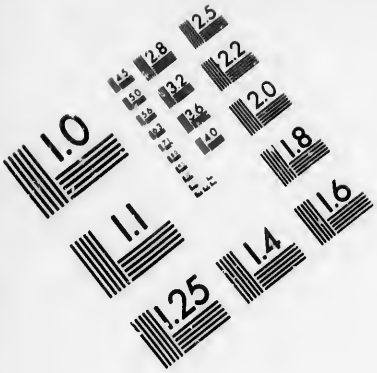

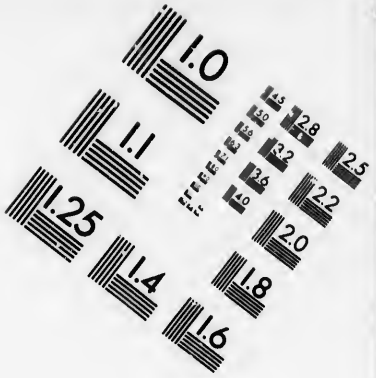

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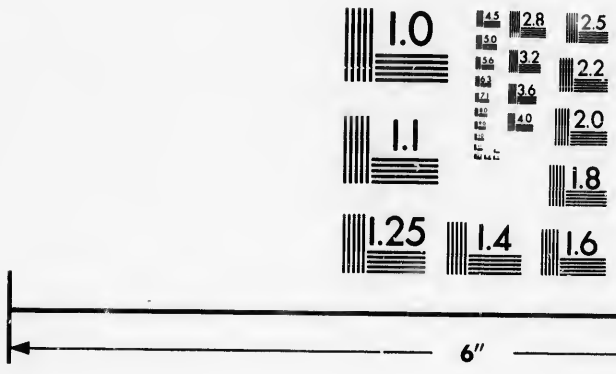

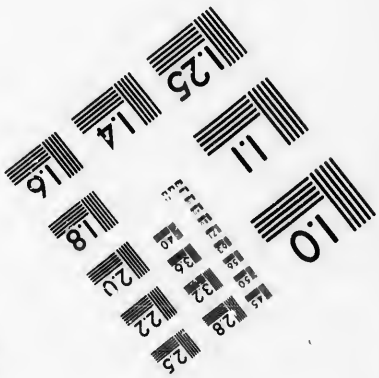

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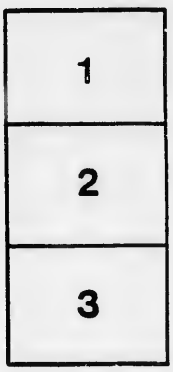

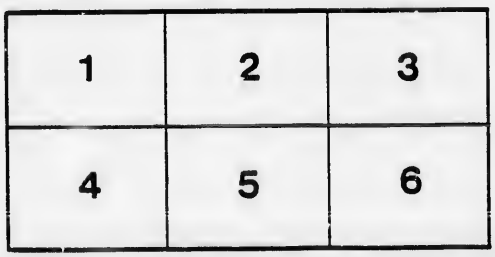

THE

LAW AND FACTS

OF THE CASE OF THE

"ALABAMA,"

WITH REFERENCE TO

THE GENEVA ARBITRATION:

BY

JAMES O'DOWD, Esq.,

BARRISTER-AT-LAW.

LONDON:

BUTTERWORTHS, 7, FLEET-STREET.

Law Publishers to the Queen's Most Excellent Majesty.

1873

PREFACE.

The Geneva Award has relegated the case of the *Alabama* to the regions of history.

But, before the exact story of that vessel can be written, the merits of the award and the legal principles upon which it proceeded, will, no doubt, be canvassed in both Houses of Parliament.

It is with a view to aid the full and fair discussion of the subject that the following pages have been written.

The Author does not deny, that whilst anxious to uphold the law of England as against a retroactive treaty and its rules, he has also been influenced by, he trusts, a pardonable desire to vindicate his official conduct and his professional character.

He begs it to be understood that the essay is not, in any sense, to be regarded as official.

4, *Alfred-Place, West,*
South Kensington.

LAW AND FACTS OF THE 'ALABAMA' CASE.

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NOTE—Page 29—for Latin quotation read "*Diligenter "attendas ne eæ leges, quæ ad preterita respicere putentur, "ante-acta non infirmant*" (*De Aug. Sci.*)

LAW AND FACTS OF THE 'ALABAMA' CASE.

LAW AND FACTS OF THE ALABAMA CASE.

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§ 1—LAW OF CONTRABAND.

According to the present doctrines of international law, there is no restriction placed upon sales of contraband, so far as a breach of neutrality, as distinguished from a forfeiture of the contraband articles, is concerned. The only question that arises with respect to sales of contraband is whether the neutral territory has not been made a base of military operations. If this has been done with the connivance of the neutral Government, it has forfeited its neutrality.

The sale of munitions of war on neutral territory, as distinguished from the carriage of those articles to a belligerent port, was formerly considered to be rendering the neutral territory a base of operations. Such transactions were termed sales of passive contraband. It is unnecessary to say that all such doctrines are now obsolete, and that but a year or two ago the American Government itself actually sold on its own soil immense quantities of arms to France, which was then at war with Prussia.

The doctrine of passive contraband, however, was sought to be revived in the case of the *Alabama*, and the United States Government then, and frequently since contended, that ships differ from other contraband in necessarily constituting the neutral soil a base of operations, or that they at least are so far different from other contraband, that any sale of a ship, armed or unarmed, by the citizen of a neutral State to a belligerent, is a breach of neutrality.

Sales of other kinds of contraband are confessedly no breaches of neutrality. The Sovereign may, indeed, prohibit the export of such articles, if he or she pleases, and our Government has on some occasions done so, not wishing to deplete our own stores of military supplies, and for other motives personal to the nation itself. But, in the absence of any restriction imposed by the Crown, the trade in contraband is no breach of neutrality or *casus belli*, although a belligerent may seize and confiscate the articles *in transitu*. The vessel, however, if it makes the return voyage, is free from capture ever afterwards, and a vessel illegally equipped is nevertheless scot-free after her next succeeding cruise is terminated, Kent Com. vol. i. p. 123; Wheaton, Elem. Int. Law, pt. ch. 3 § 13; The *Santissima Trinidad*, 7 Wheaton Rep. p. 348.

Although the United States Government alleged in the matter of the *Alabama* that our Government disregarded the obligations imposed on us, both by international law and our own Foreign Enlistment Act of 1819, yet, it can be readily shown, that this complaint has long since been abandoned, so far as international law is concerned, and has lately been rested alone on the Act of 1819. At international law, the sale of ships—armed or unarmed—by the citizen of a neutral State to a belligerent in the way of commerce, and not for the purpose of starting from the neutral territory on martial expeditions, is without any doubt perfectly lawful.

Whether the sale of any kind of contraband is moral or not, is another question. The better opinion appears to be that it is odious in the sight of God and man. Free trade in contraband is a bounty on the success in war of the richer belligerent. It is adding fuel to fire. It is to give drink to the drunken, or weapons to intending duellists. The power of the Crown to forbid the export of contraband may be used in favor of any belligerent it pleases. Why should the Crown, or its servants, have any discretion in a matter concerning the lives of hundreds of thousands of excited and almost insane persons, struggling with the tide of hostile passions, and unable to check themselves

in their wild and blood-thirsty career? The opinion of the Lord Chief Justice on this point is hardly in keeping with his general criticisms in the *Alabama* case.

Really, all neutrality, as defined by the law of nations, is most insincere and fraudulent. It is a game of hide-and-seek, got up in the interest of the leading maritime powers, who cry "catch me if you can," and sometimes "catch me if your dare." Yet, no nation is more earnest on behalf of the existing legal rights of nations than the United States, whose war with ourselves in 1812 was owing to our supposed invasion of neutral privileges.

The Lord Chief Justice, indeed, thinks that only for the present law of contraband, the nation which was well prepared for war should necessarily succeed. But, in fact, no nation ever increases its military strength without the fact becoming known. The issue, however, which the Government, and the Customs Authorities, had before them in 1862, was not what was morally right—for this is not always the question even at international law—nor what was politically expedient, but simply what was the construction of the Enlistment Act of 1819.

At the commencement of every war the Foreign Secretaries of the belligerent powers are found to be remonstrating with the Governments of neutral States for allowing their citizens to dispose of arms to the enemy. Count Bernsdorff wasted quires of paper in writing on this subject to Secretary Fish in 1870. If the circumstances of the case were reversed, we would find perhaps Mr. Fish remonstrating with Count Bernsdorff for a similar cause. Nothing was more natural, therefore, than that Americans should feel exasperated towards us for the escape of the *Alabama*.

As late as June 3rd, 1819, we find Lord Castlereagh denying that the Government connived at any export of contraband, Hansard, vol. 40, p. 906. The present law of nations in fact will always be revolting to our feelings, and could only have been established after a long struggle. However, officials have no concern with the morality of a rule of law. They are sworn to administer not the doctrines of morality, but of the municipal

code, and of international law, so far as it forms part of the municipal code.

Yet, a person arguing in favor of the course adopted by the Customs Authorities in 1862 labors under an embarrassment similar to what the Geneva Court must have experienced in laying down a definition of due diligence, that spawn of a new technical and *ex post facto* rule.

§ 2—SHIPS AS CONTRABAND.

It is, however, preposterous to assert that the law of nations allows a neutral to sell to a belligerent large and small arms, but not ships. In Central Europe, Asia, and America, there are States which have no sea-board. Why must international law show them no mercy, and be so lenient to England, the United States, and every other nation with a sea-coast? The thing is ridiculous, and any distinction that exists must be founded on positive municipal law or treaty.

It has been argued, indeed, that as there is another rule of international law which forbids a belligerent to make neutral territory a base of operations, this implies that he may buy arms there, but not ships, as every ship is a base of operations. Granting that this distinction is solid—and it is most transparently thin, and not recognized at international law—an intent to use the ship for hostile purposes must be proved. If it is consistent with the facts that the vessel is to be used as a blockade runner, or to undergo a change of hands before she actually puts to sea for military purposes, or if she is sold without any expression of intent on the part of the vendee—which, of course, is the usual case—the vessel is not a base of operations. She is mere passive contraband, and cannot be detained.

On the motion for the repeal of the Act in 1823, April 16th, Dr. Lushington said in the House of Commons he "wished to "know when we were allowed by statute to send ships and "warlike stores to foreign nations, why we should not be per-

"mitted to send men also." Here no distinction was taken by that eminent civilian between ships and other contraband; nor does anyone else who took part in the debate draw such a distinction, although it was drawn between *men* and other contraband.

It is, then, a great, though prevalent error to suppose that the Messrs. Laird would not be legally justified in building and equipping a vessel of war to be sent for sale in a port of a belligerent. Mr. Dana, in his edition of Wheaton on "International Law," p. 563, says "An American merchant may "build and fully arm a vessel, and supply her with stores, and "offer her for sale in our own market.....He may, without "violating our law, send out such vessel so equipped, under the "flag and papers of his own country, with no more force of crew "than is suitable for navigation, with no right to resist search "or seizure, and to take the chances of capture as contraband "merchandize. In such case the extent and character of the "equipments is as immaterial as in the other class of cases. "The intent is all. The act is open to great suspicion and "abuse, and the line may often be scarcely traceable; yet the "principle is clear enough. Is the intent one to prepare an "article of contraband merchandize, to be sent to the market of "a belligerent, subject to the chances of capture? On the other "hand, is it to fit out a vessel which shall leave our port to "cruise, immediately or ultimately, against the commerce of a "friendly nation? The latter we are bound to prevent. The "former the belligerent must prevent." This passage occurs in the edition of 1865, a period not only subsequent to the passing of the American Enlistment Act of 1818, but even to the occurrence of the *Alabama* affair.

