he hath in every respect succeeded.

To enter particularly into the sentiments of any more writers on this subject, would be equally tedious and unnecessary; it will be sufficient to mention the names alone of such others as are in favour of the question.—Among these I find Heineccius,† no less

* Albericus Gentilis De Advocations Hispanica, lib. i. cap. 26.

† Heineccius de Navibus ob Vecturam Veterum Mercium Commissis, cap. 2. sect. 9.

famed for his knowledge of laws, than for his learning in what are the best expositors of laws, the antiquities of governments,—Zouch,* who for many years presided in the Court of Admiralty of this kingdom,—Voet,† —Zuarius‡,—and Loccenius,§ all of them writers of reputation, and whose opinions are universally relied on by all who treat on public jurisprudence.

I might indeed have wholly omitted the sentiments of these learned individuals, since we shall find, that great communities themselves have confirmed our opinion both by their laws and by their practice. It will not be proper on this occasion to look far back into the early annals of the European states. When the government of these were yet in their infancy, the advantages of commerce were but little understood, and of course the rights of it were not sufficiently regarded; war was then too much the season of rapine, and they, who entered into it, meant less to conquer than to plunder. As soon, however, as some better order began to be introduced into these affairs, it then became usual for each party at the commencement of the war to publish a declaration, wherein he specified what kind of trade he would permit neutral nations to carry on with his enemy; and these regulations were sometimes attended to, and sometimes not, either as the interest of the party-neutral inclined him to submit to the restraint, or as the power of the

* Zouch de *Judicio Inter Gentes*, pars 2. sec. 8. cap. 6.

† Voet de *Jure Militari*, cap. 5, n. 21.

‡ Zuarius de *Usu Maris*, consil. 11. n. 6.

§ Loccenius de *Jure Maritimo*, lib. 2. cap. 4. n. 11.

party-belligerent enabled him to enforce the execution of it. True it is, that the prohibitions, which these declarations contain, are various, according to the sentiments of the different governments which made them; and, on that account, they are perhaps too unsteady a foundation on which to establish a right; there plainly, however, follows from hence one powerful inference in our favour, that not one can be found amid all this variety, which ever permitted nations to protect the property of the enemy: The branch of freightage they all agree unanimously to prohibit.

The free states of Italy cultivated first the interests of commerce; before any vessel had as yet passed the Cape of Good Hope, and a shorter passage had been discovered to the East Indies, Venice and Genoa drove the principal trade of the world, and dispersed the manufactures of Asia to the different parts of Europe; it naturally followed, that these two commercial republics soonest understood and defined the just rights of navigation; their maritime constitutions still remain collected in the *Consolato del Mare*; and the reputation of these were so great, that as the laws of Rhodes were once to the Romans, and the laws of Oleron to the western parts of Europe, so these Italian laws became of force universally to all the nations which bordered on the Mediterranean Sea: These have determined the point expressly in our favour; in one of them it is asserted, "Se la nave o navilio, che pigliato sarà, fusse di

amici, e le mercantie, che lui porterá, saranno d'inimici, lo ammiraglio della nave o del navilio armata, può forzare & constringere quel patrone di quelle nave o di quel navilio, che lui pigliato haverá, che lui conquella sua nave gli debba portare, quello, che di suoi inimici sará;" " If the ship or vessel, which shall be taken, belong to an ally, and the merchandise, which she has on board, belong to an enemy, the captain of the armed ship may force or constrain the master of the ship or vessel, which he has taken, to carry into some port for his account, the effects of his enemy which are on board;" and it is afterwards added that the master of the vessel must be paid for the freightage of the goods of the enemy.* And such was not only the constant purport of their laws; but the practice of their governments was always conformable to it. Their historian† tells us, that, in the war between the Venetians and the Genoese, the ships of Grecians, who were neutrals, were always searched, and the enemies, who lay hid in them, were taken out, and made prisoners.

It is unnecessary to dwell longer in giving a further detail of the conduct of every nation in this respect; I will therefore confine myself to those who are most concerned in the present dispute; and will shew, that as England claims no more at present, than what she always enjoyed, so France and Holland have constantly supported the same opinion, whenever their interest required it.

* Il Consolato del Mare, c. 273.

† Niceph. Gregoras, lib. 9.

It was in the reign of the first Edward, a prince who thoroughly understood the rights of his crown, and had a spirit equal to the support of them, that Philip the Fair of France, being engaged in a war with the Duke of Burgundy, the French admiral took the ships of several neutral nations, which were passing through the British Channel into the ports of Flanders: great complaints were made on this head, and commissioners were appointed to examine into the conduct of the admiral; a libel was there presented against him by almost every trading nation of Europe; the record * of this is still remaining; and if neutral nations had at that time pretended to enjoy the right of protecting the property of the enemy, and that the effects, which they carried on board their ships, could in no case, except in that of contraband, be made lawful prize; we might well expect that this right would here have been claimed and asserted: fear could not in this case have prevented it; for all the world, except France, was on one side of the question; but the record contains no such claim: the injured demand their right on a different principle, because the ships were taken on those seas, "where the kings of England (saith the record) have, time out of mind, been in peaceable possession of the sovereign lordship, with power of appointing laws, of prohibiting the use of arms, of giving protection, as occasion should require, and appointing all things necessary for the maintaining peace, justice, and equity, among

* Sir Edward Coke's Fourth Inst. chap. 22.

all, as well foreigners as natives, who navigate those seas."* Here, then, the right of protection is placed on that basis, on which alone it can properly be founded, —the right of dominion; no other pretence is offered; and if I may be allowed to sum up the evidence, as their names are written in the record: "Genuæ, Cæloigne, Espagne, Alemaine, Seland, Hoyland, Frise, Denmarch, Norway, et plusours aultres lieux del empier," all join here in asserting the principle, on which I first established my argument.

The annals of Edward III. afford still other facts in favour of my opinion: this prince added to his military accomplishments great sagacity in the science of laws, and uncommon attention to the commercial interests of his kingdoms. In the second year of his reign he confirmed the charter of privileges, which some of his predecessors had before granted to foreign merchants, and particularly to those of the Hanse Towns,† who were at that time the greatest freighters of the western parts of Europe: this instrument may well be considered as a sort of maritime regulation, by which England meant to direct her conduct at that time in affairs of this nature: In this, liberty of navigation is fully confirmed; foreign merchants are allowed to carry their goods, whether purchased within the kingdom, or without, "Quocunque voluerint;" but with this exception, "præterquam ad terras notiorum et manifestorum hostium regni nostri;"‡

* See all this more fully stated in the record.

† Rymer's *Fœdera*, tom. 4. p. 361.

‡ Ibid. p. 516.

and some offences being afterwards committed against this charter in the succeeding wars, it was again renewed in the same manner in the sixth year of this reign. In both these instances the exception is express, that no trade whatsoever should be permitted with the enemy; but this good king, perhaps through a principle of justice, and his ardent love to commerce, seems to have practised this right with more moderation, that is, in much the same manner, in which the government of England claims it at present: for in his wars with Scotland, some ships of Great Yarmouth having taken several vessels belonging to the burgesses of the town of Bruges, "*Prædentes bona in iisdem existentia fuisse hominum de Scotiâ;*" he directed his precept to the sheriff of Norfolk,* commanding him to set at liberty, and to cause full restitution to be made of the ships, and of such of the goods as belonged to the merchants of Bruges; and that he should detain only that part of the cargo, which was the property of the Scotch, his enemies. We find also, that when Queen Elizabeth was engaged in war with Spain, she seized several vessels of the Hanse Towns, which were entering into the port of Lisbon; and she urged among other arguments the charter above mentioned in defence of her conduct; she was in this respect so satisfied of the justice of her cause, that the threats of the German Empire and other neutral powers could not oblige her to relinquish her right; and though she

* Rymer's *Fœdets*, tom. p. 328.

might perhaps on this occasion give too great extent to it, yet it is remarkable, that Monsieur de Thou, who was himself a great lawyer, and had long sat in the first court of judicature in France, even, when he blames the conduct of the queen in this affair, passeth his censure upon it not as defective in justice, but only in policy : " In tam alieno tempore," says he,* " rerum prudentiores existimabant, imprudenter factum esse a reginâ et ab Anglis."

We have as yet mentioned the conduct alone of those English Princes, who knew how to assert their rights, and who ruled their people with glory; but we shall find that even under a weaker government, and in a later period, this right of seizing the property of the enemy found on board neutral ships hath been fully claimed and practised : When Villiers Duke of Buckingham presided over the naval affairs of England, and to gratify his own private resentments had engaged his country in a war against Spain, the British fleet under Pennington took several French vessels, to the number of between thirty and forty, which had Spanish effects on board; they were brought into the ports of England, and our Courts of Admiralty condemned the goods of the Spaniards, as legal prize, but ordered the vessels of the French to be released, and the freightage to be paid to them. This conduct was avowed by the court of England, and a full representation of it transmitted by the Lord High Admiral to the administration of France: about fifteen

* Thuanus, lib. 96.

years after this, when the French themselves were at war with Spain, the navy of France took a great many English ships, which were laden with the property of Spaniards; and their Courts of Admiralty condemned not only the enemy's effects, but the English ships which conveyed them: the Earl of Leicester, then ambassador in France, made great complaints on this head; he was answered that the English always acted in the same manner; and this reply being transmitted to the Earl of Northumberland, at that time Lord High Admiral, he consulted upon it Sir Henry Martin, the best English civilian of that age, and the most versed in maritime jurisdiction; and by his advice he returned to Lord Leicester the following answer, which at the same time proves the constant opinion, and shews the moderation of the British Admiralty on this point: "That," says he,* "which is alledged by the French to be practised in our Court of Admiralty, is absolutely denied; and that neither the law nor practice hath ever been here to confiscate the goods of friends for having enemies' goods among them: we are so far from doing any such act of injustice, as when in time of war we have met with any such prizes, the freight hath always been paid by the taker for those enemies' goods that he took, and those that belonged unto friends, were duly restored to them."

