8-1931

The Interpretation of Early American Treaties by the Supreme Court of the United States

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To the Graduate Council:

I am submitting herewith a thesis written by Edmund Cody Gass entitled "The Interpretation of Early American Treaties by the Supreme Court of the United States." I have examined the final electronic copy of this thesis for form and content and recommend that it be accepted in partial fulfillment of the requirements for the degree of Master of Arts, with a major in History.

Paul Farmer, Major Professor

We have read this thesis and recommend its acceptance:

W. Neil Franklin, H. B. Butcher

Accepted for the Council:
Carolyn R. Hodges

Vice Provost and Dean of the Graduate School

(Original signatures are on file with official student records.)

August 22 1931

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To the Committee on Graduate Study:

I submit herewith a thesis by Mr. Edmund Cody Gass, "The Interpretation of Early American Treaties by the Supreme Court of the United States." I recommend that this thesis be accepted for 9 quarter hours credit in fulfillment of the requirements for the degree of Master of Arts.

P. M. Hamer
Major Professor

At the request of the Committee on Graduate Study, I have read this thesis and recommend its acceptance.

W. Neil Franklin

H B Butcher

Accepted by the Committee

P. M. Hamer
Chairman

THE INTERPRETATION OF EARLY AMERICAN TREATIES BY THE SUPREME COURT OF THE UNITED STATES

A THESIS
Submitted to the Graduate Committee
of the
University of Tennessee
in
Partial Fulfillment of the Requirements
for the degree of
Master of Arts

EDMUND CODY GASS

August 1931

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INTRODUCTION

One precept of modern international law that eventually gained universal recognition was the right of each state to act as its own interpreter of compacts to which it was a party.[1] This fact arose from necessity, because until recently there was no international tribunal, possessing the attributes of a court of law, competent to pass upon the validity or the construction of treaties in a manner of binding finality. Hence, whenever there have arisen cases involving treaties, each state concerned has acted in the dual capacity of litigant and judge.[2] This situation might easily be regarded as a weakness in the conduct of international affairs since it affords no adequate guarantee of an objective or equitable interpretation of treaties.[3] Indeed, it was partly in an effort to correct this

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1. See the opinion of Mr. Justice Miller in the Head Money Cases (1884), 112 U. S., 580, 598-99; and that of Mr. Justice Day in Sullivan et al. v. Kidd (1921), 254 U. S., 433.
2. This, of course, is not wholly true in a literal sense. The execution of a treaty as between governments is a function of the executive department of each state. But where a treaty is the law of the land, and thereby affects the rights of individuals in litigation, the courts of each state act in an interpretative capacity. United States v. The Schooner Peggy (1801), 1 Cranch, 103, 109. See also the opinion of Mr. Justice Miller, cited above.
3. The observation made by Thomas Hobbes in the Leviathan, that "covenants, without the sword, are but words, and of no strength to secure a man at all," is by no

weakness and to supply the needed agency that efforts have been made during the early part of the twentieth century to establish international tribunals. The most recent of these attempts, and perhaps the most successful one, resulted in the creation of the Permanent Court of International Justice. This tribunal is more nearly a court, in the true sense of the word, than have been its predecessors, inasmuch as it possesses permanency and a fixed personnel -- two characteristics that the Hague Court lacked. But even here the principles of nationality are neither ignored nor completely transcended. Article 38 of the organic Statute of the Permanent Court provides that in framing its decisions and opinions, the Court shall apply, among other things, "international conventions," the teachings of the world's most highly qualified publicists, and the judicial decisions and law of the leading nations.[4]

The Supreme Court of the United States, among its other and perhaps more familiar activities, has produced a body of principles and rules governing

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means totally discredited even today. Sir William Molesworth (Ed.), The English Works of Thomas Hobbes, III, 154.

4. American Journal of International Law, Supplement to Vol. 17, p. 17.

the interpretation of treaties that is remarkable for its completeness, its consistency, and its fidelity to international obligations. Hence, an examination of the early treaty cases which came before the Supreme Court seems pertinent, inasmuch as it was in these cases that there were laid the foundations of American judicial construction of treaties.

The Supreme Court of the United States was not suddenly created by a fiat of the Convention of 1787; that assembly was neither capricious nor omnipotent. The very raison d'etre of the Court lies in the circumstances which prevailed prior to 1787, and these in turn were influential in determining the decisions of that tribunal on treaty cases. In order, then, properly to review and to estimate this phase of the work of the Supreme Court, it is necessary to make a brief inquiry into the conditions which brought about its establishment.

Although it is true that many features of the government of the United States, as embodied in the original Constitution of 1787, are results of peculiarly American experience, it may be questioned that the jurisdiction given to the Federal Judiciary over treaty cases, and over cases generally of an international character, was based upon extensive precedent. While

it seems evident that many features of the government established by the Federal Convention owe their existence largely to empirical knowledge gained by the colonists,[5] yet it also seems clear that when it came to determining the construction and nature of a federal judiciary, the Convention did not enjoy the benefit of a comprehensive colonial experience. An examination of American judicial procedure prior to 1787, both before and after the outbreak of the Revolution, reveals that the scope of practical acquaintance in such matters was of a quite limited character.

Before the Revolution began, colonial courts were of two general classes. There were, of course, the regular judiciaries in each colony.[6] But the jurisdiction of these bodies, whether exercised by councils of the legislatures,[7] or by separate agencies, was confined to ordinary civil and criminal cases of a

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5. W. C. Morey, "The Genesis of a Written Constitution," Annals of the American Academy of Political and Social Science, I, 529-557; "The First State Constitutions," Ibid., IV, 201-232; "Sources of American Federalism," Ibid., VI, 197-226; Thomas F. Moran, "The Rise and Development of the Bicameral System in America," Johns Hopkins University Studies, XIII, 211-258; James Bryce, The American Commonwealth, I, 684-87.
6. Winfred T. Root, The Relations of Pennsylvania with the British Government, pp. 11-44, 158-179; Edward Channing, A History of the United States, II, 42, 81, 120-122. Herbert L. Osgood, The American Colonies in the Eighteenth Century, IV, 135-213; 270-302; Oliver Morton Dickerson, American Colonial Government, 1696-1765, pp. 195-209.
7. Channing, op. cit., II, 81; W. Roy Smith, South Carolina as a Royal Province, 1719-1776, p. 118.

distinctly local character.[8] The other type of colonial courts comprised those of Vice-Admiralty.[9] These were courts established in the colonies for the primary purpose of enforcing obedience to the prescribed regulations governing trade and navigation.[10] But, as their title indicates, they were concerned solely with one phase of legal procedure and judicial function. Thus, it would seem that however valuable the colonial courts may have been as judicial laboratories, yet owing to their circumscribed jurisdiction they contributed no more than a very limited knowledge of and practical acquaintance with the exercise of judicial matters.[11]

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8. Smith, op. cit., pp. 118-133; Osgood, op. cit., IV, 270-302; Osgood, The American Colonies in the Seventeenth Century, I, 183-186; Dickerson, op. cit., pp. 196-197.
9. Osgood, The American Colonies in the Eighteenth Century, I, 26-30, 206; Root, op. cit., 91-99; Smith, op. cit., 147-156; Hampton L. Carson, History of the Supreme Court of the United States, I, 27-29. For a review of the colonial Vice-Admiralty courts, see the opinion of Mr. Justice Wayne in Waring et al. v. Clarke (1847), 5 Howard, 441, 454-460.
10. Carson, op. cit., I, 27-29.
11. In the course of his opinion in Waring et al. v. Clarke (1847), 5 Howard, 441, 454-460, Mr. Justice Wayne gives a review of the colonial courts of Vice-Admiralty and their jurisdiction, as well as the admiralty functions of American courts during the Revolution. He states that the colonial courts of Vice-Admiralty enjoyed fuller and greater jurisdiction than was allowed similar courts in England. Ibid., 454. From this he concluded that the framers of the Constitution were well acquainted with American colonial experiences with jurisdiction over admiralty. Ibid., 455-57. But it is also significant that the

The Revolution, however, in theory and in fact, operated to alter the status of the colonies, to endow them with attributes of sovereignty, and to force upon them, either severally or jointly, the settlement of questions contingent upon and arising from hostilities. Although the administration of some of these newly-created problems was properly regarded as a legislative or an executive function, and was accordingly assumed by those departments of the several state governments or by the Continental Congress acting in similar capacities, other matters quite clearly demanded judicial action. Such were questions of capture, determination of prizes, and cases of crimes and felonies committed upon the high seas. The necessity for providing appropriate agencies to handle these contingencies was clearly apparent, and the situation elicited rather prompt action on the part of the states and of Congress. Washington, as Commander of the army, early saw the urgent need of tribunals competent to act upon prize cases, and in letters of November 11, and December 4, 1775,