In 1815, in the case of the *Alerta*, tried before the Supreme Court of the United States, the following passage occurs in the judgment, "A neutral nation may, if so disposed, without "a breach of her neutral character, grant permission to both "belligerents to equip their vessels of war within her territory; "but, without such permission, the subjects of such belligerent

"powers have no right to equip vessels of war, or to increase or "augment their force, either with arms or with men, within "the territory of such neutral nation." But, it seems if the privilege was granted to one only of the belligerents, this conduct would not be just and equal on the part of the neutral power, and would be a breach of neutrality.

According to the decision in the *Alerta*, the United States had no footing to claim a detention of the *Alabama* only for our Act of 1819. They were, therefore, bound to elect to sue either under that Act or at the common law of nations. The latter law gave them no right, and by the former they were estopped from demanding of our Government to act, except in the mode pointed out by the Act, viz., on sworn evidence of facts, and not on hearsay or rumour. No foreign Government has a legal right under a mere municipal statute. But, supposing it has, then it must in proceeding under the statute adopt the mode of procedure pointed out by it.

The *Independencia*, in 1816, was armed and sold by an American citizen to the Government of Buenos Ayres, then at war with Spain. We find Mr. Justice Story saying in that case, "The question as to the original illegal armament and outfit of "the *Independencia*, may be dismissed in a few words. It is "apparent that, though equipped as a vessel of war, she was "sent to Buenos Ayres on a commercial adventure, contraband, "indeed, but in no shape violating our laws or our national "neutrality. If captured by a Spanish ship of war during the "voyage, she would have been justly condemned as good prize, "and for carrying on a traffic prohibited by the law of nations. "But, there is nothing in our laws, or in the law of nations, "that forbids our citizens from sending armed vessels, as well "as munitions of war, to foreign ports for sale. It is a com- "mercial adventure which no nation is bound to prohibit, and "which only exposes the persons engaged in it to the penalty of "confiscation. Supposing, therefore, the voyage to have been "for commercial purposes, and the sale at Buenos Ayres to have "been a *bonâ fide* sale (and there is nothing in the evidence

"before us to contradict it), there is no pretence to say that the "original outfit on the voyage was illegal, or that a capture made "after the sale was, for that cause alone, invalid," The *Santissima Trinidad*, Wheaton's Rep. 7, p. 340.

In 1832, it was held also in America that the intent referred to in the Act must be an absolute and not a contingent intent. This ruling, indeed, follows from the penal nature of the statute. For every such enactment is to be construed strictly. Of course the intent must be on the part of the equipper, or his contractee, and not of the master or any other person; else the property of A. would be confiscated for the conduct or acts of B. This indeed is partly authorized by the sixth section (hereinafter referred to) of our Act of 1819. But such a provision is not to be presumed, and not to be extended beyond its strict letter.

President Pierce stated in his message to Congress in 1855, that "The laws of the United States do not forbid their citizens "to sell to either of the belligerent powers articles contraband "of war, or to take munitions of war, or soldiers, on board their "private ships for exportation."

In 1842, Mr. Webster writes, "It is not the practice of "nations to undertake to prohibit their own subjects from "trafficking in articles contraband of war."

In December, 1854, President Pierce declares the same thing, and adds "Our merchantmen have been, and still con- "tinue to be, largely employed by Great Britain and France in "transporting troops, provisions, and munitions of war to the "principal seat of military operations, and in bringing home "the sick and wounded soldiers; but such use of our mercantile "marine is not interdicted either by the international or by our "municipal law, and therefore does not compromise our neutral "relations with Russia."

No author, except Hauteville, in thus treating of contraband, makes any exception as to ships, or regards them as more or less unlawful than other articles of contraband.

Sir Alexander Cockburn says (*London Gazette*, p. 4129) "In "principle is there any difference between a ship-of-war and any

"other article of warlike use? I am unable to see any. Nor "can I discover any difference in principle between a ship "equipped for armament and a ship actually armed."

Hauteville held all trade in contraband to be a breach of neutrality. He, therefore, consistently held the equipping or arming of a ship to be also a breach. If his universal proposition is untenable, so is his particular doctrine as to ships. But, his universal proposition has been long since exploded. Therefore, his rule as to ships is also obsolete.

Ortolan considers that a ship-of-war can be sold to a belligerent, but not made to order, without breach of neutrality. The Lord Chief Justice denies the soundness of this distinction.

In 1721, all the Judges of England, except one, declared in the House of Lords that the Crown had no power to prohibit the sale of ships of war to a belligerent. But, as the Lord Chief Justice observes (p. 4132), offences against international law are misdemeanours at common law. Therefore, the sale of ships of war is no breach of international law, for else the Crown could prohibit it.

The *American Law Review*, of January, 1871, says "It may "be declared as indubitable that the pure, unalloyed bargain "and sale of a ship, even of a ship-of-war, to a belligerent, is "legal by the rules of international law.....It was not," adds the *Law Review*, "because the Messrs. Laird sold a war-ship to "the Confederates, that we have a claim against England for a "breach of international law; but it was because collateral "arrangements for completing the equipment and armament of "the ships so sold, by placing on board officers and crew, guns "and provisions, rendered the entire procedure, in fact, the "inception of a hostile undertaking from the confines of a "neutral country." But how, I should like to know, were the Government aware of these "collateral arrangements?" The writer in the *Law Review* evidently gives up the non-detention of the *Alabama* as a hopeless task, since he bases his argument not on the character of the ship, but on the collateral arrangements, the alleged enlistment, &c.

Mr. Adams himself, on 6th April, 1863, writes to Lord Russell with reference to certain American authorities. "The "sale and transfer, by a neutral, of arms, of munitions of war, "and even of vessels of war, to a belligerent country, not sub- "ject to blockade at the time, as a purely commercial transac- "tion, is decided by these authorities not to be unlawful. They "go not a step further; and precisely to that extent I have "taken no exception to the doctrine."

On 30th July, 1861, the Department of Naval Affairs at Washington applied to the Messrs. Laird to build a ship "to be "furnished complete, with guns and everything appertaining." The United States Assistant Secretary of the Navy wrote again on the 14th August to the gentleman, who was acting for the Messrs. Laird. "I hope your friends will tender for the two iron-plated steamers." The Messrs. Laird replied that they could not complete the orders within the time appointed. Their agent, in acknowledging this letter, wrote that "the Secretary of the Navy was very desirous "to have you build the iron-plated or "bomb-proof batteries, and I trust that he may yet decide to "have you build one or more of the gun-boats." These facts were all stated by Mr. Laird in the House of Commons in the debate on the Foreign Enlistment Act, 27th March, 1863. Hansard, vol. 170, pp. 67, 68, 69.

After perusing these authorities—some of them American—will anyone venture to suggest even a doubt, whether at international law, ships of war may not be sold by a neutral to a belligerent, without any breach of neutrality?

§ 3—THE FOREIGN ENLISTMENT ACT 1819.

I now come to our Foreign Enlistment Act of 1819. And here let me repeat that a foreign nation has no right to seek the enforcement of a municipal provision which is not a rule of international law. For instance, France and several other States, have provided by statute that the exportation of munitions of war may be forbidden either generally or for a particular

period or destination. Yet, in the event of our being engaged in war, we could not think of making so useless a request to the French Government as to put this law in force. It was made for their protection, not ours. One of its objects was to prevent the depletion of the military stores of the country in time of danger, even though it might not be one of actual war.

By the 16 & 17 Vic. c. 107, our Government (in addition to the royal prerogative), has acquired a similar power, and exercised it by a prohibition against exporting contraband during the late Russian war. But, during the American civil war, they never dreamed of prohibiting the export of contraband.

In 1837, the United States Government had an act passed authorizing them to seize any ship or vehicle with arms or ammunition intended to cross the frontier to Canada. All these municipal enactments, and, in short, all statutes, can neither confer or abrogate an international right.

The American and British Acts are so far alike, that they both prohibit enlistment and the equipping of ships for military purposes, but not for sale. But, the Acts differ as to the mode in which they are to be enforced. It is here necessary to consider only our own Act. With respect to it, the Lord Chief Justice himself is a witness that the Act made no change in the law, as regards the building of vessels of war to be sold to a belligerent. This certainly would seem to be an odd construction of the Act, if the very same interpretation had not been put on the analogous American statute by a Judge of world-wide fame, Mr. Justice Story. (Vide the case of the *Santissima Trinidad* hereinafter referred to.)

Sir A. Cockburn says (p. 4135) that at one time "the "Spanish Minister loudly complained that some thirty vessels, "specifically named, the property of American citizens, and "belonging to ports of the Union, were then preying on "Spanish commerce. The representative of Portugal made "similar complaints." The American Act of 1818, accordingly, was directed against privateering carried on by American citizens against countries with which the United States were

at peace. Building or fitting out ships of war for a belligerent had not come into question at that time at all. In like manner the British Act of 1819 had in view, not the prevention of building or equipping ships for a belligerent in the way of trade, but the prevention of military or naval expeditions on behalf of the revolted colonies or malcontent subjects of Spain.

The Lord Chief Justice says (p. 4147) "I will only in "passing repeat my conviction that neither the American nor "the English statutes were ever intended to interfere with the "execution of orders from belligerents by American or British "shipbuilders, but simply to prevent the ports of the respective "countries from being used for fitting out privateers, or being "made the bases of hostile operations."

All old English statutes operate in the several States of the American Union except Louisiana, Texas, and the territory ceded by Spain and Mexico. *Magna Charta* and the *Habeas Corpus Act*, therefore, *proprio vigore* are, until repealed, the laws of most of the United States. But, the Federal Government is not bound by the common, or the old statute, law; and this is the reason why Mr. Adams adduces no argument for the purpose of reconciling the rules of the Washington treaty or the American Enlistment Act with the provisions of *Magna Charta* and the *Habeas Corpus Act*. With us the case was different. The statutes referred to are still the leading charters of our civil rights, and to allow the Crown to set them at nought during a foreign war, would be virtually to repeal them wholly, as well as to commit the egregious folly of doing for foreigners much more than we do for one another in our municipal proceedings. Even Dido only said that Trojan and Tyrian would be treated by her *nullo discrimine*. She did not say she loved the Trojans more, and would treat them better than the Tyrians. Æneas would not believe such a declaration. The American Act of 1819 gives the President a discretion. Need we fear that he will ever use that option in the interest of foreign belligerents in cases where he would remain passive if the contention were between different citizens and not between different belligerents, or a belligerent

and a citizen. Surely, Spain must have often remonstrated in vain, notwithstanding the extensive powers of the President, and though she could adduce clear evidence of a violation both of international and municipal law. Were we in 1862, without any evidence at all and on mere hearsay (as will be presently shown), to confiscate property and to imprison persons, where, if the case were one between subject and subject, it could not keep its ground in a Court of Law one instant.

Law is either prohibitory or punitive, or both. The Act of 1819 is only punitive. It does not authorize a perpetual injunction, but only confiscation (founded on legal evidence) as the punishment for a preceding crime. Accordingly the American "case" refers to the "practical inefficiency" of the Act, and comparing the American with the English statute, states that "the great difference between the two consists in the "cardinal fact that the provisions of the British Act are merely "punitive, and to be carried into effect only by judicial instru- "mentality; whereas the American Act is preventive in calling "for executive action, &c." Our Act, however, is, in one respect, apparently stronger than the American, as the latter requires a fitting out and arming to constitute an offence under it, whereas our statute requires only a fitting out *or* arming. As to the supposed arbitrary powers conferred on the President by the Act, they are given to him only "in order to the execution "of the prohibitions and penalties of the Act." Even *he* must bring the ship to trial and then adduce evidence.

The Act of 1870 makes it an offence to *build*, and affects the question of intent, so far as that the vessel can be seized if the builder has reasonable cause to believe she will be employed in the service of a belligerent. The burden of proof is then transferred to the owner or builder. He must prove his innocence. This was not a rule of our law in 1862.

