FREE SHIPS UNDER ENEMY'S FLAG

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By

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Rec. May 21, 1898

The seven Powers, which concluded the Treaty of Paris, came to an agreement, in case of future wars, by adopting the Declaration of the 16th of April 1856 respecting Maritime Law [No. 1] *), and invited those States, which had not taken part in the Congress, to give their formal and solemn adhesion to the four principles, the indivisibility of which being maintained, mentioned in the Declaration [No. II]. The German Confederation and the several German States, Belgium, Denmark, Greece, the Netherlands, Parma, Portugal, Rome, Sweden and Norway, Switzerland, the Two Sicilies, Tuscany, the Argentine Republic, Brazil, Chili, Ecuador, Guatemala, Hayti and Peru declared their adhesion [No. III]. The Brasilian Government, in doing so, suggested those further relaxations in the international code, which from an other quarter had been advanced as the condition for acceding to the Paris Declaration, and the attainment of which has since then been the object of both practical and theoretical endeavours [No. III, Note]. The United States of America had namely in a Despatch of July 14, 1856, addressed to those Governments, which had been invited to give their adhesion to the Paris Declaration, advised them to hesitate in acceding to the proposition, by pointing out the incompatibility of the Declaration with existing treaties, and by adducing that commercial States,

*) The numbers refer to the Documents annexed to the German Edition.

which are not burdened or may not choose to burden themselves with large naval establishments, could not surrender the incontestable right to employ privateers (which right Count Walewski in the 22d sitting of the Congress of April 8, 1856, designated as „*piraterie organisée*"), without going one step further and insisting upon the abolition of the right of seizure by public armed vessels, and thereby securing the full application of the principle declaring the inviolability of all private property on the ocean in time of war. [No.IV]. These views of the American Government were more fully developed in the celebrated Circular-Note, commonly called „Marcy's Note to Sartiges", which the Secretary of State addressed to the Ambassadors of Austria, France, Prussia, Russia and Sardinia at Washington on the 28th of July 1856 [No. V.] *) The Note commences by stating that the United States cannot agree, first, to the resolution, come to by the Congress, to maintain the indivisibility of the four principles, and, second, to the subsequent proposition, that in future the Powers, which have signed or may accede to the Declaration, shall not enter into any treaty arrangements, in regard to the application of the right of neutrals in time of war, which do not rest on the four principles, which are the object of the said Declaration. The Note approves the second and third principles, which it states, corresponded with the views always expressed by the United States**) and which had been embodied in the Treaties, concluded with Russia on the 22d of July 1854, and with the Two Sicilies on the 13th of January 1855, and for the general adoption of which negotiations were pending, that, but for the proceedings of the Paris Congress, would ere now have been brought to a successful termination. The Note considers the fourth principle as futile and worthless, and then examines the first principle concerning the right to employ privateers. It is maintained at great length, that this right is as clear as it is incontestable, and as well sustained by practice and by public opinion as any other right to be found in the maritime code, and that it is indispensable for upholding the freedom of the seas. The Note

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*) The Note, according to the Report of the Bremen Minister Resident, was transmitted on the 6th of August to the French, Prussian and Russian Minister.

**) „A doctrine which, from the very commencement of our being, has been a cherished idea of the statesmen of this country." Message of President Pierce, December 4, 1854. [No. LVI, 7.)

regrets that the general adoption of the second and third principles should be endangered by uniting them to the first inadmissible principle, and by making the failure of all the necessary consequence of the rejection of the one. To the three last principles there would not probably be a serious objection from any quarter; but to the first a vigorous resistance must have been anticipated. The Declaration stated no reasons for the abolition of privateering, but it was to be presumed that the desire to exempt private property from hostile seizure to the extent it is usually exempted on land was the chief inducement. But such a desire, as already explained in the Message of the President in 1854, *) could not be carried out by the abolition of privateering alone, it was equally required, to provide, that private property should not be seized or molested by ships of war, in fact, the full immunity of private property upon the ocean should be acknowledged by international treaty. The United States considered powerful navies and large standing armies to be detrimental to national prosperity and dangerous to civil liberty; they could, therefore, never be brought to acquiesce in any change in international law, which might render it necessary for them to change their traditional policy and assume a military attitude, or become defenceless against States possessed of a powerful navy. The latter might easily surrender the right to employ privateers, provided the States, whose naval forces are of less power and extent, did the same; for they would only augment their ascendency on the seas and gain the dominion of the ocean, which was the common property of all nations. Such a dominion was not compatible with the freedom of the seas and arose mainly from the practice of subjecting private property on the ocean to seizure by belligerents. The President, therefore, proposed to add to the first proposition in the Declaration the following words: „And that the private property of the subjects or citizens of a belligerent on the high seas shall be exempted from seizure by public armed vessels of the other belligerent, except it be contraband." Thus amended, the Government of the United States would be ready to adopt the first principle and with it the

*) Prussia had agreed to the invitation of the United States to conclude a treaty in regard to the right of neutrals similar to the one concluded with Russia on July 22, 1854, but proposed to abolish at the same time the right to issue letters of marque. To that proposition the above cited answer was given.

whole Declaration. Without such amendment the United States would reject the first proposition and only accept the three other principles.