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Continental Congress of 1774 protested against the wide jurisdiction that had been granted to the American colonial courts of Vice-Admiralty. Ibid., 456. Journals of Congress, I, 55, 64, 85, 91, 93, 116. See also New Jersey Steam Navigation Co. v. Merchants' Bank of Boston (1848), 6 Howard, 344.

he earnestly recommended their establishment by Congress.[12] The matter was referred by Congress to a committee of seven.[13] On November 25, 1775, this committee made recommendations sanctioning the capture of British warships and the confiscation of transport cargoes destined for enemy military use.[14] Congress was at that time content merely to assume a rather vague appellate jurisdiction in prize cases, for it refrained from establishing a Congressional or Continental prize court, and requested the states to provide the requisite machinery for adjudicating cases of capture.[15] The problem of war-time admiralty and prize jurisdiction was a new one to Congress, and one with wh ch it apparently realized its own inability to deal. Congress even attempted to engraft trial by jury upon state admiralty hearings.[16] At the very least, that suggestion was a unique departure from established admiralty procedure, and was one of such dubious value that it seems to betray a noviciate acquaintance with

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12. 131 U. S., App. XIX; Worthington C. Ford (Ed.), The Writings of George Washington, III, 213-217, 256-258.
13. Journals of Congress, III, 357-58; Carson, op. cit., I, 42; 131 U. S., App. XIX.
14. Journals of Congress, III, 371-75; 131 U. S., App. XX.
15. Journals of Congress, III, 371-75, especially 374; 131 U. S., App. XX; Carson, op. cit., I, 43.
16. Journals of Congress, III, 373-74; 131 U. S., App.XX.

the subject. Thus, the problem of admiralty was openly remanded to the states. The latter, however, responded promptly to the request of Congress. Massachusetts had already acted on the matter, and during 1776 most of the other states either endowed their already-existing courts with admiralty jurisdiction or set up special judicial agencies for that purpose.[17]

Since the Continental Congress had announced its appellate jurisdiction in prize and admiralty cases, it was natural that appeals should be made to it. These appeals were heard by a Congressional committee of four,[18] and on January 30, 1777, the Committee was made a standing one of five members.[19] But the impotence of the Committee to enforce its judgments impaired its effectiveness to such an extent that the results were wholly unsatisfactory.[20] The ill-defined scope of appellate jurisdiction that Congress purported to assume was also a serious handicap to the work of the Committee. Thus, the machinery first provided by Congress for hearing

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17. Carson, op. cit., I, 44. For the response of each state, see 131 U. S., App. XXII-XXIII.
18. Journals of Congress, VI, 885. This was October 17, 1776. See also Carson, op. cit., I, 50, and 131 U. S., App. XXI-XXII.
19. Journals of Congress, VII, 75; Carson, op. cit., I, 50-51; 131 U. S., App. XXIII.
20. 131 U. S., App. XXV; Carson, op. cit., I, 54.

cases appealed from state admiralty courts was crude, and even after being altered proved ineffectual. The result was that on January 15, 1780, Congress resolved to set up a court of admiralty to hear appeals from state courts on the subject.[21] Commissions were issued and the tribunal was designated as "The Court of Appeals in Cases of Capture."[22] This well-intended expedient represented a step in the proper direction, but the Court of Appeals proved to be unpopular and just as helpless as had been its antecedent committee-tribunal.[23]

In a rather futile attempt to aid matters Congress, on April 5, 1781, exercised its newly-acquired power under the Articles of Confederation.[24] The result was the passage, on that day, of an ordinance directing that piracies and felonies committed upon the high seas should be proceeded against.[25] But there was no special or separate court provided for by the ordinance; Congress relied merely upon the members of the

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21. Journals of Congress, XVI, 61; 131 U. S. App. XXV. At this time it was also recommended to the states that in future admiralty cases, trial by jury be dispensed with, since the practice was found "to be inconvenient," and as it was "not practised in any other nation." Journals of Congress, XVI, 62.
22. 131 U. S., App. XXVI.
23. Ibid., XXIX.
24. Article IX.
25. Journals of Congress, XIX, 354-56. This ordinance was amended on March 4, 1783, but the amendment was of no importance so far as the nature of Congressional action was concerned. Ibid., XXIV, 164.

state courts to execute the task.[26]

It seems quite clear, then, that prior to the Revolution the actual experience of the colonists in judicial matters had been confined to questions of an ordinary civil and criminal character and had been merely local in its scope. During the period of revolt and confederation that experience had been extended only so far as to include contact with and adjudication of cases involving admiralty. The general field of

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26. Ibid., XIX, 354-56.
The Articles of Confederation also designated Congress as "the last resort on appeal" in cases of dispute between states regarding boundaries, jurisdiction, and in other matters including questions of private rights of soil arising from a plurality of grants issued by more than one state. But again the energies exerted in this direction were so seriously handicapped by the general political imbecility of the central government as to render the undertaking practically abortive. To be sure, in the attempted exercise of this judicial function by Congress certain important points respecting federal authority as opposed to state sovereignty were clearly foreshadowed. For example, there arose such questions as the obligatory appearance of two states before the bar of Congress in cases of dispute between them, and the possibility of making a state a defendant in an ordinary civil suit. But even so, this was only one set of problems regarding the nature of a federal judiciary, and a vast field of possible jurisdiction was left undetermined.

national jurisdiction was left unsettled, and judicial problems of an international character were almost untouched. To American courts in 1787 the vast field of international law was a comparatively new subject so far as its actual judicial application was concerned. More specifically, the interpretation to be given to the then-existing treaties had not been passed upon, prior to the establishment of the national judiciary under the Constitution, except in state courts. These courts adjudicated such cases during a brief six-year period, and functioned in such a manner as seriously to impair foreign relations and to create grave doubts abroad respecting the good faith of the country.

The fact that the American people before and during the Revolution and the life of the Confederation had dealt judicially with questions of international law in only a very limited manner, is easily accounted for. The colonies as such were not, of course, sovereign, and therefore had little occasion to concern themselves directly with questions of an international character. The Revolution, although it served to create some judicial problems of an international nature and to force their settlement upon the states, nevertheless also rendered the accumulation of a definite body of legal precepts upon such questions practically impossible

because of the exigencies of the war. Then, too, the brief period of time between 1775 and 1787 could not reasonably be expected to have produced more than a preliminary acquaintance and experience with problems arising from statehood, or a settled policy respecting their judicial settlement.

In view of what has been noted it may not be erroneous to conclude that by the time the Federal Convention met there had grown up as a result of colonial experience a fairly definite body of doctrines respecting the organization of legislative and executive machinery in accordance with American conditions. Even so, it is not to be wondered that the Convention faced a task which, relative to the jurisdiction the courts ought to have over cases of an international character and those involving treaties, required creative ingenuity, because the only empirical knowledge on the subject was largely of a negative type and had been gained during a dozen years of political chaos and judicial upheaval.

It is common knowledge that among the members of the Federal Convention of 1787 there was no unanimity of opinion as to how the new government ought to be designed. Several plans of governmental architecture were submitted to the Convention, each of which represented

a different view. In fact, it would seem that the entire work of the Convention was to fashion an instrument embodying the results of past experience, both positive and negative. The problem of a national judiciary, especially as to its jurisdiction over treaty cases, appears to have been no exception to such a view.

The Virginia Plan, as first presented by Randolph, provided "that a National Judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature, . . . that the jurisdiction of the inferior tribunals shall be to hear and determine in the dernier resort, all piracies and felonies on the high seas, captures from an enemy," and other enumerated cases.[27] But by this plan there was granted to the courts no specific jurisdiction over causes involving treaties or the laws of nations generally.[28] That Randolph was well aware of the weakness of the Confederation in enforcing observance of treaties and of the consequent necessity of providing a means of insuring their observation cannot be doubted. On May 29, in discussing the

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27. Max Farrand (Ed.), The Records of the Federal Convention, III, App. C, 594-95. See also I, 21-22.
28. Ibid.

weaknesses of the Confederation, he said: "If a state acts against a foreign power contrary to the laws of nations or violates a treaty, it [the Confederation] cannot punish that state, or compel its obedience to the treaty."[29] And the following day, in the Committee of the Whole, Randolph repeatedly insisted that the body resolve, in its consideration of the state of the union, "that no treaty or treaties among the whole or part of the States, as individual sovereignties, would be sufficient" to give satisfaction under the Confederation.[30] But Randolph did not seem to regard treaty-cases, however important, as properly falling within the jurisdiction of national courts, because on May 31, in the Committee of the Whole, it was resolved that the national legislature be given power "to negative all laws, passed by the several states, contravening," in its opinion, "the articles of union."[31] And then, upon Franklin's motion, there were added the words, "or any Treaties subsisting under the authority of the union."[32]