Indeed, the only mode of acting on suspicion is to require bail or bond. The 10th section of the American Act of 1819 (like the 23rd of our Act of 1870), empowers the United States Government to get bond from any citizen (but not from an

alien), exporting an armed ship. I should like to know how many bonds were ever taken from citizens under this section. Surely the citizen would sell to a belligerent at once, and so avoid the giving of the bond. The fact is, that both the American and the English Acts have been so much waste paper, owing to the construction put upon them by the Courts. Well might the Judges say to Charles the First that "every statute "hath its interpretation," and well may an able tribune of the people boast of driving a chariot and six through an Act of Parliament. Law is not what is found in the statute books, but what is administered by the Judges. As the last brush alone gives a character to the picture, so it is the complexion imparted to a statute by judicial construction, and not its inherent letter, that renders it vigorous and effective.

The Bill of 1819 was intended to extend the Enlistment Act of 9 & 29 Geo. II. to belligerent as well as recognized States, and to reduce the penalty from a capital felony to a misdemeanour. (Speech of the Attorney General, May 13th, 1819, Hansard, vol. 40, p. 363.) It also sought to prevent the fitting out of armed vessels, and also to prevent the fitting out or supplying other ships with warlike stores in any of His Majesty's ports. Upon these points the previous Acts were wholly silent. Not that such vessels may not receive provisions in any port in the British dominions. But, the object of the enactment was to prevent them from shipping warlike stores, such as guns and other things obviously and manifestly intended for no other purpose than war. The American Act of 1818 was, like ours of the succeeding year, intended to extend to unrecognized States the provisions of their earlier Act of 1792.

The Acts of Geo. II. were intended to prevent British subjects from being engaged in hostility against the British Government on behalf of the Stuarts (Hansard, vol. 40, p. 371), and the aim of the Act of 1819 was to extend the penalties of the previous Acts to enlistment on behalf of the South American colonies, or of Spain, which were then in revolt. The old Acts of Geo. II. were never in one case acted upon. They

were a dead letter. At one period, out of 120 companies of Austrian Grenadiers, 70 were commanded by Irish officers. At Fontenoy, some of the Irish-French brigade were taken, but none of them were executed. In short, the old Acts, on account of their great severity, were never carried into effect, not even against those captured from the Irish brigade at Minden, and again at Culloden.

The preamble, which is also the first section of the Act of 1819 (59 Geo. III. c. 59), states that the enlistment of soldiers for foreign service, or the equipping and arming of vessels, without the King's license, "may be prejudicial to and tend to endanger the peace and welfare of this kingdom." How? evidently if rival enlisters or rival ships, commence hostilities in British territory or waters, and not by giving cause of complaint at international law to a belligerent, for the royal license could not have any effect on the grounds of such complaint, which would be founded on international law, to which the dispensing power of the Crown never extended.

The second section consists of two parts: the first relates to natural-born subjects, the second to any person. A natural-born subject who, without the royal license, shall accept any military commission, or shall enlist as a soldier, or enter himself to serve in any military operation, or shall accept any commission or enlist or enter himself to serve as a sailor or marine on board any ship-of-war, or on board any ship fitted out, or equipped, or intended to be used for any warlike purpose, in the service of any Foreign State, recognized or belligerent, and any natural-born subject who shall agree to go to any Foreign State or to any place beyond the seas, with an intent to serve as aforesaid, though no enlisting-money be paid to him, shall be guilty of a misdemeanour, and be liable to fine and imprisonment. This first part of the section might possibly be held not to apply to the deponents in the *Alabama* case, as these were neither enlisted nor had agreed to go to any Foreign State, but were alleged merely to have had an understanding that they should be enlisted on the high seas "when the ship got outside." The

statute is a technical and criminal one, and should be construed strictly. However, it is clear, the first part of section two applies only to natural-born subjects. The second part of the section applies to any person for trying to enlist, but not for enlisting himself. No foreigner could be punished under this section for enlisting himself as distinguished from enlisting others. The phrase "intended to be used for any warlike purpose" means "intended to be so used before putting into a port of destination." Else the sale of a ship-of-war, and the serving therein in a neutral port, would be always unlawful, whereas all admit that such sales are lawful, if the immediate object of the sale is gain, and not a warlike expedition or purpose, *supra* § 2.

The third section merely prevents the Act from having a retrospective operation.

The fourth section empowers Justices to apprehend offenders "on information on oath of any such offence," and to commit the accused, unless released on bail, to stand their trial on indictment at Westminster, or at the Assizes or General or Quarter Sessions. This section appears to have been drafted by Sir Boyle Roach, inasmuch as it requires, that, if an offence is committed out of the United Kingdom, some "Justice of the Peace, "residing *near to the port or place* where the offence is committed," is to issue his warrant for the arrest of the offender. Offences committed abroad are required by this section to be tried in one of the Superior Courts.

The fifth section empowers the Officers of Customs, and if there be none such at hand, the Governor or person having the chief civil command, "upon information on oath given "before them," to detain and prevent any such ship or vessel from proceeding to sea, or to cause such ship or vessel to be detained and prevented from proceeding to sea on her voyage with such persons as aforesaid on board. This section requires that the person giving the information should specify the facts on which he founds his knowledge or belief.

It is very clear that this section does not authorize any detention of the vessel when once the offenders are brought

ashore. The next section would be inoperative under any other construction of section five. For, if the vessel could be condemned under that section, she could not also be a security for penalties under section seven.

The sixth section directs that if any master, or other person in command of the ship, or any owner, shall knowingly engage to take on board an offender under the Act, such master or owner will be liable to a penalty of £50 for every such person so taken on board, and the Officers of Customs may seize and detain the ship *until* such penalties are paid or security given therefor.

So far it is clear that no absolute power to detain the ship is given. She is only a security for penalties. The master or owner too, offending under the sixth section, cannot be imprisoned, but only fined. After paying the fines, he would be entitled to depart. The seventh section is the only one that relates to the seizure of the vessel with a view to her condemnation.

This section (which is the material one of the Act), directs that if any person shall, in British territory, without royal license, "equip, furnish, fit out, or arm. or attempt or "endeavour to equip, furnish, fit out or arm, or procure to be "equipped, furnished, fitted out or armed, or shall knowingly "aid, assist, or be concerned in equipping, furnishing, fitting out, "or arming of any ship or vessel, with intent or in order that "such ship or vessel shall be employed in the service of any "Foreign State.....as a transport or store-ship, or with intent "to cruise or commit hostilities against any State, &c.," with which His Majesty shall be at peace, or if any person shall, in British territory, "issue or deliver any commission for any "ship or vessel, to the intent that such ship or vessel shall be "employed as aforesaid, every person so offending shall be "deemed guilty of a misdemeanour, and shall, upon conviction "thereof upon any information or indictment, be punished by "fine and imprisonment, or either of them, &c." The ship, with all furniture and stores on board, is to be forfeited, and

may be prosecuted and condemned as for a breach of the laws of the Revenue.

The Lord Chief Baron says (trial of the *Alexandra*, vol. 1, p. 233, "I must say, it seems to me that the *Alabama* sailed "away from Liverpool without any arms at all; merely a ship "in ballast, unfurnished, unequipped, unprepared, and her "arms were put in at Terceira, not a port in her Majesty's "dominions. The Foreign Enlistment Act is no more violated "by that than by any other indifferent matter that might "happen about a boat of any kind whatever." His Lordship adds, p. 234, "If you think the object really was to build a ship "in obedience to an order, and in compliance with a contract, "leaving it to those who bought it to make what use they "thought fit of it, then it appears to me that the Foreign "Enlistment Act has not been in any degree broken. I leave "you to find your verdict."

This section, I need merely observe here, does not refer at all to the building of a vessel, but only to "equipping, fitting "out, or arming." The *Alabama*, therefore, as she left port, did not come within its operation. The intent or purpose charged, too, should be an immediate intent, that is to say, the vessel should do nothing else, make no voyage, nor carry any cargo before proceeding on her warlike career. If she was to do any of these things before acting as a ship-of-war or a privateer, the Act was not violated. The intent, also, must of course be on the part of the builder or his contractees. For instance, the intent of Passmore (to which I shall presently refer) could not involve the confiscation of the property of the Messrs. Laird.*

The eighth section relates to an "augmenting of the "warlike force" of a vessel which is already equipped for war. This section, therefore, does not apply to an original fitting out, equipping or arming, such as occurred in the *Alabama* case.

The ninth section provides that offences committed out of the United Kingdom may be tried at Westminster.

* Id non deberet alii nocere quod inter alios actum esset (Paulus, Liber 18, ad Edict).

The tenth section directs that the penalties may be sued for in any Court of Record, and that half of the sum recovered is to go to the Crown, and the other half to the informer, and that the delinquent is to pay double costs of suit.

Section eleven extends to persons taking proceedings under this Act all the privileges accorded by various other statutes to persons suing on behalf of the Revenue.

The twelfth and last section prevents the Act from extending to enlistments sanctioned by the Governor General or Vice-President in Council in India.

The Act is undoubtedly in excess of the common law. For it is contrary altogether to the presumption against criminal agency and the maxim *omnia presumuntur rite et bene esse acta*. In no other statute or rule of law do we find the property of A. confiscated for the conduct of B. to which A. is not privy. Yet the sixth section of the Act makes the ship liable for the conduct of the master. The enactment virtually entails on shipbuilders the responsibility of engaging masters, who will not disobey the Act, or who, at all events, will give security for their observance of the law.

If a vendee of a newly-built ship fails to get a security or guarantee to this effect from the master, the latter can really injure the owner. For, if the master enlists 100 men, the owner is liable for £50 penalty for each of the persons so enlisted.

It is also remarkable in the Act of 1819, that it makes the shipowner liable not only for the criminal misconduct of the master, but also for acts of his not connected with navigation, but with enlistment; and yet this is the statute that has been denounced as furnishing evasions for breaches of international duty.

It is clear, however, that the Act is far in advance of anything known to international law, and that if the Commissioners of Customs fulfilled the terms of the statute, they discharged the duties of their department according to the common law of nations. The argument is an *a fortiori* one; accordingly the legal advisers of the Customs authorities did not look

outside the Act, nor inquire, whether they could not, as the deputies of the Sovereign at common law, confiscate the property of A. on the suspicion that B. contemplated a breach of international duty.

With regard to the variety of terms used, "equip, furnish," &c., Lord Chief Baron Pollock said on the trial of the *Alexandra*, vol. 1, "Certainly my present impression is that they all mean pre-"cisely the same thing, 'that it is not lawful to equip, furnish, "'or to fit out, or to arm,' for a particular purpose with a par-"ticular intent, and that there is no distinction for this purpose. "That to equip a ship-of-war you must furnish it with arms. "Furnishing it imports arming in the French language, using "that very expression 'to arm.' I apprehend that all these "words mean substantially the same thing, whether you call "it 'equip' or 'furnish' or 'fitting out' or 'arming.'"

Sir Alexander Cockburn says (*London Gazette*, p. 4151) of the American Act of 1818, which is confessedly stronger in most respects than the English one, "According to it, it is not an "offence to build or equip a vessel, unless it be also armed; "knowledge, or reasonable ground of belief is not, as under the "Act of 1870, sufficient; the intent must be proved."

As the Lord Chief Baron remarked in the case of the *Alexandra*, the Act is silent about building ships, and refers only to their equipment. Its object was to prevent two ships from being fitted up, one for each belligerent in neutral ports, and then coming into hostile contact. If they are not equipped, they cannot fight. If, then, the Act was passed for our protection and not for that of a belligerent, and, as, since the Act, the sale of an armed ship to him is lawful, so is a contract to build a ship for him. The *Alexandra* Official Report, vol 1, p. 231.

The Lord Chief Baron said at the trial of the *Alexandra*, vol. 1, p. 198, Official Report:—"I have no hesitation in saying "that, according to all the authorities and all the decisions that "we can get at, a shipbuilder has as much right to build a ship "and to sell it as a maker of gunpowder has a right to sell it to "any belligerent parties, or the maker of any sort of cannon or

"muskets, or pistols, or anything else. It is laid down in Kent's "Commentaries on American Law, that it is the right of "neutral subjects to supply both belligerents with arms, "gunpowder, and all munitions of war, to which I add, why "not ships?"