It was to be expected that further negotiations would be opened. However, in the meantime, neither the United States, nor Mexico, nor Spain had joined the great community of those States, which recognise and observe the Paris Declaration as a part of the international code.

It may here be remarked in justification of the American proposal, that, two months before Mr. Marcy wrote his despatch, Lord Clarendon declared in the House of Lords, that England by the abolition of privateering had gained more than she had lost by adopting the principle „free ships, free goods"; and the Earl of Derby added: that the necessary consequence of the Paris Declaration must lead to the exemption of all private property on the ocean from seizure and to allowing all merchant vessels in time of war to continue their journey without molestation by men-of-war.

The doctrine of the immunity of private property on the ocean in time of war, promulgated in theory towards the middle of the last century by the Abbot Bonnot de Mably,*) and subsequently affirmed by the Priest Galiani**), was for the first time officially recognized in the 23d Article of the Treaty, concluded by Frederick the Great and Franklin between Prussia and the United States in the year 1785 [No. LIV]. ***)

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*) Droit public de l'Europe fondé sur les traités, 2me édition, 1748, t. II, p. 310.

**) De' doveri de' principi neutrali verso i principi guerreggianti e di questi verso i neutrali 1782, capo X, § 2 del conseggiare, p. 429—436. p. 277, Note. See also Linguet, Annales politiques t. V., p. 505.

***) Martens Recueil des Traités t. IV, p. 47. On the renewal of the Treaty in 1799, only the immunity of private property on land has been recognized in Article 23; see Martens Receuil des Traités v. VI. p. 689. The last treaty, concluded between Prussia and the United States on the 1st of May 1828, corroborates Articles 13 to 24 of the treaty of 1799, but only renews Article 12 of the treaty of 1785, which abolishes the confiscation of contraband of war; see Martens v. VII p. 619 This principle, which Franklin called „his Quaker notions", has not been embodied in any other treaty concluded by that Statesman except in the one with Prussia; see C. F. Wurm: On the Neutrality of German Maritime Commerce in time of war. Hamburg, 1841, p. 46. 47. Jefferson remarks in his Memoirs, v. I, p. 50: "Old Frederick of Prussia met us cordially and without hesitation."

In the year 1792, when France was already at war with the greater part of Europe, Deputy Kersaint, on behalf of the united committees for Trade, Marine and Foreign Affairs, in the sitting of the National Assembly of May 30 moved a resolution: that a Royal Decree, abolishing privateering and declaring the immunity of private property on the ocean in time of war, should be issued. The Assembly, on the motion of Deputy Vergniaud, resolved, not to come to any vote on the resolution but to request the Government to open negotiations to that effect with the other powers. (No. LV, 1). In the debate the following principle was laid down, that individuals *„ne doivent ni s'envisager, ni se traiter comme ennemis."* This principle in all its consequences was especially approved of by those, who by privateering had gained large sums at the cost of the enemy's private property. *)

Some days after this resolution had been passed by the Legislative Assembly, and just before his resignation, the then Minister for Foreign Affairs, General Dumouriez, opened the negotiations on June 14, 1792, by addressing two despatches, one to the Marquis de Chauvelin, who together with Monsieur de Talleyrand was then on a mission in England, the second to Monsieur de Ternant, the French minister at Washington. The Marquis de Chauvelin in transmitting a copy of this despatch to Lord Grenville added: *„Sa Majesté ne se dissimule pas que l'état présent de l'Europe peut apporter quelque retard du prompt accomplissement de ses désirs."* Lord Grenville gave no reply to the communication. The successor of Dumouriez, the Marquis de Chambonas, who came into office on the 16th of June, addressed in the name of Louis XVI. a circular despatch, dated June 19, 1792, on the subject to all the French ambassadors, accredited to the different foreign courts, and also to Monsieur le Hoc, the French representative at Hamburg. The Spanish Government replied, that His Catholic Majesty was willing to accede to the French proposition, *„dès que nous serions d'accord avec l'Angleterre."* With Russia the diplomatic relations had in the meantime been suspended, and Austria was

*) The member for Dunkirk, Mr. Emmery said: *„Je suis d'une ville qui a fait le plus d'armements de ce genre. Les 1000 ou 1200 corsaires qu'elle a armés dans la dernière guerre, ont fait plus de mal à l'Angleterre, que les marines royales des deux maisons de Bourbon réunies. Cependant cette ville ne désire pas la continuation de ce genre d'armement."* „Moniteur" of June 1, 1792, p. 634.