It is quite apparent, therefore, that the plan submitted by Randolph was far from being the basis

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29. Ibid., I, 24-25.
30. Ibid., I, 33, 39, 40, 41.
31. Ibid., I, 47.
32. Ibid.

of the present jurisdiction of national courts over treaty-cases. Neither Charles Pinckney's draft nor that of Hamilton, submitted June 18, delegated to the federal judiciary specific power over treaty-cases.[33]

In the New Jersey document, however, as presented and moved by Paterson on June 15, there was provided a federal judiciary of one court, with appellate jurisdiction to hear and determine cases involving the construction of treaties.[34] It is significant, too, that this proposal made treaties part of the supreme law of the land, regardless of state laws to the contrary.[35] Hence, it appears that, as respects treaty-cases and the legal supremacy of treaties, the Paterson proposals became the nucleus of the national judicial authority over these matters as finally embodied in the Constitution. It was apparently suggested, on the same day that Paterson moved the adoption of the New Jersey draft, that the President should be empowered to appoint the members of the highest national tribunal, and that the Paterson resolutions be incorporated in the final document.[36] At any rate, the Committee on Detail included these provisions in its draft,[37] and the Committee on

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33. Ibid., III, App. D, 600; I, 292; III, App. F, 626.
34. Ibid., I, 244.
35. Ibid., I, 245.
36. Ibid., I, 247.
37. Ibid., II, 157.

Style and Arrangement did likewise in its report of September 10.[38]

Thus, the Constitution in its final form as released by the Convention specified: "The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . ."[39] And in Article VI, paragraph 2, national treaties were designated as part of the supreme law of the land.

That the Convention's proposed frame of government, when submitted to the states for their approval, was the object of bitter attacks is so well known as hardly to merit more than a brief allusion. It was only natural that the Constitution's provisions for a judiciary should not escape criticism. However, this branch of the projected government was ably defended by Marshall, Madison, Wilson, Iredell, and Hamilton in their respective states. Mr. Wilson, who had been a member of the Federal Convention, and who was shortly to sit on the Supreme Court, spoke at length in the Pennsylvania ratification convention. His defense of the newly-proposed judiciary emphasized the urgent

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38. Ibid., II, 600.
39. Constitution, Article III, sec. 2.

necessity of some agency to give to treaties an interpretation that would be binding throughout the land and would insure their observance.[40] Madison likewise urged upon the Virginia Convention that treaties ought to be given a meaning that would be not only binding but also uniform throughout the whole country, and that "the establishment of one revisionary superintending power can alone secure such uniformity."[41]

In spite of stremuous objections and bitter invective, the work of the framers of the Constitution survived and emerged from the struggle as an entity possessed of latent potentialities that were to be developed under stern pragmatic tests. When the new national government went into operation in the spring of 1789, hostility to it had by no means ceased. The judiciary, acting under what seemed, in some quarters, its all-inclusive jurisdiction, aroused suspicion and distrust that were not easily allayed. The Supreme Court, as the nation's highest tribunal, occupied a delicate --possibly an unenviable -- position. Upon it devolved the important task not only of laying the foundations for future judicial guidance, but also of contributing, in its proper capacity, to the establishment of domestic stability and to the winning of a proper

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40. Elliot's Debates, II, 454-455.
41. Ibid., III, 485.

respect for the country among the family of nations. In the performance of these duties, the Supreme Court early and for well over a generation displayed a distinctly national attitude. Marshall's repeated and consistent assertion of national supremacy as opposed to the powers of the states is perhaps the most common proof of the broadness and liberality of the Court in its earlier days. But the Court's national character and the fidelity with which it strove to establish international respect for the nation are amply illustrated by its interpretation of treaties.

The Supreme Court has proceeded cautiously but clearly to lay down and to follow a few general precepts governing its construction of international agreements to which the United States has been a party. Moreover, in the Court's opinions on treaty-cases, there lie not only dicta upon the proper judicial interpretation of treaties categorically, but also valuable reflections of contemporary attitude regarding specific doctrines of international law.

Chapter I

POST-REVOLUTIONARY ADJUSTMENT AND THE RIGHTS OF ALIENS

That any government or people, upon becoming a member of the international community, is faced with numerous problems is quite evident, and the United States in 1783 was no exception to the rule. By entering into the treaties of 1778, France had tacitly accorded recognition to the new American nation. The successful conclusion of the Revolution had, of course, vindicated the earlier assertion of independence, and by the treaty which put an end to the war, Great Britain had acknowledged, rather than accorded, American independence. With reference to the position of the United States in this respect at the close of the Revolution, Mr. Justice Cushing declared, in 1808: "The treaty of peace contains a recognition of their independence, not a grant of it."[1] This same view was reiterated by the Supreme Court in 1827 when, in the case of Harcourt v. Gaillard, Mr. Justice Johnson delivered the opinion of the Court. "It has never been admitted by the United States," he said, "that they acquired anything

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1. M'Ilvaine v. Coxe's Lessee, 4 Cranch, 209, 212.

by way of cession from Great Britain, by that treaty. It has been viewed only as a recognition of pre-existing rights, and on that principle, the soil and sovereignty within their acknowledged limits, were as much theirs at the declaration of independence as at this hour. By reference to the treaty, it will be found, that it amounts to a simple recognition of the independence and the limits of the United States, without any language purporting a cession, or relinquishment of right, on the part of Great Britain."[2]

But even though the question of independence was settled, difficulties persisted. The problems that confronted the United States after 1783 were of a major character. That of a competent central government was settled by the formation and adoption of the Constitution, but outstanding problems of foreign relations continued to demand a solution.

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2. 12 Wheaton, 523, 527. In accordance with this view the Court held that a grant made by the British governor of Florida, after the Declaration of Independence, within the territory lying between the Mississippi and Chattahoochee rivers, and between the 31st degree of north latitude and a line drawn from the mouth of the Yazoo river due east to the Chattahoochee, was invalid as a foundation of title in the courts of the United States. See also Henderson v. Poindexter's Lessee (1827), 12 Wheaton, 530. Similarly, it was held by the Supreme Court in United States v. Repentigny (1866), 5 Wallace, 211, that by the peace treaty of 1783 the United States came into possession of all rights in that part of old Canada, which later became the state of Michigan, that were in the king of France before its conquest by the British in 1760.

Article IV of the definitive treaty of peace with Great Britain provided "that creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted."[3] In Article V it was agreed that the Congress should "earnestly recommend it to the legislatures of the respective States, to provide for the restitution of all estates, rights, and properties which have been confiscated, belonging to real British subjects. . ."[4]

The execution of these provisions of the treaty created a source of friction between the two contracting parties that is well known, and it also furnished a paramount subject of litigation in American courts. To the British, especially to those who had been victims of confiscation and sequestration on the part of the several states during the war, these were very real matters. The inability of the Continental Congress to give full and complete force to the spirit of these portions of the treaty is easily understood when its inherent weakness under the Articles of Confederation is recalled. Even under the Constitution it has sometimes been difficult for the national government to assert full power in foreign affairs.[5]

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3. Malloy, Treaties, I, 588.
4. Ibid., I, 588-9.
5. The McLeod Case and the Mafia Incident are good examples.

Nevertheless, Congress did act on the matter. On May 30, 1783, Hamilton rendered a report on behalf of a committee that had been appointed to consider means of enforcing obedience to Articles IV and V of the treaty.[6] The report merely suggested resolutions requiring the states to remove all obstructions to a full and faithful execution of the treaty.[7] This, of course, was a recommendation that Congress should do a thing that it had no real power to do, and was made before the definitive treaty of peace was concluded.[8] But after the definitive treaty was ratified and proclaimed, Congress passed a resolution, in conformity with Article V, recommending to the states restitution of the property contemplated in that article.[9] Later, on May 3, 1786, Mr. John Jay, as Secretary of Foreign Affairs, and acting under the direction of Congress, wrote a circular note to the governors of the states inquiring as to compliance with the Congressional recommendation.[10] Again, on March 21, of the following year,

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6. Secret Journals of Congress, III, 355-58.
7. Ibid.
8. The provisional Articles of Peace were concluded on November 30, 1782, but the definitive treaty bears the date of September 3, 1783. Malloy, op. cit., pp. 580, 586.
9. Secret Journals, III, 444-46. This was done on January 14, 1784.
10. Am. St. Pap., For. Rel., I, 228, App. 31. In a report to Congress, dated October 13, 1786, Jay reviewed the situation and expressed the opinion that all treaties duly made and ratified by Congress become "binding on the whole nation." Secret Journals, IV, 185-287, esp. pp. 203-205.