The only reason why a distinction may be fancied to exist between ships and other munitions of war, appears to be this—As a matter of fact, ships are more rare and expensive articles of commerce than arms or ammunition, and consequently fifty instances of sales of the latter contraband take place for one of the former. Hence, perhaps arose the impression that it was unlawful to sell ships to a belligerent.

In February, 1863, the Messrs. Laird consulted Mr. (now Lord Justice) Mellish, as to the legality of their conduct in building the ship. The following is a copy of the opinion of the eminent lawyer whom they consulted, and whose opinion is endorsed by the high authority of Lord Cairns and Mr. Kemplay :—

"I am of opinion that Messrs. Laird had a right to build "the ship, which has since been called the *Alabama*, in the "manner they did, and that they have committed no offence "against either the common law or the Foreign Enlistment Act "with reference to that ship. I am of opinion that the simple "building of a ship, even although the ship be of a kind "apparently adapted for warlike purposes, and delivering such "ship to a purchaser in an English port, even although the "purchaser is suspected or known to be the agent of a foreign "belligerent power, does not constitute an offence against the "Foreign Enlistment Act, 59 Geo. III. c. 69 § 7, on the part "of the builder, unless the builder makes himself a party to the "equipping of the vessel for warlike purposes. The *Alabama*, "indeed, appears to me to have been equipped at the Azores, "and not in England at all. "GEORGE MELLISH."

"2, Harcourt Buildings, 6th February, 1863."

"We entirely concur in the opinion given by Mr. Mellish "on the statements laid before him, and our opinion would not "be altered if the fact were, that Messrs. Laird Brothers knew

"that they were building the *Alabama* for an agent of the
"Confederate Government. "H. M. CAIRNS.
"JAMES KEMPLAY."

Such being the state of the law in 1862, what could be easier for the Messrs. Laird, or the Confederate Government, than to get a ship built for John Doe, who was to send her for sale to a Confederate port—*cui bono* any espionage of our Government over the *Alabamas* and *Oretos* of the period, if, under the Ægis of the international code, any vessel might escape from our most complicated toils?

When the President of the United States and his Cabinet sold huge quantities of arms to the French Government during the Franco-Prussian war, every one saw that he was copying the precedent of the *Alabama* on a colossal scale, and without at all concealing his friendly *animus* towards Republican France. No one can fail to be struck by the coincidence that it was soon after the sale referred to that friendly overtures were made to England to re-open the Clarendon-Johnson negotiations. President Grant could not feel exasperated about a technicality. He saw that we had done him no substantial wrong, which he did not seek to do to the Germans—with this difference, that our Government ultimately sought to detain the *Alabama*, and consulted all the Sibylline books within reach in order to discover the path of duty, while the President and his Cabinet were actual sympathisers with Germany.

The Americans take a distinguished lead as international jurists. Owing to the frequent collision of State with State, and of States with the Federal Government, the principles of inter-state and inter-national law have been cultivated practically in America, and developed to an extent unknown in any other country except Germany. Is it necessary to point to Kent, Story, and Wheaton as the best jurists known to international law? Mr. Secretary Fish and the President are, doubtless, familiar with that law, and knew very well that their sale of arms to the French in 1870-1, was justifiable. Otherwise President Grant would never have ventured to repel by such

conduct the German vote, which is almost equivalent to the Irish influence throughout the Union.

What a flimsy pretence satisfies the international rule! A vessel of war can be sent to a belligerent port, to be sold there as an article of commerce, although it is evidently to be used immediately afterwards for belligerent purposes. This rule is absurd and ridiculous. Yet the distinction is perfectly well established.

I repeat and willingly admit, that the law which authorized sales of *Alabamas* to the United States and arms to the French, is radically unsound. But, I also submit, that I am stating the law correctly as it stood in 1862.

The fact that our Government considered in 1870 that supplemental legislation was necessary to prevent, as well as to punish breaches of neutrality, shows conclusively, that they found the Act of 1819 to have been weighed and found wanting in the case of the *Alabama*. This, indeed, may appear to Americans to be only a pretence. But I shall presently cite the evidence of Mr. Dudley himself, to show that the Act of 1870 became necessary, and that the Act of 1819 was virtually worthless, even though it aimed to be a great step in advance of international law.

§ 4—RELATIONS OF ENLISTMENT TO THE DETENTION OF SHIPS.

Arrest of the ship I have shown to have been out of the question, unless on the ground that she was enlisting under the Act of 1819. Arrest of the master on mere suspicion of having violated the Act was equally out of the power of the authorities. On this point there has been a difference of opinion from the very beginning between the American and British Governments. The English rule is embodied in the Act of 1819. The American rule is contained in the American Act of 1818, our Act of 1870, and the first rule of the Washington treaty. I shall now show

the obstacles that stood in the way of arresting the master of the gun-boat No. 290 in 1862, as the law then stood.

Magna Charta provides that no free person shall be seized or imprisoned except by the judgment of his Peers and the law of the land, that is to say by a court and jury. The illegal arrests made by the first and second Stuart Sovereigns raised a suspicion, that the clause, quoted from *Magna Charta*, would soon become obsolete, if it had not already become so. For this reason the *Habeas Corpus Act* was passed. That statute is only in affirmance of the common law, and it is still competent for any one under arrest to apply to a Judge for a *Habeas Corpus* at common law and not under the statute. The Crown and its officers, therefore, have long ago relinquished all pretence of claim to arrest anyone on mere suspicion. Besides *ciu bono* to arrest, when the Judge must discharge the accused in the absence of legal evidence.

The substitution of "reasonable ground" of suspicion instead of legal evidence in the Act of 1870 and the Washington treaty, is *pro tanto* a repeal of *Magna Charta* and the *Habeas Corpus Act*. No one can for a moment contend, that the Sovereign, since the passing of *Magna Charta*, and especially of the *Habeas Corpus Act*, can arrest or detain anyone on grounds of mere suspicion not sufficient to warrant a finding of guilty by a jury. But, is it likely, that our constitution (for statute law prior to 1870, is silent on the point) gives to the Crown more arbitrary powers for maintaining the tranquility of foreign nations than it does for preserving its own domestic peace? Impossible. Charles the First levied ship-money under pretence that his constitutional powers were greater in maritime than in municipal matters, and that, besides an ordinary power, he had an extraordinary prerogative, which might spring up into action on any unusual emergency, *ne quid respublica detrimenti caperet*. The Rebellion, the Petition of Right, the Bill of Rights, and the Act of Settlement, have long ago flung these pretensions to the winds. If, then, the power of the Crown to tax or seize the property of its subjects, or of persons resident here, can only be

exercised according to due form of law, is it likely that personal liberty is left less protected than property, and that the Crown, in time of a foreign war, can seize the person, but not the property, of a person resident on British soil. The phrase in *Magna Charta* "*Nullus liber homo*," &c., comprises all persons, whether subjects or strangers, and even alien enemies. No one can be lawfully arrested or detained except on a warrant specifying a crime and supported by legal evidence.

The Crown has no more power during a foreign war to imprison on mere suspicion, than it has to levy ship-money under pretence that the tax is necessary to preserve the peace of the kingdom. It possesses has exactly the same constitutional powers in respect to both foreign and domestic matters, with this difference, that if for adequate reason it exceeds the law on a great foreign emergency, it will probably be indemnified by a subsequent statute, just as the Ministry who occasionally authorize a breach of the Bank Act of 1844, are immediately thanked rather than blamed by Parliament for their prompt, though illegal, action. The Customs authorities in 1862, or 1872, can attempt no such *fete*. They can only put the existing law in force, and not resort to fresh devices *pro re natâ*.

The Commissioners of Customs, therefore, in 1862, exercised due diligence in respect to the Messrs. Laird who contemplated no violation of law. As regards the enlistment, even if proved, it would only entail the payment of £50 penalty for each person, and Passmore's was the only case in which the affidavit could be at all acted upon. Lord Selborne so stated in the House of Commons, 27th March, 1863. But, when the reader comes to my analysis of that affidavit he will see what it was worth. The Customs authorities saw all along that the decision in the United States, and the opinion of American jurists, had completely effaced the Enlistment Act of 1819, and *fortiori* our own, which is weaker. It remains to be seen, whether the Act of 1870 will not also be a dead letter as regards the *permanent* detention of a ship, if it is pretended, that she is intended to be sold to a citizen of some power at peace with ourselves.

§ 5—FACTS OF THE ALABAMA CASE.

I now enter upon a brief detail of the events in the *Alabama* case. On the 21st June, Mr. Dudley wrote to Mr. Adams respecting the vessel. "The foreman in Messrs. Laird's yard says she "is sister to the gun-boat *Oreto*, and has been built for the same "parties and for the same purpose." If this foreman so stated to Mr. Dudley, why did he not prosecute and call the foreman as a witness? No doubt it was better for him to get the Government to act. Still if he had cogent evidence, he ought to show to the world what sort of justice was to be had from a British Court and jury by prosecuting in open Court.

The Lord Chief Justice says (p. 4288) "the unsupported "statement of a single workman from the shipbuilder's yard, "even if such workman should be willing to re-produce it on "oath, would have fallen short of what would probably been "deemed judicially requisite." Why then should not the weight, as well as admissibility of Passmore's "unsupported statement" be considered by the Customs authorities before proceeding under the Act. And why should the Lord Chief Justice pronounce an opinion "erroneous" and "misleading" so entirely in accord with his own "reasons?"

Mr. Adams first applied to our Government on the 23rd of June, and the Government directed the Commissioners of Customs to inquire and report on the matter. On the 1st July the Commissioners reported that the ship was evidently a ship-of-war, that it was not denied, that she was built for a Foreign Government, but, that the builders would give no information about her destination, and that the Commissioners had no other reliable source of information on that point.

Lord Russell communicated the result of the enquiry to Mr. Adams, and added that if he could produce any evidence on the matter it would receive attention.

With regard to Mr. Adams' letter of the 24th June, an opinion was given five days later by the Law Officers of the Crown, as follows:—"If the representation made by Mr. Adams

" is in accordance with the facts, the building and equipment of " the steamer is a manifest violation of the Foreign Enlistment " Act, and steps ought to be taken to put the Act in force and " prevent the vessel from going to sea." The question, however, was whether the statements made by Mr. Adams could be substantiated in a Court of Justice. Mr. Adams knew nothing personally about the facts.

Sir A. Cockburn says (p. 4288) " The evidence, which was " conclusive to Mr. Dudley's mind, and left no doubt on it, and " on which Mr. Adams asked for the seizure of the vessel, was " wholly insufficient to justify such a proceeding." This refers to the letter of Mr. Dudley, dated 21st June, which Mr. Adams transmitted to Lord Russell two days afterwards, and Lord Russell referred the letters of Mr. Adams and of Mr. Dudley to the Department of the Customs. The Surveyor of the Port of Liverpool reported on the 28th, that " the vessel had not " escaped the notice of the Customs officers," " that she was " intended for a ship-of-war," " has several powder canisters " on board, but neither guns nor cartridges as yet. The current " report is that she has been built for a Foreign Government, " and that report is not denied by the Messrs. Laird." The Surveyor concluded by saying that if anything worth mention occurred he would immediately report it.

Subsequent reports carrying the case no further, Mr. Hamel, the Solicitor to the Customs, on June 30th advised as follows: " At present there is not sufficient to show that the vessel in " question falls within the provisions of the 7th section of the " Foreign Enlistment Act, or to give the Board of Officers of " this Revenue power to interfere in this case." The Solicitor further reported that the vessel was under surveillance, and would be kept so, but that her seizure under the Act of 1819 would require evidence of intent, and that the mere proof of her cargo being contraband would not justify her detention.