Thus much may suffice to shew the conduct of the

* The Sidney papers, Algernon Earl of Northumberland to Robert Earl of Leicester, Nov. 5. 1640.

people of England. History will also prove to us that Holland hath always exerted the same right : At the beginning almost of that war, which the United Provinces sustained in support of their liberties, and even before their sovereignty was as yet fully established, the people of Zealand scrupled not to carry into their ports all such neutral vessels * as were conveying the effects of the enemy, under pretended names, from Flanders into Spain ; and the Courts of Admiralty of that province adjudged the Spanish property to be legal prize ; and though they released the neutral ships, they made them no compensation for the freightage ; among these there were some English vessels, and Queen Elizabeth, angry that so young a State, and one which had placed itself under her protection, should in any degree interrupt the commerce of her people, at first shewed the effects of her resentment, by seizing their ships and imprisoning their merchants. The Zealanders upon this made reprisals ; several English vessels were detained, and their commanders put under confinement. To endeavour at some settlement of this affair, the Queen sent over to Holland Mr Robert Beal, her secretary ; and for the same purpose, the Prince of Orange despatched a minister to London. By these means, the dispute at last was compromised ; the ships and the prisoners were on both sides released ; but the Queen never obtained the restitution of the enemy's goods, which were taken on board the vessels of her subjects. This

* *Historia Belgica Metereni*, liu. v. Cambden, anno 1575. Zouch. de *Judicio inter Gentia*, pars 2, § 8. c. 6.

fact is worthy of observation, not only as it relates to the conduct of Holland, but as it shews how far a Princess thought herself obliged in equity to yield, whom historians have always described as positive in her temper, and, whenever her right was concerned, of a very tenacious disposition.

Holland, whenever she was engaged in war, almost constantly pursued the same conduct; she sometimes even prohibited the commerce of neutral nations beyond all justice and moderation. In the year 1599,* when the government of Spain first prohibited the subjects of the United Provinces from trading to the ports of that kingdom, a liberty which had unaccountably been allowed them from the commencement of their revolt to that period, the States-General, in revenge, published a placart, forbidding the people of all nations to carry any kind of merchandise into Spain. The words of Grotius, in the relation he has given of this affair in his *Belgic history*, are very full and express: "Per edictum (says he) vetant populos quoscunque ullos commeatus resve alias in Hispaniam ferre; si qui secus faxint, ut hostibus faventes vice hostium futuros." This placart they publicly notified to all kings and nations, for this reason, as the historian expresses it, "Ne quis inscitiam excusaret." The consequences of this notification deserve also our attention; the historian continues, "Paruit rex Galliae, ac si quis suorum sex intra menses in Hispaniam navigaret, professus est privatum periculum fore." Henry IV., at that time king of France,

* Grotii *Historiarum*, lib. viii.

though delivered then from all his distresses, and arrived at the summit of all his power, scrupled not to submit to this placart, and gave up the interests of all his subjects who should attempt, within six months, to transgress it. The historian concludes, "*Cæteri (reges) silentio transisere*;" the other powers of Europe made no clamorous complaints against this measure of the States; in silence they passed it over. How unlike was this conduct to that of Holland at present! Charles II., in a letter to the States-General, of October 4. 1666, charges them also with a remarkable violence of the same nature. Being at war with some Asiatic princes in the East Indies, they seized all the ships and goods of the English merchants which were trading to those countries; and the Dutch governors scrupled not openly to profess in their declarations, "*Qu' ayant depuis peu annoncé la guerre aux princes, avec qui ils avoient dessein de trafiquer, cette guerre devoit par consequent leur interdire tout commerce avec les dits princes.*" *

I omit citing many other instances of their conduct in this particular, lest I should appear tedious, especially as one fact still remains, which is alone sufficient to evince the opinion of Holland on this point; and which I the rather chuse to mention, as it happened even after the Dutch had by their negotiations endeavoured to establish, as a general maxim among nations, that the goods of an enemy under a neutral banner should pass unmolested. At the commencement of that war which broke out immediately

* Charles II.'s Letter to the States-General, Oct. 4. 1666.

after the Revolution, when the first grand alliance was formed against France, Holland entered into a convention * with England, to prohibit totally the commerce of neutral powers with the enemy. In the preamble of this, they assign publicly their reasons for it. They say, "that having declared war against the most Christian king, it behoves them to do as much damage as possible to the common enemy, in order to bring him to agree to such conditions as may restore the repose of Christendom; and that, for this end, it was necessary to interrupt all trade and commerce with the subjects of the said king; and that to effect this, they had ordered their fleets to block up all the ports and havens of France;" and afterwards, in the second and third articles of this convention, it is agreed, "That they would take any vessel, whatever king or state it may belong to, that shall be found sailing into or out of the ports of France, and condemn both vessel and merchandise as legal prize; and that this resolution should be notified to all neutral States." Such, therefore, was at this time the avowed opinion of Holland, and England was induced to join with her in this convention, exceeding thereby those bounds of equity and moderation which she had almost always practised in this point before, and which she will, I hope, most faithfully observe for the future. The northern crowns, who were particularly affected by this prohibition, contended very vehemently against it. In answer to their objections, were urged the circumstances of

* Convention concluded at London, August 22, 1689.

affairs, the danger of Europe, and the mighty strength of that ambitious power, which, if some extraordinary effort was not made, would bring mankind under its subjection. It is remarkable, that Puffendorf,* who owed his fortune and employments to one of these northern crowns, was of opinion in this case against them, and thought that the convention might be justified. It is not meant here, at present, either to censure or to commend it; circumstances may sometimes make a thing to be lawful, which, considered by itself, would be unjust; but such times are truly unhappy, when necessity must be pleaded in support of a right.

It remains that I now inquire into the conduct of France. My proofs† on this head will be clear. They are indeed nothing less than the public laws of that kingdom. By some very old French ordinances it is declared, not only that the enemy's goods shall be adjudged to be lawful prize, but that the neutral vessel which carries them, or the property of any ally which shall be joined with them, shall be joined also in the condemnation. It has always been a maxim of the courts of maritime jurisdiction of France, "*Que la robe d'ami confisque celle d'ennemie*;" and so clear were they in this opinion, that the laws which established it, were repeatedly enacted in the reigns of two of their kings, Francis I. and Henry III.

* See a letter of Puffendorf in Jo. Groningii Bibliotheca Universalis Librorum Juridicorum, p. 105.

† See the ordinances of France, Francis I. 1543, c. 4, 2 Henry III. 1584, c. 69.

That the practice of the French marine hath in this particular been conformable to their laws, may be proved by a thousand instances. I shall select one upon the authority of a minister of Holland, which will shew what their conduct was in that Spanish war which preceded the Pyrenean treaty. In a letter of Monsieur Boreel from Paris, to Monsieur de Witt, December 26. 1653, "On tient ici," says he, "pour maxime favorable a leurs interests, que leurs ennemis ne doivent recevoir ni defense ni service des sujets de leur H. H. P. P. en transportant de chez eux quelques marchandises ou commodités ou d'autres, qui seroient pour le compte de l'ennemie, sous peine, au cas qu'ils les trouvent dans les batiments Hollandois, qu'ils seront de bonne prise, et qu'on les puisse enlever des dits batiments et les confisquer."

But it is not the old laws of France alone that thus determine this point; their more modern regulations confirm it. One of the last and greatest services which Colbert performed to his country, was the establishment of a system of naval laws, the wisest and best digested which the spirit of legislation hath ever yet produced. It is observable, that although the ordinance which contains these laws was registered in 1681, several years subsequent to those treaties, by which France agreed that neutral vessels should protect the property of an enemy, yet it pays no attention to them, and establishes the contrary doctrine. This proves how little regard France always shewed to that article. The words of the ordinance expressly condemn not only the enemy's goods, but the neu-

tral ship which carries them. "All ships (saith the law*) which have goods on board, that belong to the enemy, shall be good prize." These laws continue still to be observed in France. At the commencement even of the present war, the French government delivered to Mons. Berkenrode, the Dutch minister at Paris, a memorial, "Contenant les precautions" (as the title expresses it) "que doivent prendre les negociants Hollandois conformement à l'ordinance de la marine et aux reglements de la France, pour eviter que leurs navires soient declarés de bonne prise." In the preamble of this, the words of the above mentioned law are repeated, and the same rule of condemnation is declared to be still in force; and the seventh article of the Memorial lays even a greater restriction on neutral commerce, than the ordinance of 1681 seems to have intended. It is there said, "Si les navires Hollandois transportoient des marchandises du cru ou fabrique des ennemis de la France, ces marchandises seroient de bonne prise, mais le corps du navire seroit relaché." By this memorial, therefore, every thing which is either of the growth or manufacture of the enemy's country, when found on board the ships of Holland, though the property does not appear to belong to the enemy, is declared to be good prize. The same restriction evidently extends to all other neutral traders.† Is not this almost a total prohibition to neutral powers, of any commerce with the enemies of France?

* Naval ordinance of 1681, tit. 9, art. 7.

† See the preamble of the Memorial.

Let us now look back on what has been said. The deduction which I have made hath, I fear, been tedious ; but the importance of the subject by force led me into it. I flatter myself, however, it has appeared that reason, authority, and practice all join to support the cause I defend. By reason, I have endeavoured to trace out those principles on which this right of capture is founded, and to give that weight to my own sentiments, which of themselves they would not deserve ; I have added the authorities of the ablest writers on this subject ; and lastly, I have entered largely into the conduct of nations, that I might not only lay thereby a broader foundation for this right, but that I might the more fully illustrate, by the extravagant pretensions of other States in this respect, the present moderation of England. No age or country ever gave a greater extent to the commerce of neutral nations, and we have seen that most in the same circumstances have confined it within much narrower bounds.