Congress undertook to aid matters by urging the states to pass "Identical Laws" on the subject of British debts and confiscated property.[11] This proposed law, if enacted by a state, would have proclaimed the superiority of the treaty ex mero motu suo, and would have directed state courts to decide all cases on the basis of the treaty where there existed a conflict of the latter with a statute.[12] On April 13, this recommendation and a circular letter were despatched to the states.[13] The letter suggested that the whole problem be settled by state courts acting under a blanket obligation to uphold the treaty.[14]

To this proposal, Massachusetts, Rhode Island,

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11. Secret Journals, IV, 294-96.
12. Ibid. The basis of this seems to be Jay's report to Congress under the date of October 13, 1786, pp. 203, et seq.
13. Ibid., IV, 329-338.
14. Ibid.; also pp. 282-83; 294-96.
It is interesting to note that in this circular letter a very laborious effort was made to show that the Continental Congress really enjoyed the rightful power to require the states and their courts to support the treaty. There was also an attempt made to assert as fact the view that in case a state law conflicted with a Continental treaty, the latter should prevail proprio vigoro, and should invalidate the former. But however hopeless, though not unreasonable, such arguments may have been at the time, it is clear that the way was being prepared for the ultimate supremacy of federal treaties. This letter was sent out only a few weeks before the Federal Convention met.

It is, however, of interest to find that the doctrine of the supremacy of treaties under the Articles of Confederation was advanced on several occasions. During the debates in the South Carolina House of Representatives on the adoption of the

Connecticut, New York, Delaware, Maryland, and North Carolina responded by reporting that their legislatures had adopted the main features of the recommended "model law," while New Jersey and Pennsylvania declared that none of their statutes conflicted with the treaty.[15]

Constitution, Charles Cotesworth Pinckney said: "I contend that the article in the new Constitution, which says that treaties shall be paramount to the laws of the land, is only declaratory of what treaties were, in fact, under the old compact. They were as much the law of the land under that confederation as they are under this Constitution. . ." Elliot's Debates, IV, 270. John Rutledge expressed a similar view (p. 261), as did William R. Davie in the North Carolina Convention (p. 134). In Ware v. Hylton (1796), 3 Dallas 199, 236, Mr. Justice Chase said: "It seems to me that treaties made by Congress, according to the Confederation, were superior to the laws of the States; because the Confederation made them obligatory on all the States. They were so declared by Congress on the 13th of April, 1787; were so admitted by the legislatures and executives of most of the States; and were so decided by the judiciary of the general government, and by the judiciaries of some of the State governments." See also Ellsworth, C. J., in Hamilton et al v. Eaton, 11 Fed. Cases, 5,890, p. 340.

15. Am. St. Pap., For. Rel., I, 228-231, App. 32-46; H. A. Washington (Ed.), The Writings of Thomas Jefferson, III, 392-95; Crandall, op. cit., p. 39.
In 1788 the Supreme Court of Pennsylvania had upheld the treaty of peace as the law of the land and as superior to a state law. Respublica v. Gordon, 1 Dallas, 233. See also Gordon v. Kerr (1806), 10 Fed. Cases, 5,611, p. 801.

New Hampshire claimed already to have repealed such of her laws as were repugnant to the treaty, but it does not appear that she remanded enforcement of the treaty to the judiciary.[16]

It is difficult to determine with any degree of exactitude the effectiveness and the results of this attempt to insure state enforcement of the treaty. When, on May 29, 1792, Jefferson, as Secretary of State, replied to the British minister's protest against American infractions of the treaty, he stated that American states had repeatedly upheld the treaty rather than state laws at variance with it.[17] But in spite of this evidence it is certain that Articles IV and V of the treaty of peace were not fully and completely executed. Anti-British sentiment in the United States was intense during the latter part of the eighteenth century, and was not conducive to a judicious view of the treaty or a scrupulous regard for the rights of British subjects. The British minister would not have protested against infractions of the treaty unless there had been a good basis for complaint, because the

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16. Am. St. Pap., For. Rel., I, 228, App. 32.
17. Ibid., I, 201, et seq.; p. 224, App. 18; pp. 224-25, App. 19; Washington (Ed.), op. cit., pp. 400, et seq. For the acts that the British government alleged to be repugnant to the treaty, see Am. St. Pap., For. Rel., I, 198-200.

English themselves were liable to a similar accusation because of the question of northern posts and the carrying off of slaves. In the Federal Convention Madison spoke of violations by the states of "the law of nations and of treaties, which, if not prevented, must involve us in the calamities of foreign wars."[18] He continued by lamenting the fact that "the files of Congress contain complaints already from almost every nation with which treaties have been formed."[19] Finally, the fact that the Supreme Court, in hearing several appealed cases, reversed the decisions of lower courts that had been adverse to the treaty, shows conclusively that judicial fidelity to the treaty was not absolute.

Thus, when the Constitution went into operation, it was imperative that the national government take steps to insure a genuine observance of treaties, especially that of 1783. The Constitution itself had declared treaties, including those already contracted, to be the supreme law of the land.[20] Upon the national

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18. Elliot, Debates, V, 207. This volume is really a supplement to Elliot's collection and comprises Madison's papers on the subject.
19. Ibid., On April 22, 1787, Madison wrote to Edmund Pendleton: "An investigation of the subject had proved that the violations on our part were not only most numerous and important, but were of the earliest date." Letters and Other Writings of James Madison, I, 317-8.
20. Constitution, Art. VI, paragraph 2.

judiciary, headed by the Supreme Court, devolved the difficult task of imparting to that declaration full judicial reality in so far as private rights at litigation were concerned. The Court's position was a delicate one, because it was impossible to give to the treaty its fullest meaning and at the same time to placate public sentiment.

The first treaty case to reach the Supreme Court of the United States was that of the State of Georgia v. Brailsford et al., and it involved the question of British debts under the treaty of 1783.[21] This case first came before the Court in its August term of 1792,[22] and at that time the Court ordered that there be granted an injunction to halt payment to others than the State of Georgia of a debt appropriated by that state, until it should be definitely determined to whom the money rightfully belonged.[23] Brailsford was an alien and a British creditor, and he had entered suit in the United States Circuit Court against a citizen of Georgia for recovery of a debt that the state had sequestered during the Revolution.[24] This case closely followed that of Chisholm v. Georgia.[25] In the latter,

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21. 2 Dallas, 402 and 415, and 3 Dallas, 1.
22. 2 Dallas, 402.
23. Ibid.
24. Ibid.
25. 2 Dallas, 419 (1793).

the state of Georgia protested against being made a party to a suit by a British creditor. It is common knowledge that in the Chisholm Case Georgia had been forced to appear before the Federal Judiciary, and that the Supreme Court on that occasion had given a decision that went far to undermine the doctrine of state sovereignty.[26] Now, however, in the Brailsford Case, which was also instituted by a British creditor, the state of Georgia sought to be admitted by the Circuit Court as a party defendant, in order to establish her title to the money in question.[27] The Circuit Court had denied this request, and so Georgia filed an original bill in equity in the Supreme Court praying for an injunction against the proceedings of the Circuit Court.[28] Thus it was that in the Brailsford Case, originally one of private and individual litigation, the state of Georgia became a party.

The act passed by the Georgia legislature on May 4, 1782, is set forth in the bill, and was plainly an act to confiscate the property of British subjects resident within the state, as well as to sequester debts owing to British subjects from all persons within the

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26. The Eleventh Amendment was, of course, passed as a direct result of the Chisholm Case.
27. 2 Dallas, 402, 415.
28. Ibid.

state.[29] The injunction that had been granted earlier was continued by the Court in February, 1793,[30] and the case now came on for final settlement in February of the following year.[31] The facts, as recited in the original record, were simple. Brailsford, a British subject, entered claim for certain debts owing to him at the time the Georgia confiscation statute was enacted, while the state of Georgia also claimed the debts by virtue of the act itself.[32] The case was tried by a special jury.[33]

This case was a natural result of the confiscation and sequestration acts passed by the various states during the Revolution, and was not without antecedents in state courts.[34] The question here before the court was to determine who was the rightful owner of the money in question, but this necessitated a preliminary decision on the relation between the act of Georgia on the one hand and the law of nations and the treaty of 1783 on the other.

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29. Ibid., 402-403.
30. 2 Dallas, 415, 417.
31. 3 Dallas, 1.
32. 2 Dallas, 402, 404.
33. 3 Dallas, 1.
34. Bayard v. Singleton (North Carolina); Neale's Executors v. Sands (New York); Osborne v. Mifflin's Executors (Pennsylvania); Hoare v. Allen (Pennsylvania); Stewardson, Admr. of Mildred v. Dorsey (Maryland); Rutgers v. Waddington (New York); Ex Parte Hatfield (New Jersey). Am. St. Pap., For. Rel., I, 199-200; 209-211.