The Commissioners concurred in this opinion, and in their report to the Lords of the Treasury stated, that Mr. Dudley should submit to the Collector at Liverpool all the evidence he

had. The report concluded by observing that "Without the "production of full and sufficient evidence to justify their pro- "ceedings, the seizing officers might entail on themselves and "on the Government very serious consequences."

Mr. Adams then wrote to Mr. Wilding, the American Vice-Consul at Liverpool, requesting him to communicate any evidence he had. Referring to this, Mr. Dudley, writing on the 9th July to Mr. Seward, said "The burden of proof ought not "to be thrown upon us. The Government ought to investigate "it, and not call on us for proof." Here Mr. Dudley admits that he had no evidence. On the same day, in a long letter written by him to the Collector of Customs, when referring to the sources of his information, he said "As the information in "most cases is given to me by persons out of friendly feeling to "the United States, and in strict confidence, I cannot state the "names of my informants."

So far a suppression of evidence is admitted, though excused on grounds of confidence.

Mr. Edwards, the Collector at Liverpool, truly observed "If she is for the Confederate service, the builders and parties "interested are not likely to commit themselves by any act "which would subject them to the penal provisions of the "Foreign Enlistment Act." The Solicitor of Customs accordingly reported once more (July 11th) "there is only one proper "way of looking at this question. If the Collector of Customs "were to detain the vessel in question, he would, no doubt, have "to maintain the seizure by legal evidence in a Court of Law, "and pay damages and costs in case of failure. Upon carefully "reading the statement, I find that the greater part, if not all, "is hearsay and inadmissible, and, as to a part, the witnesses "are not forthcoming or even named."

This opinion having been communicated to Mr. Dudley, he wrote to Mr. Adams on the 11th July :—"The Collector seems "disposed to hold our Government to as strict a rule as if we "were in a Court of Justice. We are required to furnish legal "evidence (I take it this is his meaning, though it is involved

"in some obscurity) that is, that the *onus* is upon us to prove "and establish by legal evidence that this vessel is intended as "a privateer. If this is to be taken as the answer of the "Government, it is hardly worth spending our time in making "further application to them."

The Lord Chief Justice here (p. 4292) observes that the Government could not interrogate the Messrs. Laird as Mr. Dudley expected, and adds, that "A vessel could only be seized "with a view to its being brought forthwith into a competent "Court with a view to its condemnation." His Lordship also observes that Mr. Dudley's expectation "proceeds on an entirely "mistaken notion of the powers of a Constitutional Government "in a Free State." Yet, in the next sentence, I may say in the same breath, his Lordship blames the Government for sitting "with their arms folded," and not enquiring either of outsiders, or of the Messrs. Laird, for whom was the ship being built. As to outsiders, need it be said that enquiries addressed to such persons would have been frivolous and nugatory, and that the answers, if any, would be worthless hearsay. His Lordship adds, that a truthful answer by the Messrs. Laird "would have "justified an immediate seizure" of the ship. But, his Lordship has stated the very reverse in at least a dozen passages of his "reasons," some of which I have already cited *verbatim*. The fact is, that his Lordship had so many important matters and principals of law, some of them wholly new to the world, to arrange and comment upon, that he almost necessarily confounds the three rules of the treaty with the Act of 1819, and the enlisting of marines with the seizure of the ship. As regards the seizure of the ship directly, and apart from the alleged enlistment, I repeat that it was entirely out of the question in 1862, prior to the Act of 1870, and the Washington treaty. Had the Messrs. Laird advertized themselves as builders, but not furnishers of vessels of war for both North and South, no power known to British law could have restrained them. A proclamation, indeed, could have prevented them for carrying on such traffic, if the proclamation amounted to a general prohibi-

tion to the whole nation not to export contraband. The Crown can, by proclamation, forbid such export, although a proclamation cannot create any new crime. For, dealings in contraband are not at common law strictly lawful, more than at international law. But, until forbidden, no trade in such articles can be punished either at common law or by statute. The opinion of the Judges already referred to establishes this conclusively.

Mr. Laird stated in the House of Commons, 27th March, 1872, that "the Officers of the Government had every facility "afforded them for inspecting the ship during the progress of "the building. When the officers came to the builders, they "were shown the ship, and day after day the Customs officers "were on board, as they were when she finally left, and they "declared there was nothing wrong." As the armament was put on board only at Terceira, there was nothing in or about the vessel at Liverpool to excite such extreme alarm on the part of the Customs authorities, especially, indeed, as they were daily familiarized, or, shall I say, demoralized, by the sight of the cargoes of arms and ammunition which were shipped to both North and South.

The diligence required by the Lord Chief Justice is the preventive, or "due diligence" prescribed by the first of the three rules of the Washington treaty. Lord Palmerston is a sufficient authority, that the Act of 1819 admitted of no such preventive measures on mere grounds of suspicion, without evidence, that would, if not weakened by the trial, warrant a condemnation of the vessel. No doubt it was very difficult for the arbitrators at Geneva, while deciding the case according to the treaty rules, to remember that, if the rules were clear law before the treaty was signed, there would have been no occasion to place them expressly at the head of the treaty. The treaty rules, however, cannot be construed so as to impose any constructive obligation of diligence on the Officers of Customs to which they were not *in re verâ* liable in 1862. For, well has Lord Bacon observed "*Diligentæ attendas ne eæ leges, quer ad "preterita respicere putantur, ante-acta infirmant*" *De Aug Sci.*

How hard is the fate of a British Official, especially if he is supposed to possess any portion of the mind of the Government. If he recommends action, either unpopular or unsuccessful action, he may earn for himself the consequences of just dismissal. If, owing to the want of due knowledge or due diligence on the part of others, his masterly inactivity comes to be called in question, he finds that the day of atonement for the prejudices and sins of the people was only postponed. Empson and Dudley, the Ministers of Henry the Seventh's extortions, would have been put to death by that Monarch if they disobeyed him. But, Henry the Eighth had them executed, because they did obey the commands of his father. A hapless dilemma this for officials: nor is it at all unlikely that with the transference of much of the royal prerogative and power to the people and their representatives, the same parties have also inherited the tendencies of the old monarchs to charge every mishap to the credit of their legal advisers. In this, however, they were not abetted by a Lord Chief Justice of England.

Had the Lord Chief Justice only recently left the ranks of the bar, he would have remembered how small a residuum of the evidence placed before him on the part of a client survives the ordeal of a rigid cross-examination and the artillery of the opposite camp. Of all the suits instituted only two per cent. reach the stage of judgment; but of all the evidence laid before a professional man, not a fraction per cent. is left at the trial uncontradicted either by proof positive from the opposite party, or by its own inherent infirmity. Even were Passmore's swearing, therefore, more to the point than it was, I should not have felt justified in acting on it, when the affidavit disclosed that not only was there no set proceeding towards an enlistment, but the man did not know whether Butcher was sailing-master or fighting-master.

Mr. Dudley having engaged the services of Mr. Squarey, a most respectable Solicitor of Liverpool, that gentleman appeared on the 21st before Mr. Edwards, with six depositions. The above was the date when the first legal application was made "on in-

"formation on oath" as required by the Act of 1819. The chief of these affidavits is Passmore's. It is to it Lord Selborne referred in his excellent speech in the House of Commons, 27th March, 1863, when he said that there was one deposition only that was admissible in evidence. As respects anxious care, close attention and due diligence, Mr. Squarey will admit that I went over each deposition in conference with him, and debated each statement with pains-taking anxiety.

The following is a verbatim copy of all the material parts of Passmore's affidavit:—

"I, William Passmore, of Birkenhead, in the County of "Chester, Mariner, make oath and say as follows: 1—I am a "seaman, and have served as such on board Her Majesty's ship "*Terrible* during the Crimean war. 2—Having been informed "that hands were wanted for a fighting-vessel built by Messrs. "Laird & Co., of Birkenhead, I applied on Saturday, which was, "I believe, the 21st day of June last, to Captain Butcher, who, "I was informed, was engaging men for the said vessel, for a "berth on board her. 3—Captain Butcher asked me if I knew "where the vessel was going, in reply to which I told him I "did not rightly understand about it. He then told me the "vessel was going out to the Government of the Confederate "States of America. I asked him if there would be any fighting, "to which he replied yes, they were going to fight for the "Southern Government. I told him I had been used to fighting-"vessels, and showed him my papers. I asked him to make me "signalman on board the vessel, and, in reply, he said no "articles would be signed until the vessel got outside, but he "would make me signalman, if they required one, when they "got outside. The said Captain Butcher then engaged me an "able seaman on board the same vessel at the wages of £4 10s. "per month; and it was arranged that I should join the ship "in Messrs. Laird & Co.'s yard on the following Monday. To "enable me to get on board, Captain Butcher gave me a pass-"word, the number '290.'"

The rest of the affidavit describes the vessel, and states the

rumours that were afloat about her. "It is reported on board "the ship," the affidavit added, "that Captain Butcher is to be "the sailing master, and that the other gentleman, whose name "I believe is Bullock, is to be the fighting-captain."

The reports and hearsay to which Passmore alludes are evidence against him, though not for him. They, in fact, disclose the extent of his ignorance.

Now, is it likely that Passmore was engaged as for a fighting-ship at the wages of only £4 10*s.* per month. Reddin, another deponent, swears that he was to get £10 per month. This would look like business in Reddin's case, but he was an old acquaintance of Captain Butcher, and the wages were certainly suspicious, only that Reddin's affidavit otherwise was worthless. Passmore's is the only one in point. Yet, the conversation is reconcilable with the fact that the vessel was to be a blockade-runner, or else a ship of war intended to "go out to the "Southern Government," and to be afterwards used for fighting purposes. This would be no violation of the Act.

Passmore does not know which was to be the fighting-captain, or whether his alleged enlister had really any commission to enlist. Could Passmore, I ask, if he deserted after his arrival in America, be executed justly if afterwards captured by the Southern Government? That Passmore was ready to enlist his affidavit proves; that Butcher had anything to do with enlisting it entirely fails to disclose. He engaged Passmore to serve on the voyage out, and he did not say that the vessel was to fight on that voyage. Neither did he say that the vessel was not to fight on the outward voyage, because she might be attacked and have no choice in the matter. To constitute an offence under the Act against the master of the ship, he should have agreed to enlist as well to employ a person who professed a willingness to be enlisted.

Butcher's answer, that "they were going to fight for the "Southern Government" was inconsistent with her at once privateering and preying upon commerce. If Butcher meant to convey this, which was the real object of equipping the vessel,

he would have said "You will see fighting the moment you leave "this port. We will pillage and make spoil of every Northern "vessel we meet." I am far from saying that Butcher's words, as reported by Passmore, were not suspicious. But could, or would a jury find Butcher guilty on Passmore's affidavit if uncontradicted?

The promise to make Passmore a signalman was conditional—if they would require one. Now if the ship was to begin to fight at once, of course they would require a signalman. What Butcher meant was, if we find ourselves in danger from American craft, I will appoint you a signalman. The affidavit does not disclose that Liverpool was to be any base of operations, or that the vessel was to leave the port armed for an expedition, or that Passmore was bound by the laws of war to serve, or that Butcher was bound to accept Passmore's services in battle.

Was Passmore so enlisted as to be liable to be tried by Court Martial if he absconded? Certainly not. Was he compellable to enlist when the vessel reached her port of destination? By no means. Not a word about enlisting passed between him and Captain Butcher. Now the Act of 1819 only provides either for actual enlistment, promises, or agreements to enlist at a future time, or else for engaging persons to serve on board a vessel about entering on actual service. The two first suppositions I have disposed of. The third could not arise until after the vessel received a commission from the President of the Confederate States, and was actually armed.