There remains still, however, one objection to what has been said, and that of so plausible a cast, that I cannot leave it without an answer. It has been pretended that the liberty of navigation is destroyed by means of these captures, and that a violent restraint hath been put on the lawful industry of mankind. The liberty of navigation, in fair construction, can mean no more than the right of carrying to any mart unmolested the product or manufacture of one's own country or labour, and bringing back whatever may be received in return for it ; but can it be lawful that

you should extend this right to my detriment ; and when it was meant only for your own advantage, that you should exert it in the cause of my enemy ? Each man hath a right to perform certain actions ; but if the destruction of another should follow from them, would not this be a just reason of restraint ? The rights of mankind admit of different degrees, and whenever two of these come into competition, the lowest in the scale must always give place to the higher ; but you will say, that you have a profit in doing this ; if, however, it is otherwise unjust, will that consideration convert it into a right ? If you mean that your own commerce ought to be free, the right is not in the least denied you ; but if, under this disguise, you intend to convey freedom to the commerce of the enemy, can policy or justice require it ? What can neutral nations desire more, than to remain amid the ravages of war in the same happy circumstances which the tranquillity of peace would have afforded them ? But can any right from hence arise, that you should take occasion from the war itself to constitute a new species of traffic, which in peace you never enjoyed, and which the necessity of one party is obliged to grant you, to the detriment, perhaps destruction, of the other ? If this right was admitted, it would become the interest of all commercial states to promote dissension among their neighbours ; the quarrels of others would be a harvest to themselves ; and from the contentions of others they would gather wealth and power. But, after all, the rights of commerce are not the real cause of this dis-

pute, and liberty of navigation is only a fair pretence, which ambition hath thought fit to hold forth, to interest the trading states of the world in its cause, and to draw down their indignation upon England; this is not the first time that a deceit like this hath been practised; when the power of Spain was at its greatest height, and Elizabeth wisely contended against the mighty designs of Philip, the capture of some vessels belonging to the Hanse Towns gave occasion to a contest of this nature; but they were the emissaries of Philip, who at that time blew up the flame, and, pretending a love to commerce, promoted the ambitious projects of their master; the Queen of England published an apology for her conduct, and this was answered in a virulent and abusive manner, not from any of the Hanse Towns, but from Antwerp, a city under the dominion of Spain, and it seemed to be written (says Thuanus) "*per hominem Philippi partibus addictum, non tam pro libertate navigationis et in Germanorum causâ defendendâ, quam in Hispanorum gratiam, et ad reginæ nomen proscribendum:*" the interests of commerce were the pretended cause of this dispute, but the real cause was the interest of Philip; the pretended design was to preserve the liberty of navigation, but the real end was to serve the cause of ambition, and to destroy the government of England. It is not necessary to enter into a comparison of this case with our own at present, the resemblance is too obvious.

Here, then, we might rest our cause, if the law of nations was the only foundation, on which this point

could be argued ; but the bands of equity having been found alone too weak to hold the nations of the world to their duty ; their interest taught them to renew and confirm these by contracts among themselves, and frequently to stipulate in addition certain mutual advantages, greater than what the law of nations singly would have allowed them : Let us, consider, therefore, what influence these may have in the present case ; whatever they are, I mean to give them all the force which reason or justice can require : if our ancestors have betrayed the interest of their country in granting any privileges of this nature, we, who have succeeded to their rights, are bound to abide by their concessions ; it is the happiness of great kingdoms, whose power is equal to the support of their own independency, to be able to set up to those principles which necessity hath often forced little states unhappily to abandon : Those scandalous maxims of policy which have brought disgrace both on the name and the profession, took their rise from the conduct of the little principalities of Italy, when, distressed by their successive invasions, which France and Spain made upon them, they broke or conformed to their leagues as their own security obliged them ; and their refined shifts and evasions, formed into systems by the able doctors of their councils, have composed that science which the world hath called politics, a science of fraud and deceit ; by which kingdoms are taught to be governed on principles, which individuals would be ashamed to profess ; as if there could be no morality among nations, and that mankind, being formed

into civil societies, and collectively considered, were set free from all rules of honour and virtue:—Maxims like these I mean to avoid; to follow them would bring dishonour on my country.

It must then be allowed, that there are articles in some of our maritime treaties with other nations which have stipulated, that "All which shall be found on board the vessels belonging to the subjects of those countries shall be accounted clear and free, although the whole lading or any part thereof shall by just title of property, belong to the enemies of Great Britain;" such an article is inserted in those maritime treaties which Great Britain hath made with France* and Holland:† It has also by some been supposed, that the subjects of the crown of Spain have a right to enjoy a privilege of the same nature; certain, however, it is, that no such article as that above mentioned, can be found in the maritime treaties between that country and Great Britain, and particularly in that of Madrid of 1667, which is the principal maritime treaty at present in force between the two kingdoms; but as a mistake in this respect may possibly have arisen from a false interpretation of two articles in the treaty of Madrid, which declare, in general‡ that "the subjects of the two crowns respectively shall have liberty to traffic throughout all countries, cultivating peace, amity, or neutrality with either of them,

* Treaty between Great Britain and France, 24th February 1677. Art. 8.

† Treaty between Great Britain and Holland, 1st December 1674. Art. 8.

‡ Treaty of Madrid, 1667. Arts. 21 and 22.

and that the said liberty shall in no wise be interrupted by any hinderance or disturbance whatsoever, by reason of any hostility, which may be between either of the said crowns and any other kingdoms ;” and as the liberty here stipulated may by some erroneously be imagined to extend so far, as to grant a right to carry freely the effects of the enemy ; it will be proper here to remove this error, and to stop a little to shew the true design and meaning of these articles : This explanation is at present the more necessary, as it will tend to illustrate the true sense of other stipulations of precisely the same purport, which may be found in several of our commercial treaties, and particularly in the first and second articles of that with Holland, of December 11. 1674 ; a wrong interpretation of which hath already given occasion to great confusion and much false reasoning upon the present question.

It cannot, I think, be doubted, that, according to those principles of natural equity, which constitute the law of nations, the people of every country must always have a right to trade in general to the ports of any state, though it may happen to be engaged in war with another, provided it be with their own merchandise, or on their own account ; and that, under this pretence, they do not attempt to screen from one party the effects of the other ; and, on condition also that they carry not to either of them any implements of war, or whatever else, according to the nature of their respective situations, or the circumstances of the case, may be necessary to them for their defence. As

clear as this point may be, it has sufficiently appeared, by the facts deduced above, that, amid the irregularities of war, the rules of equity, in this respect, were not always enough regarded; and that many governments, in time of war, have often most licentiously disturbed, and sometimes prohibited *totally*, the commerce of neutral nations with their enemies. About the middle, therefore, of the last century, when the commercial regulations which at present subsist between the European powers first began to be formed, it became absolutely necessary to call back the attention of governments to those principles of natural right, from whence they had strayed; and to fix and determine, by the articles of their respective treaties, what was the ancient and acknowledged rule of the law of nations; for this purpose, the negociators of that age, inserted in their commercial regulations, articles* to the same purport as those above mentioned, asserting, in general, a right to trade unmolested with the enemies of each other; and these they usually placed among those articles of general import, which are commonly first laid down in treaties, as the basis on which the subsequent stipulations are founded; the rule, therefore, of equity, in this case, being thus defined, they came afterwards to erect upon it such privileges as that rule alone would not have allow-

* Treaty of commerce between France and Holland, 1662, Arts. 26 and 27. Treaty of commerce between England and Holland, Feb. 17. 1668, Arts. 1 and 2. Treaty of commerce between England and Holland, December 1. 1674, Arts. 1 and 2. Treaty of commerce between England and France, February 24. 1677, Arts. 1 and 2.

ed them; and, among the rest, some nations, as their interest prompted them, granted mutually to each other, in new and distinct articles, by express stipulations, the right of carrying freely the property of their respective enemies. These last articles, therefore, must be considered as wholly distinct in their nature from those before mentioned, and in their meaning totally different; the first are in affirmance of an old rule, the last create a new privilege;—those only confirm a right which was determined by the law of nations before; these make an exception to that law:—if they both imply the same sense, why are both so often found inserted in the same treaties? * Would the repetition in such a case have been necessary? and to what purpose were new articles added to grant a privilege which was already included in the terms of the preceding? The same exception also of contraband goods is again repeated in the last case as well as in the former, and shews clearly that the property, which is the object of the exception in the different articles, must likewise in its nature be different; the one relates to the ordinary means of traffic, which every nation enjoys, of its own produce or property, the other to the property of the enemy.

But this point is still more clearly explained by the assistance of other treaties, where articles of the same force as the 21st and 22d of the treaty of Madrid are inserted, and the intention of them fully made appear from the subsequent parts of the same treaties. In the treaty of commerce between Great Britain and

* See the Treaties mentioned in the last note.

Sweden, of the 21st of October 1661, it is stipulated, by the 11th article, "that it is by no means to be understood that the subjects of one confederate, who is not a party in a war, shall be restrained in their liberty of trade and navigation with the enemies of the other confederate, who is involved in such war;" and then, in the article which immediately follows, the meaning of these words become manifest beyond a doubt; it is there so far from being supposed that the liberty here granted can be so interpreted as to imply a right of conveying the effects of an enemy, that the very attempt to practise it under favour of this liberty, is there called a "fraud;" and, as a "most heinous crime," it is ordered "to be most severely punished;" and to prevent any collusion in this respect, the vessels of both parties are required to be furnished with passports, "specifying of what nation the proprietors are, to whom the effects on board them belong." And in the treaty of commerce between Great Britain and Denmark, of the 11th of July 1670, a right of free trade with the enemy is stipulated in the 16th article; and afterwards, by the 20th article, the extent of this right is made apparent, and the means are prescribed for preventing the designs of those, who, under favour of this stipulation, should attempt to protect the property of the enemy, so that the illegality of such a practice being supposed, and not necessary to be expressed, the article then declares, "but lets this liberty of navigation and passage

* See the Treaty of commerce between Great Britain and Sweden, October 21. 1661. Art. 12, and passport.

for one ally, might, during a war which the other may be engaged in, by sea or land, with any other state, be of prejudice to such other ally, and the goods belonging to the enemy be fraudulently concealed, under the colourable pretence of their being in amity together; to prevent, therefore, all fraud of that sort, all ships shall be furnished with passports," the form of which is there set down, and is the same as that mentioned above. From these treaties, then, it manifestly appears, that, by a general stipulation in favour of trade with the enemy of another power, negotiators never intended to imply a right to carry freely the property of that enemy; but that to establish such a right, it is necessary to have it expressly mentioned. The 21st and 22d articles, therefore, of the treaty of Madrid, in which liberty of traffic to the countries of the enemies of Great Britain is thus in general stipulated, can therefore be explained to grant to the subjects of the crown of Spain no other right but that of carrying on, without any injurious "molestation" or "disturbance," such traffic as would otherwise be legal according to the law of nations; and by this law, in time of war, it never could be legal to protect the property of an enemy:—This privilege, however, Great Britain hath consented to grant in her commercial treaties with France and Holland; the first of these is put an end to by the present war; it remains, therefore, that I now discourse on this privilege, as it is stipulated in the British treaties with Holland; and I propose to shew that here also it is extinct. But to give a fuller view of my subject, and

to shew the origin and intention of this privilege, it will be necessary to enter a little into the history of it, and to relate the manner in which the article that grants it was first admitted into treaties.