For the plaintiff in this case, Messrs. Jared Ingersoll and Alexander J. Dallas contended "that Georgia, as a sovereign state, had power to transfer the debt in question, from the original creditor, an alien enemy, to herself. . ."[35] They then proceeded to inquire whether the act of Georgia could be or had been defeated and annulled. On this point they maintained that "The peace merely does not affect the right of the state; for the condition of things at the conclusion of the war is legitimate; and all things not mentioned in the treaty, are to remain as at the conclusion of it."[36] Thus, the doctrine of unlimited sovereignty and the law of nations were appealed to by Georgia in order to establish the right of confiscation of enemy private property in time of war, and to show that the status quo at the conclusion of war holds unless the terms of peace prescribe otherwise. As to this latter possibility the plaintiff contended that Article IV of the treaty of peace ought to be regarded as applying only to "subsisting debts," so that these, admittedly bona fide, should not be "perplexed" by the passage of "instalment laws, pine-barren laws, bull laws, paper-money laws, etc."[37] Moreover, as further

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35. 3 Dallas, 1.
36. Ibid., 2.
37. Ibid.

evidence that Article IV of the treaty did not relate to confiscation and sequestration prior to the date of the treaty, it was pointed out that these matters were specifically referred to in a subsequent article "in which Congress only promise (all, indeed, that they could do) to recommend to the states, revision and restitution."[38] In conclusion it was contended by the plaintiff that "The federal constitution does not affect the right of the state: for though it gives effect to the treaty of peace, it furnishes no rule for construing the meaning of the parties to that instrument."[39]

For the defendants, Attorney-General William Bradford and Messrs. Edward Tilghman and William Lewis contended that "the debt. . . is not confiscated, but sequestered," and "That the peace alone, without any positive compact, restored the right of action to the original creditors."[40] Moreover, it was stated that in addition to "the general principle of the law of nations, the treaty expressly revives the right of action, by removing all legal impediments to the recovery of bona fide debts, and the treaty is the supreme law of the land, by virtue of the federal constitution."[41]

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38. Ibid.
39. Ibid., 2-3.
40. Ibid., 3.
41. Ibid.

Mr. Chief Justice Jay then addressed the jury. He stated that the Court was unanimously of the opinion "that the debts due to Brailsford, a British subject, residing in Great Britain, were by the statute of Georgia subjected not to confiscation, but only to sequestration; and therefore, that his right to recover them, revived at the peace, both by the law of nations and the treaty of peace."[42] After further instructions the jury retired, but after some time they returned to the bar and propounded to the court these questions: "Did the act of the State of Georgia completely vest the debts of Brailsford, Powell & Hopton[43] in the state, at the time of passing the same? If so, did the treaty of peace, or any other matter, revive the right of the defendants to the debt in controversy?"[44]

To the first question Mr. Jay replied in the negative, as the opinion of all the Court.[45] In reply to the second query, he said: ". . . no sequestration divests the property in the thing sequestered; and consequently, Brailsford, at the peace, and indeed, throughout the war, was the real owner of the debt."[46]

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42. Ibid., 4.
43. Powell and Hopton were the other defendants in the case.
44. 3 Dallas, 1, 5.
45. Ibid.
46. Ibid.

He also declared that "the mere restoration of peace, as well as the very terms of the treaty, revived the right of action to recover the debt, the property of which had never, in fact or law, been taken from the defendants," because otherwise the act would constitute a "lawful impediment to the recovery of a bona fide debt," in diametric opposition to the treaty of peace.[47]

Then the jury, without again retiring, returned a verdict for the defendants.[48]

Thus, in the first treaty case that came before it, the Court unanimously initiated a policy of giving a liberal construction to international agreements. It did so at a time when popular opinion in the United States was none too favorable toward Great Britain and war-time Loyalists. The decision preceded by several months the conclusion of the Jay Treaty, which was designed to settle the major problems between the two countries.[49]

But even though the Court had clearly proceeded on a liberal basis in the Brailsford Case, some points remained unsettled. The counsel for Georgia had based their case upon three major contentions:

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47. Ibid.
48. Ibid.
49. The Jay Treaty was not concluded until the following November. Malloy, op. cit., I, 590.

first, "that Georgia, as a sovereign state, had power to transfer the debt in question. . . to herself"; secondly, that she had exercised this power and that the seizure was an executed fact; and, thirdly, that the operation of the act had not been annulled either by the law of nations or by the terms of peace.[50] In reply, the defendants and the Court were content merely to maintain two propositions: first, that the debts in question were only sequestered and not confiscated; and secondly, that the right of recovery revived with the peace both by the law of nations and by the specific terms of the peace treaty.[51] This was sufficient, of course, to decide the case. In fact, it was only necessary to invoke the fourth Article of the Treaty of Peace and to endow it with a liberal interpretation in order to decide the point at hand, and anything else the Court might have said would have been in the form of an obiter dictum. But that an obiter dictum of the Supreme Court may be important was certainly demonstrated in the case of Marbury v. Madison;[52] and it would have been both interesting and profitable to have had the Court's opinion on the perplexing question

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50. Vide supra, pp. 30-31.
51. Vide supra, pp. 31, 32.
52. 1 Cranch, 137.

of whether or not a sovereign state possesses a right to confiscate enemy private property in war-time. In the Brailsford case the Court made no definite commitment on the subject, but in Ware v. Hylton[53] that problem occupied a conspicuous position.

The case of Ware, administrator of Jones, Plaintiff in error, v. Hylton came before the Court in its February term of 1796, and was an error from the Circuit Court for the district of Virginia.[54] The action was instituted by William Jones, the surviving partner of Farrel & Jones, subjects of the British crown, against Daniel Hylton and Company and Francis Eppes, who were citizens of Virginia. Jones, who sought to recover 2,976 pounds, 11 shillings, 6 pence sterling from the defendants on a bond dated July 7, 1774, died pendente lite, and Ware, his administrator, was substituted as plaintiff in the cause.[55]

This case is, perhaps, the classic case among those in which the question of British debts was the paramount issue. Eighty-six pages of Dallas' Reports[56] are devoted to the case. The Jay Treaty had already been concluded, and partisan feeling was high.

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53. 3 Dallas, 199.
54. Ibid.
55. Ibid.
56. Ibid., 199-284, inclusive.

The treaty of 1794 with Great Britain had only made the anti-British faction in the United States keener in its hatred for England, and had brought down upon Washington's administration the unmistakable wrath of Anti-Federalists.[57] Thus, in the case of Ware v. Hylton the Supreme Court faced a situation similar to that it encountered in the Brailsford Case. But in 1796 partisan prejudices and factional passions were more intense, and a decision in favor of the treaty as retroactively invalidating a state law and nullifying all action and rights under it, would go far to confirm the worst accusations of Anti-Federalists. But the Court chose to face the issue squarely.

The counsel in the case included Edward Tilghman, Alexander Wilcocks, and William Lewis for the defendants. The arguments and the opinions of the Justices were exhaustive and learned, and the case is of such historical import and interest as to warrant a rather close examination.

On the Court's record it appears that the plaintiff and Farrel were British subjects before and on July 4, 1776, and that they continued to be such after that date; that the plaintiff in the present

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57. Charles Warren, The Supreme Court in United States History, I, 144; John Spencer Bassett, The Federalist System, p. 130.

cause was a British subject at the time of the suit; and that the defendants were, on July 4, 1776, citizens of Virginia, and had continued to be such since that date.[58] It also appears on the record that on October 20, 1777,[59] the Virginia legislature passed an act which declared it to be lawful for anyone in Virginia owing a debt to a British subject to pay the same, or any part of it, into the state loan office and thereby be legally discharged from so much of the debt as was thus paid.[60] Further, it appears that the defendants, who, at the time the act was passed, owed a debt to the original plaintiff, paid a portion of the debt into the state loan office as provided in the act, and that they received therefor a receipt signed "T. Jefferson," on May 30, 1780.[61]

The case now came on to the Supreme Court by a writ of error, and Mr. Tilghman opened the argument for the plaintiff in error. He stated as a conceded fact that the debt was due when the Revolution commenced, and cited Georgia v. Brailsford to the effect that although the state had the power to suspend payment of such a debt for the duration of hostilities, the creditor's right to recover revived "as an

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58. 3 Dallas, 199.
59. The headnote by Dallas gives the date as December 20th, but October 20th is apparently the correct date.
60. 3 Dallas, 199, 199-200.
61. Ibid., 200.

incident and consequence of the peace."[62] "There is, indeed," he continued, "no controverting the general right of a belligerent power to confiscate the property of its enemy, in ordinary cases." But he cited Vattell (Lib. 3, sec. 77) to the effect that in modern practice nations do not exercise that right in respect to debts.[63] It was also contended that even if Virginia's right to confiscate did exist and were exercised, the fourth article of the treaty of peace removed the impediment to recovery.[64]

Oddly enough, Marshall argued the case for the Virginia debtors. It was his task to uphold the act of Virginia and the rights acquired under it. This could be done only by denying the supremacy of treaties, or by so construing the treaty of peace as to exclude from its comprehension debts of the character of those in question. Since the former would have been a preposterous contention, Marshall chose the latter alternative. His argument was ingenious, but it was saturated with strict construction of the treaty and with the doctrine of state sovereignty.