From the beginning to the end of Passmore's affidavit the word enlist does not occur. "Captain Butcher," Passmore says, "told me the vessel was going out to the Government of the "Confederate States of America. I asked him if there would be "any fighting, to which he replied yes, they were going to fight "for the Southern Government." There was nothing in the world to prevent Captain Butcher, or anybody else, from going to fight for any Foreign Government, provided they did not enlist, nor take anybody on board for the purpose of enlisting him. "I told him I had been used to fighting-vessels, and

"showed him my papers. I asked him to make me signalman "on board the vessel, and in reply he said that no articles would "be signed until the vessel got outside, but he would make me "signalman if they required one. The said Captain Butcher "then engaged me as an able seaman on board the same vessel "at the wages of £4 10s. per month." This is all of Passmore's affidavit that related to his alleged enlistment. The rest of the depositions relate to reports about the vessel's military character, which, as I have shown, is beside the question. Nor would any jury convict Captain Butcher of a breach of the Act because he engaged Passmore as an able seaman, and made a conditional promise of promoting him to the office of signalman.

If Captain Butcher was really known to have enlisted, and not merely suspected of it, why did not Mr. Dudley hire some one who could get enlisted and thus clench the matter. Passmore's statement does not hit the mark. Besides he was an accomplice according to his own confession, and the unsupported testimony of such a witness is practically worthless.

The Lord Chief Justice calls Butcher "the registered captain" of the vessel, but it so happens that she was never registered at all, and even if she had been registered, there would have been no record of the captain's name. What privity then was there between Captain Butcher and the Messrs. Laird? The Act made them responsible only for the acts of the master or other person in command of the vessel, and Passmore did not know whether Butcher or Bullock was the sailing-master. The Lord Chief Justice thinks that Mr. Edwards ought to have conversed with Passmore, and ascertained all he knew.

The matter having been referred to me for my opinion, I reported as follows:—

"There is not sufficient evidence in this case to justify the "detention of the vessel under the 59 Geo. III. c. 69. The "only affidavit that professes to give anything like positive "evidence is that of the seaman Passmore; but, assuming all "he states to be true, what occurred between the reputed master "(Butcher) and himself, would not warrant a detention under

"section 6, nor support an information for a penalty under that "section. Nor do I think, however probable it may seem, "that the vessel is fitted out for the military operations men- "tioned, that sufficient evidence has been adduced to entitle the "applicants to the interference of the Collector of Customs at "Liverpool. The only justifiable grounds of seizure under "section 7 of the Act would be the production of such evidence "of the fact as would support an indictment for the misde- "meanour under that section. "Signed, JAMES O'DOWD."

"Customs, July 22nd, 1862."

Mr. F. J. Hamel, the Solicitor of Customs, concurred in this report, and added that there was some evidence of the enlistment of individuals, "and if that were sufficient to satisfy "a Court, they would be liable to pecuniary penalties for security "of which, if recovered, the Customs might detain the ship until "those penalties were satisfied or good bail given; but there is "not evidence enough of enlistment to call upon the Customs to "prosecute. The United States Consul, or any other person, "may do so at their own risk if they see fit.

"July 22nd, 1862." "Signed, F. J. HAMEL."

The Customs authorities adopted these views, and reported to the Lords of the Treasury accordingly, "but," says the Lord Chief Justice, "accompanied their report with the very proper "suggestion that should their Lordships entertain any doubt "upon the subject, the opinion of the Law Officers should "be taken." This course, which is pronounced by the Lord Chief Justice to be proper, is referred to by Mr. Adams as the reverse as regards me, when I recommended that the opinion of the Law Officers should be taken.

On the same date as last referred to, the Secretary of the Treasury wrote to Mr. Layard as follows:—

"My dear Mr. Layard—As the communication may be con- "sidered pressing, I send it to you unofficially to save time. "Perhaps you will ascertain from Lord Russell whether it is "his wish that we should take the opinion of the Law Officers

"as to the case of this vessel. It is stated that she is nearly "ready for sea. Sincerely yours (signed) GEO. A. HAMILTON."

Does the letter disclose any remissness ?

The papers were submitted to the Law Officers on the 23rd, with a request for an answer at their earliest convenience. Two other affidavits were also forwarded, together with an opinion of Mr. (now Sir Robert) Collier, the private Counsel of Mr. Dudley, to the effect that the Act of 1819 had been violated, and that the vessel ought to be seized. Mr. Collier had given a previous opinion on the 16th to the effect that the case was one only of suspicion.

In one of the two new affidavits the deponent states "I "asked him what port he was going to, and he replied that he "could not tell me then, but that there would be an agreement "made before we left for sea." This explains what was meant by the statement in Passmore's affidavit that "articles would "be signed outside." Butcher could not specify at once the port of destination, as blockade running was perilous, and they could only steer their course according to circumstances. I submit that this explanation would entitle Butcher, on an indictment, to the benefit of the doubt thus raised as to why the signing of the articles was delayed.

It seemed to me that there was nothing material in the fresh affidavits, and reported accordingly, but added, "As "regards the opinion of Mr. Collier, I cannot concur in his "views, but, adverting to the high character which he bears in "his profession, I submit that the Board might act judiciously "in recommending the Lords of the Treasury to take the opinion "of the Law Officers of the Crown.

"July 23rd, 1862." "Signed, JAMES O'DOWD."

The papers were immediately submitted to the Law Officers.

On the 25th, Mr. Squarey forwarded a further affidavit from a person named Reddin, who deposed that he was engaged by Captain Butcher as boatswain on board the ship No. 290. "The said Captain Butcher," Reddin proceeded, "offered me "£10 per month, and said an agreement should be signed when

"we got outside. He told me that we should have plenty of "money when we got home, as we were going to the Southern "States on a speculation to try and get some." It would be a waste of argument to contend that no jury would convict under a highly penal statute on evidence such as that of Reddin. And yet the above is all that was material in his deposition. The rest was merely descriptive of the ship, and of the rumours prevalent respecting her.

It appeared to me that Reddin's affidavit rather weakened the case, "as after the lapse of several days since the date of "the former affidavits, the applicants are confessedly unable to "make out a better justification for detaining the vessel." It is no doubt, I added, "difficult to procure satisfactory evidence "in such a case; but, in the absence of at least a clear *primâ* "*facie* case, there cannot exist those grounds for detaining the "vessel which the Foreign Enlistment Act contemplated.

"Customs, July 25th, 1862." "JAMES O'DOWD."

The Law Officers reported on the 29th of July that the vessel ought to be seized. They said in their report "We do "not overlook the facts that neither guns nor ammunition have "as yet been shipped; that the cargo (though of the nature of "naval stores in connection with war-steamers) may yet be "classed as a mercantile cargo; and that the crew do not ap- "pear to have been, in terms and form at least, enrolled as a "military crew.....and an argument may be raised as to the "proper construction of the words which occur in the seventh "section of the Foreign Enlistment Act 'equip, furnish, fit out, "'or arm,' which words, it may be suggested, point only to the "rendering a vessel, whatever may be the character of its "structure, presently fit to engage in hostilities. We think, "however, that such a narrow construction ought not to "be adopted." The Law Officers, be it observed, with all respect, do not appear to have recently read the case of the *Independencia*, or Kent, or Wheaton. The opinion is founded on the warlike and combatant character of the vessel. For it concludes by stating "In the absence of any such countervailing

"case, it appears to us that the vessel, cargo, and stores, may "be properly condemned." But, the vessel could only be a security for penalties and not condemned as far as the alleged enlistment is concerned. This report came too late. The vessel had already escaped under a false and dexterous pretence.

Briefly to recapitulate the facts in the foregoing statement. On the 1st July the Commissioners of Customs reported to Lord Russell. Lord Russell communicated the report to Mr. Adams on the 4th July. On the 16th, Sir Robert Collier told him the case was one of suspicion only. Eighteen days passed away before Mr. Adams furnished any evidence in reply to Lord Russell's suggestion. It was on the 22nd he furnished the first series of depositions. He did not complete his evidence until the 24th, and his letter, enclosing the two last depositions, was not received at the Foreign Office till the 26th. On the 23rd, Mr. (now Sir Robert) Collier, gave it as his opinion that the ship ought to be detained. The Law Officers of the Crown came to the same conclusion "if the alleged facts "could be substantiated." The 26th, the day on which the fresh depositions arrived, was Saturday. Lord Russell told Mr. Adams on Monday that the Law Officers of the Crown had been consulted. He got their opinion on the 29th, and on that very day a telegram was despatched to detain the ship.

Now, in the case of the *Maury*, application was made to the United States authorities, on the part of the British Government, to seize the ship, as she was intended for Russian military service. This application was made on the 11th October, 1855; but the Washington Government issued no order to seize the vessel until the 17th of October. They gave orders at once that she should get no clearance. But, the *Alabama* got no clearance, and did not apply for one, but slipped out of port in the manner stated. She did not receive her stores, captain, or papers, until she reached the Azores. In what respect, then, was the action of our Government in regard to the vessel more dilatory or vexatious than the course pursued by the American Government in the analogous case of the *Maury?*

Whoever fairly considers the case of the *Alabama*, not by the *ex post facto* light of subsequent events, or the rules of the Washington treaty, will readily admit that the Customs officials could not have permanently detained the vessel in July, 1862. Unless, however, the ship could be condemned, she could not be detained except until trial. Seeing no hope of condemnation, the Customs authorities omitted seizing the vessel, but kept her under surveillance. She at last escaped, just as the Law Officers of the Crown had given their opinion in favor of seizing her.

I have shown that according to the law of contraband, as it existed in 1862, the *Alabama* could not have been legally seized at Liverpool. This position is supported by an almost unanimous array of American and British authorities, the only opinion of weight to the contrary being that of the Law Officers of the Crown in 1862, and of Lord Chief Justice Cockburn in his address at the Geneva arbitration. His Lordship's arguments, however, only show that the vessel could be detained until some penalties—at the most £300—were recovered from the master. But, the Lord Chief Justice has repeatedly declared in that address that both before and since the passing of our Foreign Enlistment Act, a ship-of-war may be built by a neutral and sold to a belligerent, provided that the vessel is not destined to set out from the neutral port at once on a career of hostility.

Mr. Adams blames every step the Customs officials took, though of the most reasonable nature. Referring to my suggestion to consult the Law Officers, Mr. Adams says, with reference to Mr. (now Sir Robert) Collier's opinion, "The idea "that, instead of a responsibility for stopping the vessel thrown "upon the United States, there was to be a responsibility to be "imposed upon the Customs authorities and their superiors in "office appears never to have entered their conception. It was "like a thunderbolt in a clear sky. The Assistant Solicitor of "Customs immediately sought to place himself under the "protection of the Law Officers of the Crown." What an offence forsooth the Assistant Solicitor committed in so placing himself! What else was he to do? Was he to eat his own

words at the dictation of Mr. Collier, the private Counsel of the United States.

The Lord Chief Justice says (*London Gazette*, p. 4375) of the action of the Attorney General at Nassau, "It was the "passive policy, the example of which had been set at home. "The evidence must come to the Government. It was not for "the Government to go to the evidence. Of course it naturally "happened that this worked entirely for the benefit of the "malefactors, and to the injury of the party that ought to have "been protected." But, in page 1292, his Lordship says, "Nor could the Government call on the parties interested in "the vessel to show that the purpose for which she was being "built was lawful, till they had made out in a Court of Justice "at least a sufficient *primâ facie* case to call upon these parties "for an answer." Yet, shortly after, and in the same page, the Lord Chief Justice says, that the Government ought to have enquired of other "parties capable of giving evidence." It appears to me that there is the same constitutional difficulty in making the latter enquiry as in making the former one, if the Lord Chief Justice means that the persons alleged to be enlisted ought to have been interrogated. What a Justice of the Peace does is to caution the accused against making an admission, and if he fails to give such caution, the confession is valueless. But, if the Lord Chief Justice does not refer to the persons enlisted, but to others, he is referring to hearsay, the very thing that could not make out the "*primâ facie* case," which he says was necessary to warrant calling upon any party for an answer. The right to put the interrogatory implies, according to the Lord Chief Justice, that the desired *primâ facie* case has been already established by legal and not hearsay evidence. In fact, I may say of the supposed right of our Government to interrogate accused persons, that such powers though known to French and Scotch Jurisprudence, are wholly abhorrent to the common law of England. This ground of complaint against the Government, to use the words of the Lord Chief Justice (p. 1293) "pro-

"ceeds on an entirely mistaken notion of the powers of a "Constitutional Government in a free State."