When the United Provinces had put an end, by the treaty of Munster, to that long war which they had so nobly maintained in support of their liberties, and had happily crowned their labours by obtaining a full acknowledgment of their sovereignty; delivered from the cares of war, they wisely turned their thoughts towards the arts of peace. After long contentions among themselves, their commercial provinces at length obtained the greatest lead in the state; the interest of trade was of course the principal object of their policy, their armies were reduced, all who favoured war were no longer in credit, and the views of their ministers terminated chiefly in giving permanence to that extensive traffic which had supported them through all their distresses, and to the effects of which they principally attributed all their power and freedom.

They were indeed at this time so fully masters of almost all the commerce of the world, that they had little else to do but to preserve the possession of it; the public was, on this occasion, amused with a new species of policy, the offspring rather of avarice than ambition, desirous of keeping the rest of mankind in indolence, that it might more fully reap the fruits of its own industry, where wealth was at least the first object in view, though in the end it might be accompanied by its usual attendant, power; the arts which

they practised to preserve their fisheries, and to secure to themselves alone the trade of the Asiatic spices, are well known, and not at present to our purpose; they urged loudly the freedom of navigation till they had made it free indeed for themselves; but they have been charged with practising a different doctrine on the other side of the line to what they professed on this; and with seeking to establish an exclusive trade on those very seas, the freedom of which, from Papal grants and Spanish pretensions, the pen of their Grotius had so ably defended.

There was, however, another species of commerce which demanded their attention even more than either of the former, as it was not only a profitable branch of traffic in itself, but as it greatly tended to the security of the rest, by being the principal basis of their naval power: this was the trade of freightage, or the carrying trade, the subject of our present discourse. To understand their views in this respect, we must first take notice of the foundation on which their policy was built. They had succeeded to the Hanseatic traders, in becoming the carriers of the world; long possession had therefore furnished them with great numbers of sailors and ships, and to these they added uncommon parsimony and industry, the natural endowments of their people. These made them contented with small profits, and enabled them to carry the manufactures of each country even cheaper than the natives of it themselves. With such happy circumstances in their favour, they were sure of making this branch of trade wholly and perpetually their

own, if they could, by their negotiations and policy, establish two points.

The first was, that no nation should grant to its own natives any privileges in relation to freightage which the people of Holland should not equally enjoy, nor any exclusive right in favour of its own navigation.

And as the consequences of war would otherwise frequently interrupt the course of this traffic, they laboured to obtain, as their second point, that, whenever any other nation was engaged in war, they might then enjoy, as neutrals, the right of protecting the property of its enemies.

These points, once obtained, would open a larger field on which their industry might exert itself, than what they could otherwise of right pretend to enjoy. They were wise, however, in endeavouring to obtain it, no nation besides themselves had more shipping than what was equal to the carriage of their own produce and manufactures; they alone, therefore, could carry on the freightage of other countries, and largely reap, when their neighbours were at war, the advantages proposed.

The regency of Holland laboured with great perseverance for the establishment of these two points; their great minister, De Witt,* filled all his instructions and dispatches with every argument and motive which his active mind could invent in support of these favourite maxims; they were willing to give up any temporary advantage, to gain that which, once ac-

* Lettres de Monsieur De Witt *passim*.

quired, would prove for ages an overflowing spring of wealth. By their negotiations they earnestly laboured to induce France to comply with their desires in these respects; but here they were a long while unsuccessful. In opposition to the first point of their policy, Fouquet, while he was at the head of the French marine and finances, established the tax of 50 sous per ton on all foreign shipping, and endeavoured thereby to encourage and augment the freighting of his own country; and when, upon his disgrace, Colbert succeeded to his employments, this tax of 50 sous was almost the only part of the former's policy which the latter thought fit to adopt. It is amazing with what zeal and application the ministers of Holland contended for the abolition of it. France at length relaxed her severity on this head, not so much to favour the trade of the Dutch, as in compliance with the interests of her own. Colbert's great schemes to improve the manufactures of his country had met with better success than his plans for the augmentation of its marine; and the frequent wars in which his ambitious master involved his kingdoms, gave repeated checks to the freighting of his people. To give a larger vent to her manufactures, France found it necessary at last, therefore, to open her ports to foreign vessels, and for this purpose she took off the tax of 50 sous, by the treaty of Ryswick, as far as it related to the ships of Holland alone; and since that time, she has regulated her conduct in this particular, as the interest of her trade requires. In time of war, she always remits this tax, for she is then forced to make

use of the freightage of neutral nations, as her naval power is not equal to the protection of her own; and in time of peace, she preserves the tax or not, as the increase or diminution of her shipping requires, always giving the greatest encouragement to her own marine, which is consistent with the preservation of her manufactures.

France consented sooner to the other point of Dutch policy, and granted by treaty, to the vessels of Holland, as neutrals, the right of protecting the effects of an enemy; the laws or edicts of the French government have, however, continued always to determine against this right, and in this respect, therefore, their laws and treaties have contradicted each other; some very ancient ordinances of that kingdom (as we have shewn above) had adjudged as lawful prize in this case, not only the enemy's goods, but had joined also in the condemnation the neutral vessel which carried them; the last, however, of these points was remitted as early as 1646, by a temporary treaty then made with Holland, the neutral vessel, and all the effects of a friend found on board it, by this treaty were ordered to be spared. In a subsequent negotiation, Holland endeavoured to get this privilege farther confirmed and extended; it was one great part of Monsieur Boreel's employment in his long embassy at Paris. At last, however, in the memorable treaty of defensive alliance between Holland and France, of the 27th of April 1662, this favour was obtained in its full extent. By the 35th article* it is reciprocally

* See the Treaty in the letters of D'Estrade, tom. i.

agreed, that all which shall be found on board the vessels of either of the contracting parties, "encore que la charge ou partie d'icelle fut aux enemies, sera libre et affranchie." This article was again renewed by the marine treaty of 1578, and by several subsequent treaties. The marine treaty of the 21st December 1739, was the last in which it was inserted. This continued in force during part of the last war; but in the year 1745, the French government declared this treaty void by an act of council, and it hath never since been renewed. France, from the state and condition of her mercantile marine, could certainly reap no advantage from the insertion of this article in her own treaties; but it was wise in her to endeavour to establish this point, as a general maxim of national law, among other countries: experience hath proved to her the advantage and protection which her commerce derives from it in time of war.

But Holland most exerted her policy to bring that nation to a compliance with her maxims whom she most apprehended as her rival in trade. The scandalous ignorance of the English ministers in point of commerce, and the little attention which they paid to the interests of it during the reigns of the two first princes of the house of Stuart, gave such advantages for some time to the Dutch, that more vessels of that country were seen in the ports of our colonies than even of our own. The shipping of England from the reign of Elizabeth had been in a constant decline. We should hardly have believed that, in the reign of Charles I., England could not have furnished more

than three merchant vessels of 300 tons, if Sir Josiah Child had not affirmed it. The time at length arrived, when the government of England determined that the country should be put on an equal footing, in this respect, with our neighbours, and took the manly resolution of assuming and vindicating all the advantages resulting from our own commerce and industry to ourselves. In 1651 the Parliament of England passed into an ordinance that noble strain of commercial policy called since the Act of Navigation. Mr St John returning about this time from his embassy at the Hague, became the happy instrument which Providence made use of to accomplish this great work;* resenting highly the refusal which had there been given to his proposals, and the insults which had been offered to his person, he warmly solicited, and at length induced the Council, of State to move the Parliament to pass it; the committee sat five days in forming it; and it was at last published by order of the House with great pomp and ceremony at the Royal Exchange. The Dutch were so sensible of its consequences, that it was the principal cause of the ensuing war; they called it, in a manifesto† published soon after, "A vile act and order." At the negotiations for that peace which put an end to the war, De Witt laboured with his usual industry and acuteness to procure the abolition of it; his efforts were happily in vain; they who made the law attended with vigour to the execution of it; the effects of it were im-

* Ludlow's Memoirs, vol. i. p. 345.

† The Manifesto of Holland, 1652.

mediately apparent: this act of policy alone hath fortunately outweighed all our other follies and extravagancies; though condemned by some of our historians, and unnoticed by others, it hath proved the fertile source of all our naval power; it hath operated insensibly to our preservation, and hath been the spring from whence hath flowed the wealth and greatness of England.

