A DIGEST

OF

INTERNATIONAL LAW

AS EMBODIED IN

DIPLOMATIC DISCUSSIONS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS, INTERNATIONAL AWARDS, THE DECISIONS OF MUNICIPAL COURTS, AND THE WRITINGS OF JURISTS,

AND ESPECIALLY IN

DOCUMENTS, PUBLISHED AND UNPUBLISHED, ISSUED BY PRESIDENTS AND SECRETARIES OF STATE OF THE UNITED STATES, THE OPINIONS OF THE ATTORNEYS-GENERAL, AND THE DECISIONS OF COURTS, FEDERAL AND STATE.

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1. JURISDICTION.

(1) THE NATION'S ABSOLUTE AND EXCLUSIVE RIGHT.

§ 175.

"The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source. This consent may be either express or implied."

Marshall, C. J., Schooner Exchange *v.* McFaddon (1812), 7 Cranch, 116, 136.

Church *v.* Hubbart, 2 Cranch, 187, 234.

"It is a settled principle of international law that a sovereign cannot be permitted to set up one of his own municipal laws as a bar to a claim by a foreign sovereign for a wrong done to the latter's subjects." (Mr. Bayard, Sec. of State, to Mr. King, Oct. 13, 1886, MS. Inst. Colombia, XVII. 568.)

From the supremacy of the territorial sovereign is derived the right to expel aliens and to regulate their immigration, as is hereafter more fully explained in this work.

A seizure within the waters of the United States, by a British cruiser, of a Spanish vessel alleged to be a slaver, is an invasion of the sovereignty of the United States.

Mr. Clay, Sec. of State, to Mr. Vaughan, Brit. min., Feb. 18, 1828, MS. Notes For. Leg. III. 430.

"The jurisdiction of every independent nation over the merchant vessels of other nations lying within its own harbors" being "absolute and exclusive, nothing but its authority can justify a ship of war belonging to another nation in seizing and detaining a vessel thus situated for any cause or pretext whatever."

Mr. Buchanan, Sec. of State, to Mr. Wise, min. to Brazil, Sept. 27, 1845, MS. Inst. Brazil, XV. 119. This statement related to the action of Commodore Turner, U. S. S. *Raritan*, in seizing the American vessel *Porpoise* at Rio de Janeiro on suspicion of her being engaged in the

slave trade. It appeared that Commodore Turner in the first instance placed a marine guard on board the vessel, at the instance of the United States consul and with the consent of a Brazilian police officer, until the Brazilian authorities could be apprized of the case, but that he afterwards refused to remove the guard when requested by the local authorities to do so. With reference to this circumstance Mr. Buchanan said: "The moment that these authorities had manifested their desire that the vessel should no longer remain in the custody of the commodore, the guard ought to have been instantly removed. After this decision of the supreme authority, its continuance on board was a violation of the territorial jurisdiction of Brazil."

"When a foreign territorial jurisdiction has been violated in the seizure of an American vessel (by officers of the United States), and process of the United States courts, it has been decided by our Supreme Court, in affirming the condemnation of a vessel so seized, that the offense thereby committed against the foreign power did not invalidate the proceedings against the vessel. (Ship Richmond, 9 Cranch, 102.)"

Mr. Buchanan, Sec. of State, letter to Committee of Claims, Mar. 4, 1846, MS. Report Book, VI. 172.

The seizure of an American vessel by an American ship-of-war, within the jurisdiction of a foreign government, for an infringement of our revenue or navigation laws, is a violation of the territorial authority of the foreign government, though this is a mater of which such government alone can complain.

Nelson, At.-Gen. (1843), 4 Op. 285.