Marshall contended that Virginia not only had power to confiscate and thereby to extinguish the debt,

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62. Ibid., 207.
63. Ibid.
64. Ibid., 209.

but that she exercised this power.[65] As to the treaty, he denied that that instrument was applicable or relevant. The treaty contemplated debts and creditors. "There cannot be a creditor," he said, "where there is not a debt; and British debts were extinguished by the act of confiscation." Thus, he construed the treaty "with reference to those creditors, who had bona fide debts, subsisting, in legal force, at the time of making the Treaty."[66]

The members of the Court delivered their opinions seriatim. Mr. Chase gave the leading opinion, and it was far from a brief one.[67] He first dealt with the right of confiscating enemy private property, including debts, during a war. On this point he said:

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65. 3 Dallas, 199, 210.
It is interesting to note that in amplifying this point, Marshall said: ". . . the judicial authority can have no right to question a law, unless such a jurisdiction is expressly given by the constitution." Ibid., 211. He concluded by declaring that "the act of the government, though disgraceful, would be obligatory on the judiciary department." Ibid., 212. These statements seem rather amusing when it is recalled that a few years later in the case of Marbury v. Madison (1803), 1 Cranch, 137, Marshall, as Chief Justice, did not rely upon jurisdiction "expressly given by the constitution."

66. Ibid., 213.

67. Chase stated that he had not wanted to sit in the present cause since he had served as counsel for American debtors in a similar case in Maryland "some years ago." But since the other members of the Court had urged him "not to withdraw from the bench" he had decided to take part. 3 Dallas, 199, 221.

"I am of opinion, that the exclusive right of confiscating, during the war, all and every species of British property, within the territorial limits of Virginia, resided only in the legislature of that commonwealth."[68] He also held that from July 4, 1776, "the American States were de facto, as well as de jure, in possession and actual exercise of all the rights of independent governments."[69] Consequently, they had power to make whatever laws they deemed wise or expedient.[70]

As to the position and liability of British subjects during the Revolution, Chase was very explicit. Those who chose to remain loyal to the British Crown "voluntarily became parties" to an unjust and oppressive cause, and "became personally answerable for the conduct" of their sovereign.[71] "Their property," said Chase, "wherever found (on land or water) became liable to confiscation,"[72] and the debt of the plaintiff in question was forfeitable to Virginia.[73] He then laid

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68. Ibid., 222.
    By this statement Chase really meant that Virginia rather than the Continental Congress enjoyed the right, because that question had been injected into the argument. But in any case, the statement presupposes that the right of confiscation exists; it only attempted to locate that right.
69. Ibid., 224.
70. Ibid., 225.
71. Ibid.
72. Ibid.
73. Ibid., 226.

down a blanket rule that "every nation at war with another is justifiable, by the general and strict law of nations, to seize and confiscate all movable property of its enemy, (of any kind or nature whatsoever) wherever found, whether within its territory or not."[74]

Chase's views on this point are clear and unmistakable. But he went on to say that even if the Virginia statute had been a violation of the law of nations, it was nevertheless "obligatory on all the citizens of Virginia, and on her Courts of Justice."[75] Hence, it follows that whatever was the nature of Virginia's conduct, she was only "answerable to Great Britain," and whatever injuries might have accrued "could only be redressed in the treaty of peace."[76]

Thus did Chase clearly endow Virginia and

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74. Ibid.
From the citations and references given in this case it seems that the chief treatises on international law sanctioned, either tacitly or positively, the confiscation by a belligerent of enemy private property. Bynkershoek, Puffendorf, Rutherford, and Vattel were frequently cited in the arguments and in the opinions. Although Vattel did not deny the right of confiscation, he did suggest that the practice of European nations at that time tended toward making exceptions to private debts, for commercial reasons. Ibid., 227.

75. Ibid., 229. And he added: "and, in my opinion, on all the Courts of the United States." This is somewhat misleading. Chase did not mean to infer that the Federal Courts ought to sustain the act of the Virginia legislature, or that they were bound by it in spite of the treaty. He meant to say that any act passed by one of the thirteen states during the Revolution and before the Articles of Confederation went into effect, ought to be regarded in courts of law as binding unless invalidated by the Constitution, a treaty, a federal statute, or some other

each of the other twelve states with unrestricted sovereignty after July 4, 1776; and thus did he hold that municipal laws occupy a position of priority in the courts of a state, even when such acts contravene the law of nations. If this be the case, then only a treaty, or some other act of equal power, could countermand the act of the Virginia legislature.

On this point, Chase proceeded at great length to show that a treaty is, by the Constitution, the supreme law of the land, and that it supersedes state laws in conflict with it. "A treaty," he said, "cannot be the supreme law of the land, that is of all the United States, if any act of a State Legislature can stand in its way."[77] In this respect, he said, the Constitution was retroactive, so as to give full vigor and validity to those compacts entered into prior to the establishment of the national government.[78] Since the peace treaty of 1783 was a compact of this description, it was necessary to inquire whether or not there existed a conflict between its provisions and the

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superior act. This principle was later sustained by the Supreme Court in certain cases that involved citizenship prior to 1789. Vide infra.,p.54,note 127.

76. Ibid.
77. Ibid., 236.
78. Ibid., 237.

act of Virginia of 1777. In undertaking to make this determination Chase quoted the fourth article of the treaty of 1783, as well as that part of the fifth that related to debts, and explained why the latter was incorporated in the compact.[79]

But before entering upon a detailed examination of these provisions he made a few remarks which were drawn chiefly from Vattel and Rutherford, upon the principles of interpreting international compacts. The intention of the framers of the treaty, he said, must be taken as a basis for correct interpretation of such agreements.[80] Their intention ought to be ascertained "from a view of the whole instrument," and from the language employed, "or from probable or rational conjectures."[81] He maintained that if a literal interpretation is consistent with clarity and precision, and if it accurately reflects the intention of the framers, then it is to be preferred.[82]

In considering the fourth article of the treaty, Chase broke the provision into seven parts and examined each separately. He held that so far as the terms of this article related to lawful impediments, they had "both a retrospective and a future aspect."[83] His

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79. Ibid., 238-39.
80. Ibid., 239.
81. Ibid.
82. Ibid.
83. Ibid., 241.

consideration of the article was reasonable, and to each portion he gave the interpretation that was obviously contemplated by the negotiators.[84] He also found that the debt in question was of the type comprehended by the treaty.[85]

Was it intended, then, that this article of the treaty should nullify a state law and destroy rights acquired and actions done under it? Chase propounded this question and answered both portions of it emphatically in the affirmative.[86] Thus, not only was the Virginia act annulled, but the payment under it by the debtors of part of the obligation was also invalidated.[87] The question naturally arose whether the debtors should thus be forced to make double payment for that part of the debt, or whether the state of Virginia ought to indemnify them. Chase could not consistently hold that Virginia was obligated to make such compensation, for, "if Virginia had a right to receive the money," as he so earnestly contended in the early portion of his opinion, "by what law was she obliged to return it?"[88] Nevertheless, in conclusion he remarked that even though "Virginia is not bound to make compensation to the

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84. Ibid., 240-42.
85. Ibid., 242.
86. Ibid.
87. Ibid., 245.
88. Ibid.

debtors," yet, according to "the immutable principles of justice" they ought to be indemnified by the state.[89]

Mr. Justice Paterson then gave his opinion. After reviewing the facts in the case and stating the issue,[90] he quoted the act of the Virginia legislature of October 20, 1777. He noted that in the preamble of the act it was stated that "the public faith, and the law and usages of nations require, that they [private debts owing to enemy aliens] should not be confiscated on our part, but the safety of the United States demands, and the same law and usages of nations will justify, that we should not strengthen the hands of our enemies during the continuance of the present war. . . ."[91] From this, Paterson concluded that "the act did not confiscate debts due to British subjects."[92] That the preamble was compatible with the rest of the act, and with what took place under it, he did not doubt, for the payments made under the act "were voluntary and not compulsive."[93]