Our ancestors, with equal constancy, for some time withstood the other maxim of Dutch policy, and would not permit the vessels of that Republic, in quality of neuters, to protect the property of the enemy. By a very ancient and remarkable treaty, made when the dukes of Burgundy were sovereigns of the Low Countries, the contrary opinion had long been established; in that, it was determined,* "*Quod subditi unius principum prædictorum*" (that is, Henry VII. King of England, and Philip Duke of Burgundy) "*non adducent aut adduci facient per mare, fraudulosè, vel quocunque colore, aliqua bona seu merchandizas inimicorum alterius eorundem principum.*" And it farther stipulated, that in case the master of the neutral vessel shall endeavour, by a false report, to defraud the captor of any of his enemies' effects, he shall be obliged to make good the loss sustained thereby by the forfeiture of as much of his own. Frequent applications were made previous to the Restoration of Charles II. both to the Parliament and to the Protector, to alter the course of proceeding in this respect; but those eminent men who plan-

* *Intercursus Magnus*, in Rymer's *Fœdera*, vol. xii. p. 585.

ned the act of navigation, understood too well the interests of commerce, and were too much attached to the maritime greatness of this country, ever to consent to this, or even listen to such a proposal. After the Restoration a particular occasion at length induced England to make the concession; by the treaty of commerce made at the Hague 17th of February 1668, this point was fully settled to the satisfaction of Holland; by the 10th article of which it was mutually stipulated, that the shipping of each country should carry freely the goods of the enemies of the other. The circumstances of the time, and the situation of affairs, when this concession was made, account for the admission of it into this treaty, and in some degree apologise for the authors of it. Lewis XIV. had then just commenced the first career of his ambition, and England resolved with spirit to throw herself in his way. Holland was then engaged in a strong defensive alliance with France, from whom it was necessary to separate her, and to make her join with England, to support the independency of Europe. The Dutch ministers, always mindful of their favourite object, seized this fortunate opportunity of obtaining from England the same advantages in favour of their shipping which they had already acquired by their treaties with France. It hath been the policy of most republics never to enter into any alliance where some benefit doth not accrue to themselves, and Holland could not be expected to deviate from this maxim on the present occasion, in compliment to the King of England, who had always shewn

but little affection to the States; the war also with England was but lately ended, and the wound but weakly healed. The French treaty of 1662, besides its defensive stipulations, contained also several commercial regulations, all of which were the favourite object of Holland; these had been provisionally referred to a few months before, in the negotiations then pending at Breda, with a design to prevent any intermediate disputes between England and Holland, until a treaty of commerce, which was then under deliberation, was concluded; but unless these regulations were perpetuated on the present occasion, and formed into a permanent national treaty, to which, however, England was averse,* the states were resolved not to join in the alliance proposed. Mons. de Witt expressly told Sir William Temple,† "that the treaty of defensive alliance must, for a basis, have at the same time an adjustment of matters of commerce," and unless this could be obtained, it was the avowed opinion of that great pensionary not to conclude. Influenced by the sentiments of their minister, the states persisted in the same resolution: they forced at last Sir William Temple to yield the point. Apprehensive of the least delay, and of the uncertainties which would necessarily follow from it, he ventured to comply with their desires, though he exceeded thereby his instructions; a private promise passed first between him and Mons. de Witt, and in consequence of that, a few weeks after, a treaty of commerce was

* Sir William Temple to Lord Arlington, Feb. 12. 1668.

† The same to the same, Jan. 24. 1668.

concluded. We have before observed, that in the 35th article of the treaty of 1662, the French consented to grant the right of protecting enemies' property to neutral vessels; this privilege, therefore, came of course to be conceded in our commercial treaty of 1668; and the advantages which would arise from thence in favour of the trade of Holland, were the concession which England then chose to make, that she might obtain the assistance of that Republic against France; to what other purpose could England at this time establish a rule of maritime law which she had before so often refused, and now so reluctantly granted to the earnest solicitations of the states? any benefit which the British trade might reap from the mutual stipulation of this article, could never be the object which the ministers of this country had in view. The article, considered by itself, is of the most fatal consequence to the power and trade of Great Britain; when she is at peace, and her neighbours are at war, she cannot reap any benefit from it, as her own shipping is not, in general, more than equal to the maritime commerce of her people; and when, on the other hand, Great Britain is at war, and her neighbours at peace, it tends to render fruitless, in a great degree, the efforts of her naval force, while, at the same time, considered as a general maxim of right among other nations, Great Britain neither wants the use of it, as she is equal, in time of war, to the protection of her own shipping; neither can her merchants enjoy the advantage of it, as the employment of foreign freighting is in most respects directly con-

trary to her laws. This article was again renewed and admitted into the treaty of commerce of 1674, in consequence of its having been before stipulated in that of 1668. The treaty of 1674 is the maritime regulation which at present subsists between Great Britain and Holland.

In this manner therefore the article having obtained existence in these treaties, we are now to consider, whether it is still in force.

Treaties of alliance being nothing more than stipulations of mutual advantages between two communities in favour of each other, ought to be considered in the nature of a bargain; the conditions of which are always supposed to be equal, at least in the opinion of those who are parties to it: he, therefore, who breaks his part of the contract, destroys the equality or justice of it, and forfeits all pretence to those benefits which the other party had stipulated in his favour: "Si pars una (says Grotius *) *"fœdus violaverit, poterit altera a fœdere discedere, nam capita fœderis singula conditionis vim habent."* And Puffendorf, speaking of conventions, says,† *"Neu hæc alterum obligant, ubi ab uno legibus conventionis non fuerit satisfactum."*

The next question then is—Hath Holland complied with her part of the treaties or contracts to which she is mutually bound with England?—Hath she performed all, that she hath stipulated in our fa-

* Grotius de Jure Belli et Pacis, l. 2. c. 15. sec. 15.

† Puffendorf de Jure Natur. et Gentium, l. 3. c. 8. sect. 8.

vour?—or hath she been deficient in the execution of some article, in which the very life of our alliance is contained?—If a part so essential should be extinguished, it would be unnatural to suppose, that any lesser limb of the treaties should continue to have vigour; Holland in this case could have no pretence to require the execution of what may have been conceded in her favour; especially, if the performance of it would operate to the detriment of that ally, whose friendship she hath forsaken.

I doubt not, but my reader hath already answered in his own mind the question proposed;—that the possessions of the crown of Great Britain in Europe have been attacked by the armies of France; that in consequence of this, on the 2d of August 1756, the British Government made to the States General in proper form, the necessary requisition;—that in such case Holland is obliged by treaties to grant immediate succours, and after a certain time to join with Great Britain in open war;—that she hath not performed these conditions, and hath therefore forfeited all title to any advantages, contained in those treaties, and above all to such as may arise from the nature of the war itself?

I shall state, however, this point something more particularly;—Holland is engaged in three different guarantees or defensive treaties with Great Britain: the first is that ancient original defensive alliance, which hath been the basis of all the subsequent treaties between the two nations; this treaty was designed to have been made immediately after the triple

alliance, but the unsteady conduct of the ministers of Charles II., and unfortunate attachment of that monarch to the French court, for some years delayed it; it was at last however concluded at Westminster the 3d of March 1678: it is (except in two immaterial alterations) an exact copy of the twelve first articles of the French treaty of 1662; and both were negotiated by the same minister, Monsieur Van Beuningen. In the preamble of this treaty,* "the preservation of each other's dominions is set forth as the cause of making it; and the stipulations of it are,† a mutual guaranty of all they already enjoyed, or might hereafter acquire, by treaties of peace, in Europe only:" They farther guaranty, "all treaties, which were at that time made, or might hereafter conjointly be made, with any other power:" they promise also to ‡ "defend and preserve each other in the possession of all towns or fortresses, which did at that time belong, or shall for the future belong, to either of them;" and for this purpose it is determined,§ that "when either nation is attacked or molested, the other shall immediately succour it with a certain number of troops and men of war, and shall be obliged to break with the aggressor in two months, immediately after the party, that is already at war, shall require it; and that they shall then act conjointly with all their forces, to bring the common enemy to a reasonable accommodation."

* See the Treaty Preamble.

† Art. 2.

‡ Arts. 3, and 4.

§ Art. 5. and 1st separate Article.

That Holland hath not complied with the terms of this guaranty is evident;—Minorca, “a possession of the crown of Great Britain,” and which she “acquired by treaty,” hath been attacked, this is one case of the guaranty;—by that attack, “a treaty that was made in common concert,” the treaty of Utrecht, hath been broken; this is a second case of the guaranty;—and by these means, “England hath been deprived of a possession, which of right belonged to her;” this is a third case of the guaranty;—and notwithstanding all this, Holland hath not as yet granted the succours stipulated; and many more than two months have passed without her having entered into war conjointly with England, as the treaty requires.

The second species of defensive alliance, which subsists between Great Britain and Holland, is that which was first agreed to, in the treaty of barrier and succession of October 29. 1709, and again more particularly stipulated in another treaty to the same purpose of January 29. 1713: the design of this treaty is the guaranty of the Dutch barrier on one part, and the guaranty of the firmest barrier of British liberty, the protestant succession, on the other; the stipulations are,* “that in case either should be attacked, the other should furnish, at the requisition of the party injured, but at his own expense, certain succours there expressed; and if the danger should be such as to require a greater force, that he shall be obliged to augment his succours, and ultimately to

* Art. 14. of the Treaty of Barrier and Succession of January 29. 1713.

act with all his power in open war against the aggressor." I pretend not to make any use of this treaty in the present case; and only mention it to give a fuller view of the alliances which subsist between us;—here, however, I will indulge a wish, that the case of this guaranty, as far as it relates to the right of the crown of Great Britain, may never again exist: I always read with sorrow, that there ever was a time, when the unfortunate dissensions of our people, in a point, where the whole of their happiness was concerned, should have made it necessary to add any other sanction to our laws, or any other security to our constitutional rights, than such as our own power can afford them; these days however of shame now, I hope, are passed; more than forty years' experience of the mildest government must have won the most obdurate heart to confess the present felicity, and bless the hand which bestows it: when forgetting ancient errors, we are thus united in defence, the affections of his Majesty's subjects are the happiest guaranty of his right.

I come now to the last species of defensive alliance, which subsists between Great Britain and Holland; this was concluded at the Hague the 4th of January 1717; to this treaty France was a party: the intention or view of it was, "the preservation of each other reciprocally in the possession of their dominions, as established by the treaty of Utrecht;" and the stipulations are, "to defend all and each of the

• Art. 5.

articles of the said treaty, as far as they relate to the contracting parties respectively, or each of them in particular; and they guaranty all the kingdoms, provinces, states, rights, and advantages, which each of the parties at the signing of that treaty possessed;* and in a separate article all this is confined to "Europe only;" the succours stipulated in support of this guaranty, are much the same as those mentioned above, first,† "Interposition of good offices,"—then a certain number of forces,—and lastly, "declaration of war." This treaty was renewed by the quadruple alliance of 1718, and again by the accession of Holland to the treaty of Hanover of 1726, and last of all by the 3d article of the treaty of Aix-la-Chapelle.

Holland hath by no means executed the terms of this guaranty,—Minorca, "a possession of the crown of England in Europe, which she enjoyed at the signing of this treaty," hath been attacked; this is one case of the guaranty;—by this attack, "the article of the treaty of Utrecht, by which that possession was ceded to England," hath been broken; this is another case of guaranty: I need not again observe, that Holland, in consequence of this, hath neither granted the succours, nor declared war, as this treaty also requires.

It will here, however, be objected, "that Great Britain was the aggressor in the present war, and unless she had been first attacked, the case of the guaranties doth not exist." True it is that the treaties, which contain these guaranties, are called defensive

* Separate Article.