The rules of the treaty do not dispense with the element of intent. But, instead of legal evidence of such intent, they require merely "reasonable ground" thereof. But *cui bono* this "reasonable ground" if it is not legal evidence, it will justify a Government in seizing a ship. But, it will not exempt them from being mulcted in damages, unless protected by the very objectionable mode of legislating *ex post facto* by a bill of indemnity, or *privilegium*. Nor, though the ship is seized, can she be detained, except on legal evidence sufficient to warrant her condemnation. This is the law under the Washington treaty. But, as our Act of 1870 goes farther than the rules of the treaty, and shifts the burden of proof to the owners of the "suspected vessel," the case is different under that Act. Yet, as regards the application of the treaty rules to the circumstances of the *Alabama* in 1862, "reasonable ground" of suspicion would only have warranted a temporary arrest. The Lord Chief Justice himself admits she could be detained only with a view to legal condemnation, and if not condemned on proper evidence should be released.

Lord Selborne (then Solicitor General) said in the House of Commons, 27th March, 1863, that the accusations against the Government with respect to the *Alabama* were "entirely "groundless," and again he adds, that they "are utterly des- "titute of solid ground," and denies that the "Act was meant "to prohibit all commercial dealings in ships of war with "belligerent countries. She might have been legitimately built "for a Foreign Government; and though a ship-of-war, she "might have formed a legitimate article of merchandize even "if meant for the Confederate States."

On the 27th March, 1863, Lord Palmerston said in the House of Commons, with respect to the *Alabama* claims or complaint, "Those complaints, I think, are totally unfounded on the "part of the American Government. The Solicitor General "has demonstrated indisputably that the Americans have no

"cause of complaint against us. He has shown that the British "Government have done everything which the laws of the "country enabled them to do. You cannot seize a vessel under "the Foreign Enlistment Act unless you have evidence on oath "confirming a just suspicion. She sailed from this country "unarmed, and not properly fitted out for war, and she received "her armament, equipment, and crew in a foreign port. Her "condition at that time (*i.e.* when at Liverpool) would not have "justified a seizure. The law is in this case of very difficult execu-"tion. This is not the first time where that has been discovered. "When the contest was raging in Spain between Don Carlos "and Queen Isabella, it was my duty—the British Government "having taken part with the Queen—to prevent supplies from "being sent to Don Carlos from this country. There were several "cases of ships fitted out in the Thames. But, though I knew "they were intended to go in aid of Don Carlos, it was impossible "to obtain that information which would have enabled the "Government to interfere with success. There must, however, "be a deposition upon oath, and that deposition must be made "upon facts that will stand examination before a Court of Law."

The Attorney General said in the House of Commons, 1st August, 1870, "The *Alabama* escaped by a stratagem which "we could not foresee, and which, as we maintain, could not "be prevented by ordinary care in the then existing state of the "law. We deny that we are responsible to the American "Government for the escape of the *Alabama*."

Vessels will always be able to escape in this way. The *Caroline* attempted to invade Canada from the United States. Walker's expedition to Honduras is another instance; and during the Russian war, a vessel-of-war called the *America*, was built in the United States, brought out to the Pacific, and taken to Petropaulonski. The *Alabama* was attempted to be seized; the *Alexandra* was seized; so were the Birkenhead rams; and the *Florida*, as already mentioned, at Nassau, by virtue of the preventive powers alone of the Government. The *Oreto* left Liverpool on the 22nd March, 1862, and was afterwards seized at Nassau, but she was acquitted, the evidence being insufficient.

In the case of the *Alexandra* it was clearly proved that the vessel was built for the Confederate Government, and was to a certain extent equipped for service. Yet, the Chief Baron directed the jury that the Act did not apply, because the vessel was not fully equipped; and on appeal to the Court of Exchequer the Court was equally divided in opinion.

When Earl Russell detained the steam rams, his proceedings were severely criticised in the House of Commons, and on a division—nominally for papers, but really amounting to a vote of censure—his conduct in stopping the steam rams was approved by a comparatively small majority. (Speech of the Attorney General, House of Commons, 1st August, 1870.)

Shortly after the passing of the Act of 1870, two vessels, the *Steady* and the *Sharpshooter*, were seized in the Port of Liverpool, but both ships were soon after released. Thus out of the four cases that arose under the Act of 1870, viz., the *Steady*, the *Sharpshooter*, the *International*, and the *Gauntlet*, the Government succeeded only in one, the case of the *Gauntlet*, while they totally failed in the case of the *Alexandra*.

In the case of the *International*, a Telegraph Company, under a contract with the French Government, shipped some telegraphic cables to be laid down between the French ports on the North Coast during the war. The steamship which had the cables on board was seized under the Act of 1870. But, the Court decided that as the object of the Company was gain, and not glory, the Act did not apply. In the case of the *Gauntlet*, a steam tug which towed a prize of war from the Downs to Dunkerque, was held not to have violated the Act, as the transaction was not directly military, but for gain solely.

§ 6—THE GENEVA ARBITRATION.

The three rules prescribed by the Washington treaty for the guidance of the Arbitrators at Geneva were as follows:—

"A neutral Government is bound

"First, to use due diligence to prevent the fitting out, "arming, or equipping within its jurisdiction, of any vessel,

"which it has reasonable ground to believe, is intended to cruise, "or to carry on war against a power with which it is at peace; "and also to use like diligence to prevent the departure from its "jurisdiction of any vessel intended to cruise, or carry on war "as above, such vessel having been specially adapted, in whole "or in part, within such jurisdiction to warlike use."

Spain and Mexico will doubtless rejoice at the adoption of this principle by the United States. I need only say of its preventive character, that it is wholly new to our jurisprudence to seek to prevent a crime not on legal evidence, but on "reasonable ground," that is on suspicion and hearsay, and not on sworn proof of revelant facts.

The second proposition runs thus:—

"Secondly, not to permit or suffer either belligerent to "make use of its ports or waters as the base of naval operations "against the other, or for the purpose of the renewal or aug- "mentation of military supplies, or arms, or the recruitment "of men."

This proposition, so far, contains nothing new, but it is materially affected in meaning by the third proposition, which is as follows:—

"Thirdly, to exercise due diligence in its own ports and "waters, and as to all persons within its jurisdiction to prevent "any violation of the foregoing obligations and duties."

This gives a new point to the second proposition, because it requires the Government to enforce that doctrine with "due diligence," that is, as the phrase is interpreted by clause one, on moral or probable grounds of suspicion, even though these should fall short of legal evidence.

The adjudication at Geneva, of course, is not to be considered as founded on a review of the legal merits of the case. The award is not the judgment of a Court of International or Municipal Law or of a Court of Prize. It is the mere summing up, so to say, upon a question of a disputed account, in accordance with the provisions of the Washington treaty. It reminds one of what Lord Kenyon suggested in the case of

"Habershon v. Troby" (3 *Esp.*, 38.) It was an arbitration case, and, though dissatisfied with the award, he said that possibly, in arriving at his conclusion, the arbitrator had proceeded to cut the knot rather than loose it, according to the strict rules of law, from a wish to do complete justice between the parties. England and America are, of course, bound by their own agreement. But foreign nations are not bound by it, nor is there a word contained in the judgment of the arbitrators that has the authority of any decision in a Court of Prize. However much, therefore, the public may admire the judgment of the Lord Chief Justice, it is not like a decision rendered by him on a question of municipal law judicially brought before him. He has acted at Geneva merely as a private arbitrator bound by special treaty and rules, and was not expected to devote his consideration to abstract questions of law. But, that was the duty of the Government and of its officials dealing with the *Alabama* case in 1862.

To ascertain what the powers and duties of an arbitrator are, the submission which confers the one and imposes the other, must be carefully regarded. By this alone can the intention of the parties be ascertained. Of course an arbitrator is not a counsel or advocate, and although the Lord Chief Justice stated that he regarded himself as, in some sense, the arbitrator of England, yet he was not so, in any sense, that can be tolerated by sound legal principle. Vide Russell on Arbitrations, p. 111 to 114.

The treaty, however, besides its peculiar rules, was what a lawyer would term an executory or inchoate draft of heads of agreement, rather than a complete deed drawn with the usual formality and care. To call a finding under it the result of a legal enquiry is incorrect. It was a political and a friendly compromise, and was so understood. Are, then, the Cabinets of the United States and of England to be blamed for this mutual set off of negatives? By no means. On the contrary, the two Governments are most highly to be praised for their beneficent, though somewhat circuitous action.

The position of our Government was not so difficult as that of President Grant, inasmuch as we won on the main issue—the indirect claims. But, why, then, must we call the subsequent proceedings a legal enquiry into liability, or why regard the damages as the finding of a legal tribunal which decided on the law and facts. No; at Geneva law and evidence were, by the implied consent of the parties to the arbitration, sacrificed to the desire of both nations for peace.

Those concerned in the *Alabama* case in 1862, can, therefore, regard the Geneva award, as every lawyer must regard it, as a non-judicial finding. The Commissioners of Customs had to act according to the mode pointed out by the Foreign Enlistment Act 1819, that is to say, by means of legal evidence, judicial process, and the known forms of law. Had they been in the happy position of the Court of Arbitration, and were masters of law, fact, evidence, their duties and discretion might have been different. But, the question they had to consider was not the politic one how far it was desirable to conciliate the Northern States, or to irritate the Southern ones, but the simple legal problem how to fit the evidence forthcoming in the *Alabama* case to the Foreign Enlistment Act, and so to secure a verdict.

It may be, doubtless, desirable that High Courts of Conciliation should be often held. But, let us not mistake them for legal tribunals. The lay members of the Geneva Court were as innocent of a knowledge of the laws of evidence as they were of any acquaintance with the Foreign Enlistment Act the day before they were appointed arbitrators.

Every one who has at any time acted as an arbitrator feels that he is not bound by the strict rules of law. Indeed, if he is not a lawyer, he cannot be bound by what he knows nothing of. He, therefore, acts with rough and ready justice, and no one can doubt that this is superior to anything like technical restraint. The President perceiving that he was before a court of honor and not of law, therefore, naturally enough wished to retain the claims for indirect damages in the American case, even though he expected "no award on foot of them." For, he

wished to put his whole case in its integrity, and not in a mutilated form before a Court, which, not being wholly composed of lawyers, would naturally aim at doing comprehensive and not merely technical justice to the parties concerned. The course which the Government of England, and especially the Commissioners of Customs, had to pursue in 1862, was of a very different nature. Their obligations were of a legal character, and they could not entertain any consideration not founded upon the law of the land.

Let no one blame the Customs Department as the fount and source of the angry feelings which America has entertained towards us on account of the escape of the *Alabama*. That escape would have taken place, and those feelings would have arisen, although Sir Robert Collier had pleaded every form of indictment known to the criminal code, and though the Lord Chief Justice had with his usual exhaustiveness enlightened the jury as to the state of the law, the question of fact would have remained, and the jury—even if Passmore's evidence were not rebutted, or weakened, as it certainly would be—would have considered the case not proven, and would have acquitted Captain Butcher.

Let me suppose that the form of a trial was gone through, and that the *Alabama* was acquitted. Would this have satisfied America? By no means. An acquittal would have exasperated the Northern States. They did not want trials under an Act which they deemed "a mockery, a delusion, and a snare," but they wanted a detention of the *Alabama* by force of the inherent prerogative of the Crown. Even, this demand was doubtless entertained, and duly considered, by the Government. But the Officers of Customs do not pretend to wield such high power, or to have any duties in respect to contraband, except those prescribed by statute law.