Paterson then devoted some space to a consideration of whether or not a sovereign state had the right, in international law, to confiscate enemy private property

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89. Ibid.
90. Ibid., 245-46.
91. Ibid., 247.
92. Ibid.
93. Ibid.

in time of war, and on this point he was emphatically clear. He conceded that "by the rigour of the law of nations, debts of the description just mentioned, may be confiscated."[94] But he maintained that this rule "is certainly a hard one, and cannot continue long among commercial nations."[95] As a matter of fact, he continued, "it ought not to have existed among any nations, and, perhaps, is generally exploded at the present day in Europe."[96] By relying upon Vattel he observed that such a "confiscation of debts is at once unjust and impolitic; it destroys confidence, violates good faith, and injures the interests of commerce."[97] He confessed that it had always appeared to him "incompatible with the principles of justice and policy, that contracts entered into by individuals of different nations, should be violated by their respective governments in consequence of national quarrels and hostilities."[98]

As to the meaning and effect of the fourth article of the treaty of peace, Paterson was equally definite. He stated that treaties ought to be construed so as "to effectuate the intention of the parties," and

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94. Ibid., 254.
95. Ibid.
96. Ibid.
97. Ibid.
98. Ibid., 255.

this "intention is to be collected from the letter and spirit of the instrument."[99] He held that the intention of the framers of the treaty in question was unquestionably "to restore the creditor and debtor to their original state, and to place them precisely in the situation they would have stood, if no war had intervened, or act of the Legislature of Virginia had been passed."[100] "The terms of the fourth article of the treaty," he said, "are unequivocal and universal in their signification, and obviously point to and comprehend all creditors, and all debtors, previously to the 3rd of September, 1783."[101]

Mr. Justice Iredell had been one of the judges in this cause when it had come up before the Circuit Court, and for that reason he refrained from giving an opinion.[102] However, he took occasion to deliver at great length some observations on the question, and to explain his earlier opinion on the case.[103]

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99. Ibid., 249.
100. Ibid., 251.
101. Ibid., 249.
102. Ibid., 256, footnote.
103. Ibid., 256-280.
Iredell was of the opinion that a belligerent had the rightful power to confiscate enemy private property, but he denied that the act of Virginia was one of absolute confiscation. Ibid., 262, et seq.

Mr. Justice Wilson gave a very brief and concise opinion. He began by denying that Virginia had a right to confiscate private debts owing to enemy aliens. Such an act, he maintained, was not permitted by the law of nations, for "the confiscation of debts has long been considered disreputable"; and "when the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement."[104] He was of the further opinion that even if the right of confiscation did exist, it belonged to the Continental Congress and not to Virginia.[105] But in any case, he said, "the treaty annuls the confiscation."[106] "The fourth article," he continued, "is well expressed to meet the very case," and "it is impossible by any glossary, or argument, to make the words more perspicuous, more conclusive, than by a bare recital."[107]

In the final opinion in the case, Mr. Justice Cushing declared that he would "not question the right of a State to confiscate debts," but would confine his remarks to a consideration of the treaty.[108] He arrived at the same conclusions reached by Chase, Paterson,

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104. Ibid., 281.
105. Ibid.
106. Ibid.
107. Ibid.
108. Ibid., 281-82.

and Wilson on this point. To him the treaty was clear and explicit, and was the supreme law of the land.[109]

The Court then declared the judgment of the court below reversed, and ordered that payment be made to the plaintiff.[110]

Thus, in the memorable case of Ware v. Hylton, the Supreme Court unanimously affirmed the supremacy of a treaty over state laws derogatory to its provisions and gave judgment to a British creditor. This decision was naturally distasteful to the anti-British element in the country, but it undoubtedly went far to allay whatever doubts the British government had entertained as to American execution of the treaties of 1783 and 1794.

But it appears that the Court was divided on the vexing question of the right of a belligerent to confiscate enemy private property. Neither public opinion nor the teachings of publicists and jurists seems to have been very definite on the subject.[111]

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110. Ibid., 285.

111. It seems, however, that the preponderance of opinion in the United States has generally conceded the right of a belligerent government to confiscate the private property of its enemies. In the case of Brown v. The United States (1814), 8 Cranch, 110, Marshall was clear in upholding that right. He said: "That war gives to the sovereign full rights to take the persons and confiscate the property of the enemy, wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of

In 1804, in the case of Ogden v. Blackledge,[112] the Court dealt with another aspect of British debts in relation to the treaty and the laws of a state. On the Court's record it appears that in 1715 the Assembly of North Carolina passed an act of limitations which declared that unless creditors of deceased persons should

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this right, but cannot impair the right itself." P. 122. But Marshall doubted that a declaration of war acted as a confiscatory measure ipso facto. He was of the opinion that subsequent to the declaration of war a legislative act was necessary to execute confiscation. Pp. 123, 125. He also stated that the whole question was one "rather of policy than of law," and that the courts were bound by whatever course of action the political departments of the government pursued. P. 128.

Similarly, in the case Miller v. The United States (1870), 11 Wallace, 268, which involved the legality of acts of confiscation during the Civil War, Mr. Justice Strong, in delivering the opinion of the Court, said: "Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted. It therefore includes the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor." P. 305. Again, he said: "This [the right of confiscation] is and always has been an undoubted belligerent right." Ibid. But in the same case, Mr. Justice Field, in a dissenting opinion in which Mr. Justice Clifford concurred, said that the war power is free from limitations "except such as are imposed by the law of nations in the conduct of war." P. 315. He reiterated the binding effect of international law (pp. 315-316), and was of the opinion that the latter did not justify confiscation of an enemy's private property. Ibid.

112. 2 Cranch, 272.

make their claims within seven years after the death of the debtor, they should be barred. It further appears that in 1789 this act was repealed by the Assembly.[113]

In this case a British creditor was suing to recover a debt that was owing to him by a debtor in North Carolina who had died. The executor of the deceased debtor's estate pleaded the act of limitations as a bar to the plaintiff's recovery.[114] But Mr. Justice Cushing, in delivering the opinion of the Court, found for the British creditor. He held that the North Carolina act of limitations was suspended during the Revolution, so far as its effect upon British creditors was concerned.[115] He maintained that the act of 1715 revived and "began to run against debts due by citizens of the United States to British creditors" at "the final ratification of the treaty of peace between Great Britain and the United States."[116] Two years later the Court held substantially the same thing in Hopkirk v. Bell.[117] Here it was held that Article IV of the Treaty of Peace prevented the operation of a Virginia act of limitations upon British debts contracted before

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113. Ibid., 273-75.
114. Ibid., 272-73.
115. Ibid., 279.
116. Ibid.
117. 3 Cranch, 454; and 4 Cranch, 164 (1807).

the treaty.[118]

Two more cases under the treaty of 1783 came before the Court in successive years, and each involved Article V of the treaty. The first of these was Higginson v. Mein,[119] in 1808. The facts of the case, as stated by Chief Justice Marshall,[120] were as follows: In November of 1769, one Alexander Wylly, who then resided in Georgia, executed his bond to Greenwood and Higginson, London merchants, for a sum of money to be paid on or before January 1, 1773. He also executed a deed of mortgage to secure payment of the bond. During the Revolution Wylly sided with the British, and as a consequence his estate was confiscated by the state of Georgia and commissioners were appointed to hold and to sell it. Wylly's mortgaged premises were sold and conveyed to other parties. In 1802, Higginson filed a bill to foreclose all equity of redemption on the mortgaged property, and brought suit against the agent of the last purchaser of it, in order to obtain payment of the original debt due from Wylly.

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118. Ibid.
Of course, the Convention of 1802 had been concluded between the United States and Great Britain. The second article of this Convention reaffirmed Article IV of the treaty of peace.
It is interesting to note that in the course of the arguments the Court agreed that "to declare what the law is, or has been, is a judicial power; to declare what the law shall be, is legislative." 2 Cranch, 272, 278.
119. 4 Cranch, 415.
120. Ibid.

The basic question in the suit was simple, but it was an odd one. Did the fifth article of the treaty of 1783 protect the interests of a British mortgagee holding a mortgage on confiscated property? In article five of the treaty, it was provided "that all persons who have any interest in confiscated lands, either by debts, marriage settlements, or otherwise, shall meet with no lawful impediment in the prosecution of their just rights."[121] When, during the arguments, the defendant maintained that the fifth article of the treaty extended no further than the fourth, Marshall interposed to remark that the Court had uniformly held that the treaty repealed state confiscation acts.[122] Then he asked: ". . . if, in this case, the debt remains, does not the security remain also? Is not the remedy as much protected by the treaty as the debt itself?"[123] Thus, it seems that Marshall would have been willing to support the plaintiff's claim merely by giving the fourth article of the treaty a broad and full meaning, without any reference whatever to the fifth article.