† Arts. 5. and 6.

treaties only, but the words of them, and particularly that of 1678, which is the basis of all the rest, by no means express the point clearly in the sense of the objection; they guaranty in general, "all the rights and possessions" of both parties against "all kings, princes, republics, and states:"—so that if either "shall be attacked" or "molested," whether it be "by hostile act or open war," or "in any other manner whatsoever, disturbed in the possession of his estates, territories, rights, immunities, and freedom of commerce," it then declares what shall be done in defence of these objects of the guaranty, by the ally who is not at war; but it is no where mentioned as necessary, that the attack of these should be the first injury or attack; nor doth this loose manner of expression appear to have been an omission or inaccuracy: they, who framed these guaranties, certainly chose to leave this question without any farther explanation, to that good faith, which must ultimately decide upon the execution of all contracts made between sovereign states: it is not presumed, they hereby meant, that either party should be obliged to support every act of violence or injustice, which his ally might be prompted to commit, through views of interest or ambition: but, on the other hand, they were cautious of affording too frequent opportunities to pretend that the case of the guaranties did not exist, and of eluding thereby the principal intention of the alliance; both these inconveniences were equally to be avoided; and they wisely thought fit to guard against the latter of these no less than the former: they knew that

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in every war between civilized nations, each party always endeavours to throw upon the other the odium and guilt of the first act of provocation and aggression, and that the worst of causes was never without its excuse: they foresaw, that this alone would unavoidably give occasion to endless cavils and disputes, whenever the infidelity of an ally inclined him to avail himself of them: to have confined, therefore, the case of the guaranty, by a more minute description of it, and under closer restrictions of form, would have subjected to still greater uncertainty a point, which, from the nature of the thing itself, was already too liable to doubt; they were sensible, that the cases would be infinitely various, that the motives to self-defence, though evidently just, might not always be universally apparent; that an artful enemy might disguise the most alarming preparations, and that an injured nation might be necessitated to commit even a preventive hostility, before the danger, which caused it, could be publicly known; upon such considerations these negotiators wisely thought proper to give the greatest latitude to this question, and to leave it open to a fair and liberal construction; such as might be expected from friends, whose interests these treaties were supposed to have for ever united, and such on the present occasion Great Britain hath a right to demand.

If, however, we should, for the present, wave this interpretation, and allow the treaties to have all the meaning, which they, who make this objection, require, the evidence of facts will sufficiently prove,

that France was the aggressor in the present war ;— if we look to America, the present war there is little more than a continuation of the last ; repeated usurpations of the possessions of Great Britain have been there the constant employment of France, almost from the hour in which the treaty of Aix was signed ; and these were at last followed by an avowed military attack upon a fort belonging to the crown of Great Britain, by regular troops acting under a commission from the Court of France. If we consider America as having no concern in the present question, the same ambitious power will also be found to have been the aggressor in the European war ; France early manifested her hostile intentions in Europe ; in 1753, in direct opposition to the express stipulations of three solemn treaties,* she began to restore the port of Dunkirk ; and Holland then considered this action in such a light as induced her, in conjunction with the British government, to present a memorial against it : France also gave another proof of her hostile intentions, by her design to invade Great Britain, avowed by her ministers in every court of Europe, and sufficiently manifested by the preparations which she publicly made for it. And these were likewise followed by an open attack upon an European island belonging to Great Britain, an attack upon the island of Minorca. It seems indeed allowed, by the opinion of the parties concerned, that by the attack of Mi-

* IXth Art. of the Treaty of Utrecht ; IVth Art. of the Treaty of the Hague 1717 ; and XVIIth Art. of the Treaty of Aix-la-Chapelle.

norca the European war was first completely avowed and commenced; notwithstanding all which passed elsewhere, proposals for an accommodation of the American disputes were never discontinued, nor the war considered as universal, till that island was absolutely invaded. As for the captures at sea, the avowed cause upon which these were taken, sufficiently evince that they undoubtedly belong to the American war; they were made in consequence of the hostilities first commenced in America, and were seized as reprisals for the injuries there committed on the property of the people of England; as such they were always declared to be taken by the ministers of that kingdom, and the value of them to be on that account retained;* and upon application made to parliament soon after the seizure of them, the legislature expressly refused to distribute them among the captors, as they have done in respect of all other prizes which have been made since the war of Errope began; but even if this distinction, which puts the question *out* of all doubt, had not been made by the ministers of England, these captures surely can never be looked upon but as a part of the American war. It will not certainly be denied that such a war may extend itself to the ocean, without having changed either its nature or denomination. What but captures at sea have been the great constituent part of every American war before the present? As a war upon the American continent must always be supported by succours sent from Eu-

* See the British declaration of war.

rope, it is absurd to suppose that either party in this case would not endeavour, as far as he was able, to take and destroy entirely the shipping of his enemy, by which alone those succours could be conveyed. Countries which have very little internal force within themselves, cannot be defended but by such troops as are thrown into them; to defeat, therefore, the only means by which this relief can be effected, must be esteemed as material a part of such a war, as the means to invest a fortress are a material part of a siege. But after all, these captures were subsequent to the restoration of the port of Dunkirk, or the * preparations to invade Great Britain; and these can never be considered but as undoubted acts of aggression. It is not the first military action alone, but hostile preparations, where the design is apparent,† the usurpation of another's rights, or the denial of justice, which, in the opinion of the ablest writers, denominate the aggressor; the objects of the defensive treaties are "rights, immunities, and liberties," no less than "towns or territories," and the "disturbance" or "molestation" of the former, as well as the "attack" of the latter, are expressly declared to be cases within the guaranties.

* Undoubted intelligence was received of this before the 27th of August 1755, when general orders were given to bring in French vessels; the *Lys* and the *Alcide* were taken on the coast of America, and are therefore in every light a part of that war.

† *Quaquam et aliquando favor defensionis ab illius partibus stat, qui prior arma alteri infert, ut si quis hostem invasionis jam certum, per celeritatem oppresserit, dum ille adhuc in adparando bello est occupatus.*—Puffendorf, de Jure Naturæ et Gentium, lib. viii. cap. 6, sect. 3.

A more subtle objection will still perhaps be made to what has been said. It will be urged, "that though France was the aggressor in Europe, yet that it was only in consequence of the hostilities commenced before in America, with which it is determined by treaties that Holland is to have no concern, and that the rights contested at present are not contained in the guaranties." If the reasoning on which this objection is founded was admitted, it would alone be sufficient to destroy the effects of every guaranty, and to extinguish that confidence which nations mutually place in each other, on the faith of defensive alliances. It points out to the enemy a certain method of avoiding the inconvenience of such an alliance; it shews him where he ought to begin his attack; let only the first effort be made upon some place not included in the guaranty, and after that he may pursue his views against the very object of it, without any apprehensions of the consequence; let France first attack some little spot belonging to Holland in America, and her barrier would be no longer guaranteed. To argue in this manner, would be to trifle with the most solemn engagements. The proper object of guaranties is the preservation of some particular country in the possession of some particular power. The treaties above mentioned promise the defence of the dominions of each party in Europe, simply and absolutely, whenever they are "attacked" or "molested." If in the present war the first attack was made out of Europe, it is manifest that long ago an attack hath

also been made in Europe, and that is beyond a doubt the case of these guaranties.

Let us try, however, if we cannot discover what hath once been the opinion of Holland on a point of this nature. It hath already been observed, that the defensive alliance between England and Holland, of 1678, is but a copy of the twelve first articles of the French treaty of 1662. Soon after Holland had concluded this last alliance with France, she became engaged in a war with England. The attack then first began, as in the present case, out of Europe, on the coast of Guinea; and the cause of the war was also the same, a disputed right to certain possessions out of the bounds of Europe, some in Africa, and others in the East Indies. Hostilities having continued for some time in those parts, they afterwards commenced also in Europe. Immediately upon this, Holland declared that the case of that guaranty did exist, and demanded the succours which were stipulated. I need not produce the memorials of their ministers to prove this; history sufficiently informs us that France acknowledged the claim, granted the succours, and entered even into open war in the defence of her ally. Here, then, we have the sentiments of Holland on the same article, in a case minutely parallel. The conduct of France, also, on this occasion, may be urged in support of the same opinion, though the measure she was forced to take, in compliance with this decree, checked at that time her youthful monarch in the first essay of his ambition, delayed for several

months his entrance into the Spanish provinces, and brought on him the enmity of England.

If any doubt can yet remain about the meaning and intent of this article, it may farther be proved from the opinion of the minister who made it. Immediately after Holland was engaged in the war above mentioned, she sent to the court of France Monsieur Van Beuningen, to press the execution of that guaranty which he had himself concluded. It is remarkable, that in his conversations on this subject with Monsieur de Lionne, the same objection was debated against which I now contend; Van Beuningen treated it with great contempt; he asked Monsieur de Lionne*, if the pretence of the European war being only a continuation of that of Africa, was any thing more than what the English alleged to deprive them of the succours of France; or whether the French ministry laid any stress upon it, as an argument at all to be supported. De Lionne at first gave him to understand, that he thought it of some weight, "A quoi, je repondis," says Van Beuningen, "que je ne croyois pas, que cette objection fut serieuse, puis qu'il dit alors, que celui, qui a commencé la guerre en Guinée, et de la en Europe, n'a pas commencé de guerre en Europe; et ne pouvoit passer pour troubler la paix et le commerce en Europe, parcequ'il l'avoit troublé ailleurs auparavant;" and then he adds, "Ce, que j'ajoutai a ce raisonnement pour refuter cette objection, resta sans replique." This was the same

* Lettre de Monsieur Van Beuningen à Monsieur De Witt, December 26, 1664.

Monsieur Van Beuningen who negotiated our defensive treaty of 1678 ; he made the terms of both these guaranties precisely alike ; and we have before shewn, that our own case at present is exactly the same as this, on which his opinion hath been produced.