Municipal law, indeed, is not the measure of neutral duty, and it was open to Americans to contend that our Foreign Enlistment Act was not in accord with international law, although their own Act was so. This argument is quite tenable,

and even granting that a neutral State, or citizen, could legally sell ships-of-war to a belligerent, yet, a neutral State may have been bound to take the initiative and enquire respecting the intent of the sale, whether it was a commercial bargain or a military one. Assuming, however, that I have stated the law on this point correctly, and of this Mr. Dana is my authority, still, it is possible that the Executive of a nation may be bound to take the initiative and to use due diligence in ascertaining the proximate purpose and intention of the builders. This was a question for Earl Russell, but, not for the Customs authorities, whose sole guide of conduct was our own Foreign Enlistment Act, and not the American one, or any new fledged rule of international law. Now, if our law would have justified such domiciliary visits and prying investigations in 1862, why did the United States get the three rules prefixed to the treaty? This would have been unnecessary if international law, much less our own municipal law, were already to the same effect. Is not this an *ex absurdo* proof that, if the Customs authorities acted in 1862, as the Washington treaty, the American Enlistment Act, and our own Act of 1870, direct, they would have acted illegally.

§ 7—CONCLUSION.

Briefly to summarize the foregoing statements, it is clear that according to international law a neutral may sell any description of contraband (including ships-of-war) to a belligerent, without involving his Government in a breach of neutrality. He has the right to sell, and the belligerent has the right to capture, if he can, *in transitu*. These are conflicting private rights, which give no *casus belli*.

The only question regarding such sales is whether the neutral territory is made a base of operations, besides being merely the market for the contraband. If the ship is fitted out for the purpose of at once entering on a career of hostilities, the property in the ship of any person so offending, or having knowledge of the purpose for which the ship is fitted out, is forfeited.

In the special case of enlistment, if there is nothing more proved, the ship cannot be confiscated or permanently detained (which implies confiscation), but only kept as a security for the penalties imposed by the sixth section of the act, viz., £50 for each person enlisted. So far as enlistment is concerned, the property of innocent shipowners may be rendered liable for the penalties. But, the complete confiscation of the ship can only take place through the conscious default of the owners.

None of the affidavits charged any complicity on the part of the Messrs. Laird with any offender against either international or municipal law. The affidavits were all evidently founded on the vain assumption that, if the warlike character of the vessel were proved, a breach of the Act was committed; whereas the only evidence in the affidavits that could be acted upon was that relating to enlistment, and for this the ship could only be detained until the penalties recovered (if any) were paid.

The change in the law effected by the Act of 1870, the adoption of special rules in the Washington treaty, and the abuse of the Act of 1819 and its framers by Mr. Adams, show satisfactorily that the Act of 1819 did not authorize the action that the American Government called for. Had the Customs Collectors acted as the Act of 1870 requires, they would have rendered themselves liable to damages at the suit of the Messrs. Laird, and to dismissal at the hands of the Government. Collectors of Customs are gentlemen of liberal education, and capable of carrying out the ordinary directions of a statute. But, to give them a discretion to involve this country in war with any belligerent, is to confer on persons who do not profess to be very astute in political science, a degree of arbitrary power that could hardly be entrusted to a Secretary of State. Besides, if the Collector of Customs at Liverpool is to have the powers referred to, so should every Collector throughout the whole United Kingdom.

The "due diligence" referred to by the Lord Chief Justice means of course diligence according to the rules of the Washington treaty. Mr. Adams explains the phrase as meaning

diligence proportioned to the importance of the interests at stake. But, Mr. Adams forgets, that the South had an interest in the gravity of the situation, and that diligence is not "due" or proper, which seeks to enforce one law at the expense of another, or to carry out the Act of 1819 in violation of the free trade in contraband which both international and municipal law allow. I admit that if the Customs authorities were called on to act at the present day under circumstances such as those I am considering, they should stop the ship at once. But why should their conduct in 1862 be measured by new rules introduced in 1870 and 1871.

The case of the *Alexandra* was the first tried under our Act of 1819, and yet, though public opinion was necessarily more or less influenced by the ravages of the *Alabama*, and though the fortunes of the South were then beginning to wane, yet the contention of the North failed to receive a judicial sanction or the verdict of a jury. What likelihood was there that in 1862, while the character of gun-boat 290 was still a mystery, the Customs authorities would succeed in confiscating the vessel?

All the cases hereinbefore cited, the *Alerta*, the *Independencia*, the *Santissima Trinidad*, and the *Alexandra*, as well as the high authority of Story, Kent, and Chief Baron Pollock, prove conclusively that the affidavits in the *Alabama* case were wide of the mark. In fact, these affidavits were deposed to by persons who never were in the confidence of the Messrs. Laird, or their contractees, and who consequently could only swear to intent as an inference from the warlike character of the ship.

The Act of 1819 is highly penal, and would be construed with proportionate strictness. I can readily anticipate the surprise which the Lord Chief Justice would express on my seeking for a conviction of the Messrs. Laird, or their contractees, who were doubtless personally unknown to every one of the affidavit-makers. There could be no evidence of intent forthcoming in such a case.

The whole gist of the affidavits lies in the alleged enlistment. The ship could not be detained at all except as a

security for the penalties attached to enlistment. But, the word "enlistment," or military "service," never once passed between Captain Butcher and any of his *employés*. All that the affidavits proved was "that it was generally understood" the ship was going out to fight for the South.

For a breach of the provisions against enlistment, it is only the person enlisted, and not the ship, that can be permanently detained. If the vessel herself could be detained under that (the fifth) section, why would the sixth section provide that the vessel could be kept as a security for the penalties recovered under the fifth section. For, if she was already confiscated under section five, she could not be also a security for penalties.

The vessel could only be detained either temporarily as a security for penalties under section five, or permanently confiscated. She could not, as some persons may have fancied, be kept for ever in durance until some evidence had turned up.

What evidence then had the Customs authorities to prove an intent on the part of the Messrs. Laird to violate the Act. A mere equipment was not sufficient, else the Act would not require proof of intent also, and even of equipment for battle there was no evidence, and in fact no such thing in existence, beyond the mere adaptation of the vessel for future equipment if found expedient by the owners.

The Customs authorities could not call on the Messrs. Laird to prove that the ship was not intended for purposes of war. "The pretension," says the Lord Chief Justice, "that it is "the duty of the neutral Government to call on the parties "engaged in building her to show that her destination is "lawful, and if they do not do so, to seize her, is one which "cannot be maintained." (p. 4292.)

Mr. (now Sir Robert) Collier, who was not one of the Law Officers of the Crown in 1862, but was the private Counsel of the United States Government, gave it as his opinion on 16th June of the year mentioned, that there were not sufficient grounds for seizing the vessel, and that the case was one only of suspicion. Is not this conclusive that the warlike character of the *Alabama*,

which was quite apparent long before the 16th June, was not sufficient to warrant her detention even in the opinion of the United States own Counsel. Lord (then Sir Hugh) Cairns, and Mr. Mellish, as already shown, were of the same opinion.

Yet, it was suggested to Mr. Dudley, that he might prosecute if he wished, and certainly every facility would have been afforded by the Government to bring the legal questions to open issue, as was afterwards done in the case of the *Alexandra*. I recommended that the opinion of the Law Officers of the Crown should be taken. The Law Officers in their first opinion gave only the conditional reply that "if the statements made by "Mr. Adams could be substantiated," the ship ought to be detained according to the existing state of the facts or evidence. The Law Officers in their second opinion recommended action absolutely; nor do I by any means question the soundness of that opinion. For, municipal law is not necessarily the standard of neutral duty, and the Law Officers may have considered that the Act of 1819 was defective (and what statute is not) in coping with the evils it contemplated. But, the Customs authorities could only act under the statute, and not by force of the great and undefined powers of the Crown at common or international law.

The array of authorities cited by me, of whom I now need merely repeat the names of Lord Palmerston and Lord Selborne, is conclusively in favor of the assertion, that neither at international nor at municipal law could the *Alabama* have been detained, and Lord Selborne asserted in his celebrated speech in the House of Commons, on 27th March, 1863, that in Passmore's affidavit alone was there anything like legal evidence as distinguished from mere statements founded on hearsay or general rumour.

If I had been slow in giving my opinion when the documents were placed before me, I would be guilty of a want of "due diligence." If I did not recommend recourse to the legal advisers of the Crown, I would have been possibly negligent. But, certainly, no one can accuse the Customs authorities, or

myself individually, of a breach of duty, in not rushing into Court with a long catalogue of moral charges against the South, while the North was pursuing its own trade of contraband without hindrance. If the Collector of Customs at Liverpool, on his own motion attempted to interfere with either branch of this trade, there would be an outcry throughout the length and breadth of the land, enquiring whether the nation had not fallen under some new and mysterious despotism, which threatened to revive the now faded memory of ship-money and arbitrary commitments.

The foregoing observations have been offered by me to the public in the confidence that a cause legally just is certain to obtain a due appreciation. The sky is now clear from all the threatening clouds that so long obscured the discussion of this question, and the exhaustive remarks of the Arbitrators at Geneva have left nothing to be desired in respect of information on the rights of neutrals as regards trade in contraband. Had the South been victorious, nothing would have been heard of the *Alabama* trouble. But, a lingering feeling has always prevailed in the mind of United States citizens that the Southerns were rebels and not entitled to trade in contraband. This impression has made itself manifest in the indirect claims, and in the other various charges against England of breaches of neutrality—charges which only prove that our Government accorded to the South a belligerent status. The Lord Chief Justice has stated that the complaint of the North in respect to the *Alabama* has been well founded; and as regards the Washington treaty, there is little ground for disputing that proposition. But, viewed in connexion with the actual law and facts of the period in question, the conduct of the Customs authorities and officials is beyond all doubt justified by every rule of law and official duty; and they could not have initiated in 1862 those searching measures implied in the Washington treaty without exciting the most extreme surprise on the part of the whole nation, and without turning themselves into objects of ridicule in any Court in which they commenced proceedings against the *Alabama*.

If my remarks on these points are well founded in law, fact, and evidence, or rather the want thereof, I hope that they do not require further corroboration, although I can appeal to the high authority of the late Lord Chief Baron, and of the eminent American jurists Story and Kent. If, on the other hand, the Lord Chief Justice shall appear to have measured the duties of the Customs authorities in 1862 by the light of the new rules of 1871, and not by the law of the former period only, I trust, that his Lordship's views on this head will not acquire any confirmation from the fact that he is one of the highest Judges of the land. It is a question of reason and law, and not of authority. I have endeavoured to argue it fairly and respectfully to all concerned in it; and I hope I have shown that the "due diligence" of an official consists in enforcing the law as it is, and not in seeking to ascertain what it ought to be. The law is now altered, and the Customs authorities will doubtless enforce the new law with as much zeal as they respected the old. The change effected show that they estimated their duties aright; else no change would have been necessary. It is doubtful whether the Act of 1870 will keep its ground as long as its predecessor of 1819 did. However, whether it does or not, it is just and necessary, that the conduct of officials should be tested by their observance of the laws for the time being, and not by their usurpation of executive discretion, or their anticipation of being indemnified by any *ex post facto* enactment. The law that is, is right for them. Its amendment is the province of the law reformer. But, obedience to the law of England should, I submit, be the only aim of every servant of the Crown, whether his functions be executive, judicial, or administrative.

In a recent speech addressed to his constituents at Oxford, Mr. Vernon Harcourt, no bad authority on this subject, thus expresses his coincidence in my views. I might cite other high instances to the same effect:—

"I have always thought and contended that under the law "of nations, as it existed at the time of the escape of the

"*Alabama*, no liability for breach of neutral obligations could "have been laid to the charge of Great Britain. I think I may "assume that now that position is, in fact, admitted. For, in "order to establish that liability, new rules have been laid "down. (Hear, hear.) But it is under the new rules, and "not under the old law, that the indemnity is to be paid. "(Hear, hear.) Well, it may be said that this is an anomalous "proceeding, and that it is open to all the objections which "apply to retrospective laws."