"Nations are bound to maintain respectable tribunals, to which the subjects of states at peace may have recourse for the redress of injuries and the maintenance of their rights. If the character of these tribunals be respectable, impartial, and independent, their decisions are to be regarded as conclusive. The United States have carried the principle of acquiesence, in such cases, as far as any nation upon earth, and in respect to the decisions of Spanish tribunals quite as frequently, perhaps, as in respect to the tribunals of any other nation. In almost innumerable cases reclamations sought by citizens of the United States against Spain for alleged captures, seizures, and other wrongs committed by Spanish subjects, the answer has been, that the question has been fairly tried before an impartial Spanish tribunal, having competent jurisdiction, and decided against the claimant; and in the sufficiency of this answer the Government of the United States has acquiesced. If the tribunal be competent, if it be free from unjust influence, if it be impartial and independent, and if it have heard the case fully and fairly, its judgment is to stand as decisive of the matter before it. This principle governs in regard to the decisions of courts of common law, courts of equity, and especially courts

of admiralty, where proceedings so often affect the rights and interests of citizens of foreign states and governments."

Mr. Webster, Sec. of State, to the Chevalier d'Argaïz, Span, min. June 21, 1842, Webster's Works, VI. 399, 403, in relation to the case of the *Amistad*.

"It was a rule of international law in 1861, and is a rule of that law now, that offenses committed in the territorial jurisdiction of a nation may be tried and punished there, according to the definitions and penalties of its municipal law, which becomes for the particular purpose the international law of the case. It matters not what the offense may be termed, if it appear that a violation of the municipal law was committed and punished. The municipal law of Hayti is not alone in defining the slave trade as piracy. It is so denominated by the laws of the United States (Revised Statutes, sec. 5376), and is punishable with death; and if the Government of the United States, like that of Hayti, were to make attempts at slave-trading equivalent to the consummated act and equally punishable therewith, it is not supposed that the rules of international law would thereby be violated."

Report of Mr. Bayard, Sec. of State, to the President, on the case of Antonio Pelletier, Jan. 20, 1887, For. Rel. 1887, 606.

"Both by our own common law and by the French law a punishable attempt is an intended, unfinished crime. It requires four constituents: First, intent; secondly, incompleteness; thirdly, apparent adaptation of means to end; and fourthly, such progress as to justify the inference that it would be consummated unless interrupted by circumstances independent of the will of the attemptor. Nowhere are these distinctions laid down more authoritatively than by Rossi, Ortolan, and Lelièvre, when commenting on Article I. of the French Penal Code, which declares that '*toute tentative de crime . . . est considérée comme le crime même.*' I cite these high authorities in French jurisprudence because it is important to show that the Haytian courts, when laying down the law in this respect, did so in accordance with the law accepted in Hayti as part of the jurisprudence of France. But I do not cite the numerous cases in which the same law had been laid down in England and the United States. It is enough now to say that it is an accepted principle in our jurisprudence that an attempt, as thus defined, is as indictable in our courts as is the consummated crime of which it was intended to be a part, and that under the indictment for the consummated crime, there may be now, both in England and in most of our States, a conviction of the attempt. . . . It seems a mockery to assert that the guilty parties are to elude Haytian jurisdiction on the pretense that anchoring a slave ship in Haytian waters, with every contrivance to entrap and

enslave Haytian citizens, is not disturbing the tranquillity of those waters, even though, on the discovery of the conspiracy, on the eve of its consummation, the slaver, in seeking to escape, fired on its pursuers. Such firing was part of one and the same outrage. I can conceive of no more flagrant disturbance of the tranquillity of territorial waters than these facts disclose.