If, however, the words of these treaties had been against the interpretation which hath been given them, I might justly have appealed to the spirit of them, as alone a sufficient foundation on which to rest my opinion : the whole design of all these our alliances with Holland, is to form a barrier against the power of France, whose ambition might otherwise induce her to destroy the independency of Europe : they are, in fact, a regular continuation of that policy which gave birth to the triple alliance, when the dangerous spirit of the French councils first began to appear. To answer this great end, they guarantee the possessions of those two maritime countries, who, from their wealth, their internal strength, and their incapacity of having any ambitious views themselves, are the best security against the designs of others ; but as the obligations of these guaranties are too considerable to be made use of on trifling occasions, for this purpose the contracting parties have made one exception :—the rights of the European kingdoms in the distant parts of the world, and particularly in America, are very uncertain, and the cause of frequent dissensions ; and it is well known that wars have there subsisted for many years between the trading subjects and commercial companies of the several nations, while the mother countries have lived,

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if not in friendship, at least in peace. 'This, then, is the case particularly excepted from the guaranty; but this exception must always be so interpreted, as to be made consistent with the principal intention of the alliance. If some great country out of Europe should become of so much importance, that for the interest of Europe, it ought to remain in the hands of the present possessors; if the same great disturber of mankind, after many fruitless attempts in his own neighbourhood, should now turn his thoughts another way, and should endeavour, by distant diversions, to enfeeble that power on whose consideration the safety of the public very much depends, and to deprive her of the sources of her wealth, which she hath always so largely expended in support of the common cause; would a generous friend, who attends to the spirit of his engagements, say that the case of the guaranty did not then exist? and, when the reason of the exception is vanished, would he urge the pretence of it as an excuse for giving up the principal point on which the alliance was constructed? But if to this distant attempt, the enemy should add an open and avowed war in Europe—should threaten the mother country with invasion, attack her fortresses, and take occasion from thence to spread his armies over the continent; shall this pretended exception still be urged, when the literal case of the guaranty is now become apparent? on this weak foundation, shall a wise people, under such obligations, not only refuse to grant their assistance, but not permit their forsaken ally to make a full use of his power; holding

back in this manner his arm, when they will not stretch forth their own; and claiming from the very contracts they have broken, that privilege which they turn to the destruction of their ally. The absurdity is shocking. Such, however, is the present case of England. Unhappy in her friendships! she hath neither that assistance from allies which they are bound by treaty to give her, neither is she allowed to exert even her own force, though abandoned to her own defence.

In this manner the point might be determined on a general view of these treaties, and this alone would be sufficient; but it may further be proved, that the article on which Holland founds her right of protecting the property of the enemy, as far as it relates to the present case, hath been particularly repealed long ago. The treaty in which this article was last inserted, was concluded the 1st of December 1674. Four years after this, in 1678, was passed that defensive alliance,* in which it was stipulated between Holland and England, "that if either party should be attacked in Europe, the other should declare war against the aggressor, two months after he is required." By this treaty, therefore, two months after England is attacked by France in Europe, and the proper requisition hath been made, Holland must become the enemy of the latter, as well as England; and to be the enemy of another, means certainly to distress his trade and seize his property; not to preserve the former and protect the latter. If this, there-

* Defensive Alliance of 1678.

fore, is the right interpretation of the word enemy, this article directly and positively declares, that two months after France has attacked the European possessions of England, the ships of Holland shall not have a right to protect the effects of the French. This, therefore, is derogatory to the eighth article of the marine treaty of 1674, and as being posterior to it, absolutely repeals it. In all laws (and such are treaties in respect to nations) the last enacted always acts aside the former, so far as they disagree. Cicero says, * it ought to be considered "*utra lex posterius sit lata, nam postrema quæque gravissima.*"

But this maxim is not necessary on the present occasion, since the same article is again repealed by two subsequent treaties, in words as positive as can be used; for in that treaty, † by which all the old alliances between the maritime powers were renewed immediately after the revolution, and also in that of February 6, 1716, by which they were again renewed upon the accession of the present family to the throne, the treaties of 1674 and 1678 are expressly mentioned, and made a part of both; and it is there declared, that "they shall have the same force and effect, as if they had been inserted in these treaties *verbatim*, that is to say, so far as they do not differ, or are contrary to one another; yet so as whatever hath been established by any later treaty, shall be understood, and performed in the sense therein express-

* Cicero de Inventiones.

† Treaty of Friendship and Alliance between England and Holland, August 1689.

ed, without any regard had to any former treaty." Can it then be doubted, that the articles above mentioned are "contrary to one another," as much as peace and war, as much as friendship and enmity? Is not the defensive alliance of 1678 "a later treaty" than the marine regulation of 1674? and ought not, therefore, according to the words of the renewal, "the article of the latter to be performed in the sense therein expressed, without any regard being had to the former?" Since then, the year 1689, this article, as far as it relates to the present case, hath been twice repealed. Thus much, therefore, may suffice to shew that the right of Holland in this respect is extinct.

There remains one more claim to be considered-- a claim which, if report had not averred that such a one had been formally offered, would by no means deserve an answer. The northern crowns, whose commercial treaties with Great Britain contain not any article which gives them expressly a right to carry the property of the enemy, have endeavoured to deduce this right from a general stipulation, which is to be found in some of their treaties, declaring, that "they shall be treated in like manner as the most favoured nation." If Great Britain, therefore, hath granted by treaty to any other nation, the right, in time of war, of becoming the carrier of her enemies, they think they are justly entitled to be admitted to the same favour. Under this pretence, they claim this privilege as stipulated in the Dutch treaty of 1674; but it has been proved above, that the treaty of 1674, as far as it relates to the present case, is no

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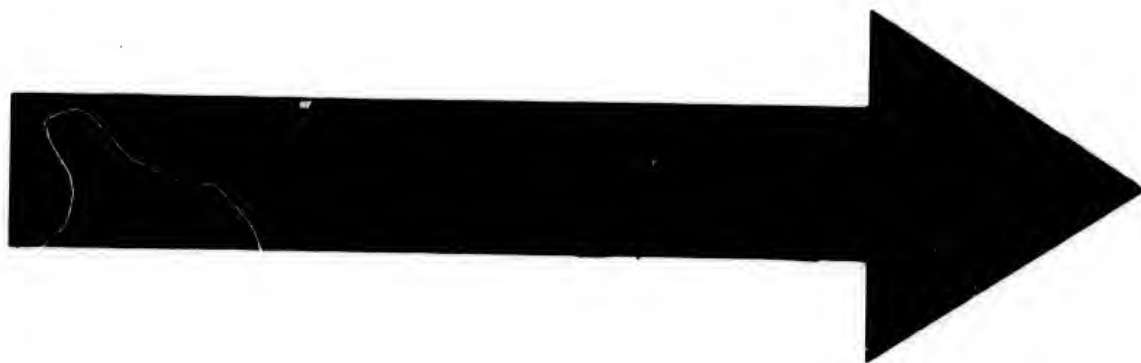
longer in force. If the inference, therefore, was otherwise unjust, the foundation being thus destroyed, whatever is built upon it must necessarily fall with it. But this stipulation of equal favour, from the very nature of it, can relate to nothing else but such advantages as may be granted to foreign traders by the municipal laws or ordinances of each country, such as equality of customs, exemption from the rigour of ancient laws, which would affect them as aliens and the privileges of judges-conservators and consuls; these are the proper objects of favour; and because the whole detail of these could not easily be specified in a treaty, for this reason they are thus comprehended in a general article. If any rights or privileges which could be considered as exceptions to the general rules of the law of nations, were the objects of this stipulation, to what purpose were any other articles added, since this would comprehend them all; and would alone include every privilege which past or future treaties could afford them? and can it be supposed that any nation meant in this manner to preclude itself from the power of exchanging, by treaty with some particular country, any great right of its own in return for an equal advantage? or that this right should, in such case, be universally forfeited to the people of every other nation, who would thus reap the benefit without having been parties to the bargain?

But this point is made clear beyond a doubt, from the words of the treaties themselves, where this general equality is stipulated. In the treaty of commerce

between Great Britain and Sweden, of the 21st of October 1661, the principal one at present in force between the two countries; the fourth article, which contains this stipulation, plainly makes it refer to such favours only as may be enjoyed in matters of traffic within their respective dominions; the treatment which the contracting parties shall there give to the subjects of each other, is the principal purport of the article; it specifies many particulars, and, among the rest, it stipulates that the people of both countries shall have "liberty to import and export their goods at discretion, the due customs being always paid, and the laws and ordinances of both kingdoms universally observed;" and then manifestly connecting this with what follows, it adds, "which things being pre-supposed, they shall hold such ample privileges, exemptions, liberties, and immunities, as any foreigner whatsoever doth or shall enjoy;" the general equality, therefore, here stipulated, plainly relates to those places alone where the customs of these kingdoms are to be duly paid, and the laws and ordinances of them are in force, and that is only within their respective dominions: the privileges here conceded cannot possibly have any larger extent; and to confine the sense of the article still more strongly to the explanation which hath now been given of it, the words "in the dominions and kingdoms of each other" are twice repeated, to determine clearly where that trade must be carried on, to which this favour is meant only to be granted; if, however, any doubt could yet remain in respect to this interpreta-