"The view here maintained of the jurisdiction of the sovereign of territorial waters of offenses committed in such waters, when of a character calculated to disturb the peace of the port, is sustained in the case of Mali *v.* Keeper of Jail, decided this week by the Supreme Court of the United States. From the opinion in this case of Chief Justice Waite, which I am permitted to cite in advance of publication, occurs the following: 'It is part of the law of civilized nations that when a merchant vessel of one country enters the ports of another for the purpose of trade, it subjects itself to the law of the place to which it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement; for, as was said by Chief Justice Marshall in The Exchange, 7 Cranch, 144, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the Government to degradation, if such . . . merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. United States *v.* Diekelman, 92 U. S., 520; 1 Phillimore's Int. Law, 3d ed., 483, sec. cccli; Twiss's Law of Nations in Time of Peace, 229, § 159; Creasy's Int. Law, 167, § 176; Halleck's Int. Law, 1st ed., 171. And the English judges have uniformly recognized the rights of the courts of the country of which the port is part to punish crimes committed by one foreigner on another in a foreign merchant ship. Regina *v.* Cunningham, Bell C. C., 72; S. C., 8 Cox C. C., 104; Regina *v.* Keyn, 11 Cox. C. C., 198, 204; S. C., L. R., 1 C. C., 161, 165; Regina *v.* Keyn, 13 Cox C. C., 403, 486, 525; S. C., 2 Ex. Div., 63, 161, 213. As the owner has voluntarily taken his vessel for his own private purposes to a place within the dominion of a Government other than his own, and from which he seeks protection during his stay, he owes that Government such allegiance for the time being as is due for the protection to which he becomes entitled.'"

Report of Mr. Bayard, Sec. of State, to the President, on the case of Antonio Pelletier, Jan. 20, 1887, For. Rel. 1887, 602-604; S. Ex. Doc. 64, 49 Cong. 2 sess.

Mali *v.* Keeper of Jail, supra, is reported as Wildenhus's Case, 120 U. S. 1.

The United States, having acquiesced in the establishment by Great Britain of a protectorate over the Gilbert Islands, should not undertake to remonstrate against the British regulations of trade with the natives by which all traders, without distinction of nationality,

are prohibited from selling firearms and liquor to the natives, and from giving them credit.

Mr. Gresham, Sec. of State, to Messrs. Wightman Bros., June 8, 1893, 192 MS. Dom. Let. 283.

The Russian consul-general at New York, having refused to visé the passport of Mrs. Mannie Lerin, a naturalized citizen of the United States, born at Odessa, Russia, the Russian minister, in response to an inquiry of the Department of State as to the cause, stated that Mrs. Lerin "declared herself to be a Jewess," and that the consul-general "acted according to the instructions of his Government, interdicting to visé passports of foreign Jews, with the exception of certain cases, under which Mrs. Lerin can not be placed."[a] This communication was acknowledged by the Department of State "under the reserve necessarily imposed upon the Government by its constitution and laws, and by its just expectation that its certification of the character of American citizenship will be respected;"[b] and the minister of the United States at St. Petersburg was instructed to bring the matter to the attention of the Russian Government in the following sense: That it was to be inferred, from the statement of the Russian minister, "that the declaration of Mrs. Lerin's religious profession was elicited from her by some interrogative process on the part of the imperial consul-general;" that as it was "not constitutionally within the power of this Government, or of any of its authorities, to apply a religious test in qualification of the equal rights of all citizens of the United States," it was "impossible to acquiesce in the application of such a test, within the jurisdiction of the United States, by the agents of a foreign power, to the impairment of the rights of any American citizen or in derogation of the certificate of this Government to the fact of such citizenship;" that the Government had on several occasions in the past "made temperate but earnest remonstrance against the examination into the religious faith of American citizens by the Russian authorities in Russia," but the "asserted right of territorial sovereignty over all sojourners in the Empire has, to our deep regret, outweighed our friendly protests;" and that it could not be expected that the United States would "acquiesce in the assumption of a religious inquisitorial function within our own borders, by a foreign agency, in a manner so repugnant to the national sense."[c]

"I am directed by my Government to bring to the attention of the Imperial Government the refusal of the Russian consul of New

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[a] For. Rel. 1893, 547.
[b] For. Rel. 1893, 548.
[c] For. Rel. 1893, 536; also 538.

York to visé passports issued by the United States to its citizens if they are of the Jewish faith.

"As your excellency is aware it has long been a matter of deep regret and concern to the United States that any of its citizens should be discriminated against for religious reasons while peacefully sojourning in this country, or that any such restraint should be imposed upon their coming and going. Painful as this policy toward a class of our citizens is to my Government, repugnant to our constitutional duty to afford them in every possible way equal protection and privileges and to our sense of their treaty rights, yet it is even more repugnant to our laws and the national sense for a foreign official, located within the jurisdiction of the United States, to there apply a religious test to any of our citizens to the impairment of his rights as an American citizen or in derogation of the certificate of our Government to the fact of such citizenship.

" It is not constitutionally within the power of the United States Government, or of any of its authorities, to apply a religious test in qualification of the equal rights of all citizens of the United States, and no law or principle is more warmly cherished by the American people. It is therefore impossible for my Government to acquiesce in any manner in the application of such a test within its jurisdiction by the agents of a foreign power.

" When this mater was the subject of correspondence between my Government and the Imperial representative at Washington, as shown by Prince Cantacuzène's note of February 20/8, 1893, such action by the Russian consul at New York was shown to be 'according to the instructions of his Government.'

" I can sincerely assure you that the continuation of this practice is as embarrassing as it is painful to my Government, especially when it is on the part of a nation for whose Government and people such intimate friendship has so long been manifested by the United States. I am happy that in this spirit I can frankly submit the matter to your excellency with the sincere hope that assurance can be given that such practices will be henceforth interdicted on the part of Russian officials located within the jurisdiction of the United States."

Mr. Breckinridge, min. to Russia, to Prince Lobanow, min. of for. aff., May 5/17, 1895, For. Rel. 1895, II. 1057.

This note was addressed to Prince Lobanow, under an instruction dated April 15, 1895, in which Mr. Gresham, Secretary of State, called attention to the Department of State's No. 60, of February 28, 1893, to Mr. White, and the latter's reply of April 11, 1893 (For. Rel. 1893, 536, 538), and said that the subject of "the refusal of the Russian consul-general at New York, under instructions from his Government, to visé passports issued by this Department to persons of the Jewish faith, has again come up for consideration." (For. Rel. 1895, II, 1056.)

See, also, dispatch of Mr. Peirce, chargé d'affaires ad interim, June 13, 1895, narrating an interview with Baron Osten-Sacken, to whom all questions in the foreign office relating to Jews were intrusted; and the reply of Mr. Adee, Acting Secretary of State, July 5, 1895. (For. Rel. 1895, II. 1058, 1059.)

President Cleveland, in his annual message of Dec. 2, 1895, referred to the practice of the Russian consuls as "an obnoxious invasion of our territorial jurisdiction." (For. Rel. 1895, I. xxxix.)

"I have not failed to devote the most serious attention to the contents of the note which you have had the goodness to address to me, under date of May 5/17 last, on the subject of the difficulties which the visé of passports, by the Russian consulate-general at New York, of people of Jewish faith under American jurisdiction encounters.

"You are good enough to express the opinion that the refusal interposed by the Russian consular authority to the request for a visé, is contrary to the American Constitution, which does not allow that a citizen of the United States should be deprived of his rights by reason of the faith he professes. I desire first and foremost to make this distinction, that the refusal to visé, which has been given in certain cases by our consular authorities, is in no wise founded on objections properly religious. Indeed, if it was at all the fact of belonging to the Jewish religion which was an obstacle for certain foreigners to be admitted into Russia, the law would extend this interdiction to all the members of that religion.

"Now, on the contrary, it recognizes formally the right of whole categories of Israelites to enter Russia, and the selection which it has made of these very categories proves that it has been guided in this question solely by considerations of an internal administrative character, which has nothing in common with a religious point of view.

"It is not necessary to say to you, Mr. Minister, that the broadest spirit of toleration for all cults forms the very basis of Russian laws; the Jewish religion is no more prohibited in Russia than in the United States; it is even legally recognized here and enjoys here certain privileges.

"But when, for motives of internal order, Russian law raises obstacles to the entrance of certain categories of foreigners upon our territory, the Russian consuls, who can neither be ignorant of nor overlook the law, are in the necessity of refusing the visé to persons who they know belong in these categories.

"I will add even that in forewarning on the spot the persons who address themselves to them to obtain visés, they save them difficulties and dangers which they would encounter later if they had not been advised.

"It is a question, moreover, of a general legislative measure, which applies to certain categories of Israelites of all countries whatsoever.