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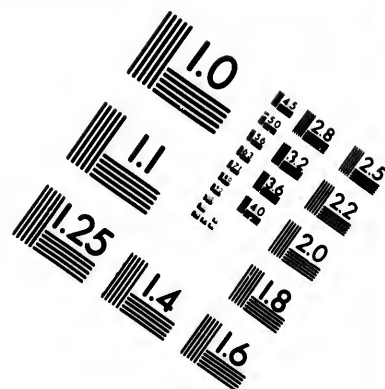
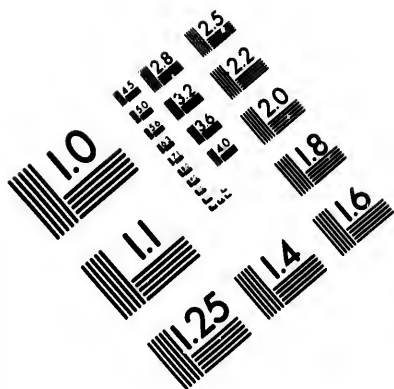
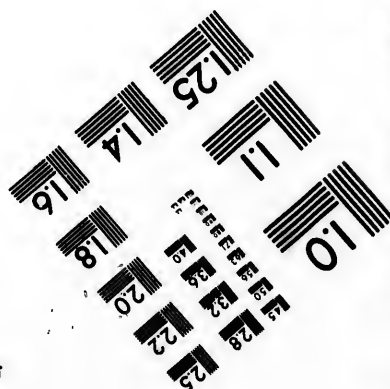
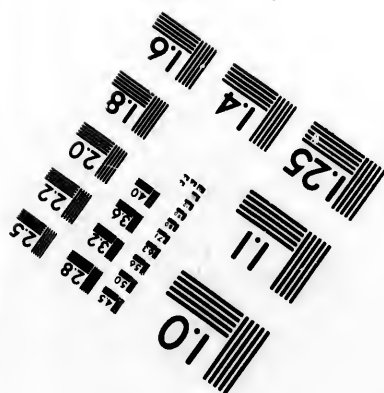
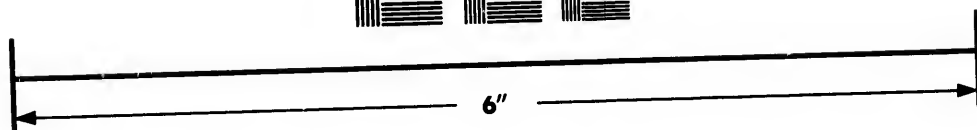
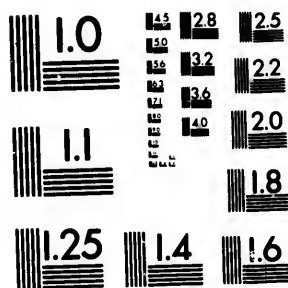


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tion, they who made this treaty have given the strongest proof, that under this article they never intended to imply a right of carrying the property of an enemy, since, by the twelfth article of this same treaty, an attempt of that nature is prohibited, and pronounced to be "a heinous crime," and the strongest provisions are made to prevent it. In the treaty of commerce between Great Britain and Russia, of the 2d of December 1734, this stipulation of equal favour is inserted in several articles; but it appears in every one of them to relate to nothing else but to the particular privileges which the subjects of each were to enjoy, while they were trading within the dominions of the other. In the second article, this equality is expressly said to be granted "throughout the dominions of the contracting parties in Europe. In the third it relates only to "the favourable reception of the subjects of each other in the ports of their respective countries." In the fourteenth it grants only an equal freedom to import "such merchandise into each other's dominions as is allowed to the subjects of any other country;" and in the twenty-eighth it refers only to the "respect and treatment which is to be given to the subjects of one party who come into the dominions of the other." In the treaty of commerce between Great Britain and Denmark, of the 11th of July 1670, the latest at present in force between the two countries, the stipulation of equal favour is inserted in the fortieth article; it is there said, "If the Hollanders or any other nation hath or shall obtain from his majesty of Great Britain any

better articles, agreements, exemptions, or privileges, than what are contained in this treaty, the same and like privileges shall be granted to the King of Denmark and his subjects also, in the most full and effectual manner:" that these privileges relate only to customs and other advantages of the same kind, might be proved from the whole tenor of this treaty; but it will be sufficient to shew that the right of carrying the property of the enemy cannot possibly be intended by it. Holland had obtained this right in 1668, two years before the Danish treaty was concluded; if, therefore, the stipulation of equal favour contained in the fortieth article, could extend to an advantage of that nature, the merchants of Denmark would have been immediately entitled to it, from the hour the treaty was signed; the ministers of that kingdom could not be ignorant of this, and yet in the twentieth article they have positively forbid the exertion of any such right. They have even expressed the greatest apprehension lest any liberty conceded by this treaty should be interpreted to that purpose, "lest such freedom of navigation," says the article, "or passage of one ally, and his subjects and people during the war, which the other may have by sea or land with any other country, may be to the prejudice of the other ally, and that goods and merchandises belonging to the enemy may be fraudulently concealed under the colour of being in amity; for preventing fraud and taking away all suspicion, it is thought fit, the ships, goods, and men belonging to the other ally, in their passage and voyage, be furnished with letters of pass-

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port; and in the passport the King of Denmark hath bound himself to declare that the ship and the goods with which it is laden, "belong to his subjects, or to others having an interest therein, who are the subjects of neutral powers," and that "they do not appertain to either of the parties now engaged in war." —Nothing more, I hope, need be said, to refute this weakest pretence to a right of carrying freely the property of the enemies of Great Britain.

As there is no article, therefore, which grants a right of this nature, at present in force in any of these commercial treaties, it is unnecessary to shew, that most of the captures which England hath made of the vessels of neutral nations, ought not properly to be referred to it, but may be justified by another part of the said treaties, where it is declared,* "that all goods are contraband, which are carried to places blockaded or invested." The debate here would turn on the real existence of the blockade. To evince this, I might shew what opinion the Dutch had of a naval blockade in 1630†, when they pretended to have blocked up all the coast of Flanders, and openly avowed that they would take and condemn all neutral ships, which had the most distant appearance of being bound to the ports of that country; I might also shew their opinion of the same in 1689, when they declared‡ publicly to neutral nations, that they de-

* Art. 41, treaty of 1674, between Great Britain and Holland. The same article is found in every other commercial treaty.

† Convention between England and Holland, 1689.

‡ Placart of June 26, 1630.

signed to block up all the ports of France. I might observe, that as the possessions of the principal avenues to a town constitutes a blockade by land, and that it is not necessary, for this purpose, to have made a complete line of circumvallation : so by keeping great squadrons of ships of war cruising constantly before the ports of an enemy, by destroying in this manner totally his trade, and preventing his fleets of war from ever venturing out, except now and then a ship or two by stealth, a blockade ought certainly to be considered as completely established by sea. I might farther prove the cause from its effects, and shew that the American islands at least have experienced all the consequences of such a situation, where want of communication with the mother country, distress and famine, fully declare that they have been invested. But as this topic may not perhaps relate to the case of every capture, and depends on the particular state of a variety of facts, I shall not dwell any longer upon it at present ; the question hath here, I hope, sufficiently been argued on principles, which are plain and comprehensive, on those equitable regulations which nature hath established among nations, and on those particular contracts with which communities have bound themselves ; and, as I before endeavoured to prove that neutral nations had no right, by the former of these obligations, to protect the property of the enemy, so now it has been shewn by what policy the Dutch first obtained this privilege,—by what treaties it hath since been taken from them,—and by what conduct they have lately forfeited whatever

might remain of this right. It hath also, I flatter myself, appeared with how little reason other neutral powers, under colour of any article in their treaties of commerce, have claimed the enjoyment of such a right. Upon the whole, therefore, I will now beg permission to conclude, that the naval power of England hath been conducted, during the present war, with no less justice than spirit,—that the faith of our sovereign is as spotless as his courage,—and that the honour of our country is unblemished.

The basis of just complaint being thus removed, those idle clamours which have been founded upon it by no means merit our attention; to charge England with ambition must appear so absurd to all who understand the nature of her government, that, at the bar of reason, it ought to be treated rather as calumny than accusation; possessed of every blessing which civil government can produce, she is open to no temptation with which ambition might seduce her; pursuits of that kind might possibly operate to the destruction of her constitution, and her system of happiness might be subverted by the augmentation of her power; it must always be the interest of England to protect the just rights of commerce, and to support those principles which promote the labours of mankind, since she herself can only be great from the virtuous industry of her people. To obtain the largest extent for the exertion of her industry, and for the operation of her commercial capital, is the point to which all her policy should tend; and if ever, forsaking these maxims, she should seek to enlarge her power by

any acts of ambitious injustice, may she then, for the welfare of the human race, cease to be any longer great or powerful ! Her courts of maritime jurisdiction are more wisely calculated to preserve the freedom of navigation than those of any other country ; as they are not subject to the control of her executive power, the passions of her princes or ministers can never influence the decisions of them, and foreign traders have, in favour of their property, all the security which the nature of the thing will admit,—the consciences of wise men determining upon matters of right, whom the threats of power cannot affect, and who are set free, as far as possible, from all bias and partiality,—and to the honour of the learned persons who at present preside in those courts, one impartial testimony shall here be produced in their favour, though treaties have expressly pointed out to all who may there think themselves injured, a regular method of redress before a superior tribunal, the merchants and freighters of Holland have never ventured as yet to bring to a hearing, or even to put into a way of trial, any one of the appeals which they have made from the determinations of these judges, giving hereby cause to presume that they made these appeals with no other intention but to delay the execution of the sentences ; and, conscious of the invalidity of their rights, they have in this manner plainly confessed the real equity of those decisions which have been passed upon them. That amid the confusions of war some irregularities may be committed, is a misfortune too true to be denied, but which the circumstances of the case

render impossible to be wholly prevented; they are the consequences of all wars, not alone of the present. To destroy the trade of the enemy, it is necessary to employ privateers, which cannot always be kept under those strict rules to which a more regular force is subject; these maritime hussars may sometimes exceed their commissions, and be guilty of disorders, the authors of which cannot always be punished, because the nature of the fact renders the discovery of them difficult; but can the crimes of these be imputed to ministers, whose ears are always open to complaints, and who labour as much as possible to redress them? The privateers of England are already made subject to every restraint which naval policy hath as yet invented, to force them to conform to their duty; if, however, these are found insufficient, and if any more successful means can be discovered to prevent every unjust depredation, by which the evils of war may be diminished, confident I am that Great Britain will be the first to adopt them; let them be consistent only with the use of her naval power, and conformable to justice, the British legislature will enact such into a law, and the British ministry will attend most steadily to the execution of them.

But, after all, the wisest regulations on occasions like this, cannot be expected to answer fully the end proposed; the system of humanity is nowhere perfect, but in the intercourse carried on between nations its weakness is most apparent; the softer ties of natural affection among these have little effect, and no coer-

cive bands of power exist to regulate and control their passions. It is the virtue of governments alone on which the general prosperity depends, and treaties have no better sanction than what that virtue can give them. These were the principles from which I first commenced my discourse, by these the rulers of communities are instructed to amend, as far as possible, by their prudence, what nature hath left imperfect; ambition or avarice will augment the evil, moderation may prevent it; every little inconvenience must be patiently suffered, where a superior right makes it necessary; the love of our country should never induce us to act contrary to that love which we ought to bear to mankind, since the interests of both, if they are rightly pursued, will always be found consistent with each other.

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