In giving the opinion of the Court, Marshall maintained that the Georgia act confiscated the estate

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121. Malloy, op. cit., I, 588-89.
122. 4 Cranch, 415, 417.
123. Ibid.

of Wylly, and not the interests of Greenwood and Higginson therein.[124] The fifth article of the treaty, he held, applied to cases like the one in question, where an actual confiscation had taken place. But it expressly provided "that in such cases the interest of all persons having a lien on such lands shall be preserved."[125] "Neither the confiscation," he said, "nor any act in consequence of the confiscation, can constitute a legal impediment to the prosecution of their just rights."[126]

Thus, it was held that the act of Georgia, confiscating the estate of a mortgagor, is no bar to the claim of the mortgagee, a British merchant, under the treaty.

Mr. Justice Livingston dissented from the majority opinion as given by Marshall, but failed to state his views.[127]

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124. Ibid., 218.
As a matter of fact, the act of Georgia seems not to have been specifically designed to confiscate estates of British subjects, but merely to sequester debts. Ibid.

125. Ibid., 419.

126. Ibid.

127. Ibid., 220. During the hearings, Livingston had made this statement: "I have never heard that confiscated property has been restored by the force of the treaty. The treaty only provides that Congress shall recommend such restitution." Pp. 217-8. Apparently, he regarded the plaintiff's interest in the property by mortgage as having been confiscated by the act of Georgia.
A similar case, and one involving the same principle, was M'Ilvaine v. Coxe's Lessee (1808), 4 Cranch, 209. Here the question of American citizenship during the Revolution was considered, and the right of expatriation was upheld.

The following year, Chief Justice Marshall made one brief observation on Article V of the treaty of 1783, in the case of Owings v. Norwood's Lessee.[128] This was an error brought up from the Maryland Court of Appeals, and was an action of ejectment between two citizens of that state. The Supreme Court dismissed the writ of error on the grounds that the case did not come under the terms of the treaty, and consequently did not fall within the constitutional jurisdiction of federal courts.[129] But in denying the Court's jurisdiction Marshall made one remark explanatory of Article V of the treaty of peace. He said: "The interest by debt intended to be protected by the treaty, must be an interest holden as a security for money at the time of the treaty; and the debt must still remain due."[130]

Article VI of the treaty of 1783 was closely associated with Article V, because both referred to the post-war rights of British subjects and persons who had supported the Crown during the Revolution. Four cases arising under the sixth article of the treaty

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128. 5 Cranch, 344 (1809).
129. Ibid., 344, 347, 350.
130. Ibid., 347. Substantially the same view was taken by the Court in 1830 in the case of Carver v. Jackson, ex dem. Astor et al., 4 Peters, 1. Here the Court repeated its opinion that the fifth article of the treaty related only to interests possessed at the time the treaty was concluded. P. 100.

reached the Supreme Court. The first of these was Smith v. The State of Maryland,[131] in 1810.

The leading facts in the case were these:[132] One William Ottey died and left certain lands in Maryland to his widow, Anne Ottey, a British subject. On July 4, 1774, she conveyed the lands to William Smith, as trustee, and on the following day Smith executed a bond of conveyance to Anne Ottey.

In October of 1780, the Assembly of Maryland passed an act confiscating all British property within the state, except debts. In the same session the Assembly passed an act designating commissioners to take charge of such property and to appoint persons to hold it for preservation. On April 27, 1801, two persons, Carroll and Maccubbin, applied to the commissioner of the state for permission to purchase the land held by Smith as trustee for Anne Ottey. The Governor and Council agreed to the proposed purchase. A survey was made, the plat returned, and on October 30, 1803, Carroll and Maccubbin gave a bond of purchase.

The Chancellor of Maryland reviewed the case and ordered Smith to surrender the lands to Carroll and Maccubin.[133] Smith appealed to the Maryland Court of

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131. 6 Cranch, 286.
132. Ibid.
133. Ibid., 287-290.

Appeals, which affirmed the decree, and he then brought the case to the United States Supreme Court on a writ of error.[134] He pleaded the sixth article of the treaty of 1783 -- that "there shall be no future confiscations made"[135] -- as a bar to Maryland's transfer of the lands. He maintained that the confiscation was completed after the treaty and was therefore prohibited.[136]

Chief Justice Marshall did not sit in this cause,[137] and so Mr. Justice Washington gave the Court's opinion. He considered only one point as the crux of the case, i. e., whether or not Maryland's confiscation had been executed before the treaty was concluded.[138] He held that by the first act of the Maryland Assembly, confiscation was not only declared but was also factually consummated; and that the second act merely provided the requisite machinery for administering what was an accomplished fact under the first.[139] It was "perfectly immaterial," he said, "at what time the right of the state to the lands now in controversy, thus completed prior to the treaty, was discovered, or at what time actual seizin and possession was obtained."[140] Thus, it

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134. Ibid., 286.
135. Malloy, op. cit., I, 589.
136. 6 Cranch, 285, 290-300.
137. Ibid., 304, footnote.
138. Ibid., 305.
139. Ibid., 306.
140. Ibid., 307.

was held that the equitable interests of British subjects were confiscated, even though such interests were not discovered until long after the peace.

Mr. Justice Washington was concerned solely with fixing the time at which the lands in question were confiscated. A determination of this point was, of course, sufficient to decide the case on the basis of the treaty. But it may be noted with interest that Washington's entire opinion contains not even an allusion to the right of confiscation. It was apparently assumed that such a right was Maryland's, and that her exercise of it was a natural incident to the war.

Nine years later, in Orr v. Hodgson,[141] Mr. Justice Story, in delivering the Court's opinion, held that the sixth article of the treaty of peace completely protected the titles of British subjects to lands in the United States which would have been liable to forfeiture, by escheat, for the defect of alienage.[142] He held that the language of the article was not meant to be confined to confiscations jure belli, "for the treaty itself extinguished the war, and, with it the rights growing out of war."[143]

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141. 4 Wheaton, 453 (1819).
142. Ibid., 462.
143. Ibid., 462-3. The expressions "jure belli," and "the rights growing out of war," seem to indicate that Story regarded confiscation as justifiable, and a thing to be expected during the course of a war. He went on to interpret and to apply the ninth article of the treaty of 1794. Ibid., 463-464.

Three years later, in the case of Blight's Lessee v. Rochester,[144] Chief Justice Marshall held that Article VI of the treaty of 1783 protected only such titles as were in existence at the time the treaty was made.[145] He maintained that the Court had "never supposed actual possession to be necessary to entitle a party to the benefit of the treaty," but that "the existence of the title, at the time, has always been supposed necessary."[146] Consequently, Marshall held that where a British subject came to the United States subsequent to the treaty of 1783, and died, seized of lands, before the treaty of 1794 was signed, the title of his heirs to those lands was not comprehended or protected by either treaty.[147]

From the foregoing cases it is clear that the Court has consistently and uniformly interpreted Articles V and VI of the treaty of 1783 as protecting the rights of British subjects to property in the United States. In each of the cases thus far noted, the British subjects claiming protection of property rights under the treaty were individuals. But in 1823 the Court extended the treaty provisions to corporations as well. The case was that of The Society for the

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144. 7 Wheaton, 535 (1822).
145. Ibid., 544.
146. Ibid., 545.
147. Ibid.

Propagation of the Gospel v. New Haven.[148] Here the Court held that an eleemosynary corporation under private endowment, even though created by a government charter, was a private corporation; and that the capacity of British subjects, either private individuals or corporations under Crown charters, whether in this country or in Great Britain, to hold lands in the United States was not affected by the Revolution.[149] It was further held that the property of British corporations in the United States was as completely protected by Article VI of the treaty of peace as was that of natural persons.[150]

Article IX of the Jay Treaty also took cognizance of property rights.[151] It was designed to

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148. 8 Wheaton, 464.
149. Ibid., 481-83.
150. Ibid., 489-91.
This case, of course, arose after Jay's treaty had been concluded, and after the War of 1812 had occurred. Mr. Justice Washington went on to state that Article IX of the treaty of 1794 reaffirmed the rights of British subjects under the treaty of peace. Ibid., 490-92. He held that the War of 1812 did not dissolve these rights. On this latter point he held that treaties are not extinguished, ipso facto, by war. Ibid., 494.
151. Malloy, op. cit., I, 597.
The treaty, by permitting nationals of each party resident in the other, to hold the lands they then had, seems to go beyond the Common Law on the subject. According to the Common Law, as commented upon by Blackstone, "An alien born may purchase lands, or other estates; but not for his own use, for the king is thereupon entitled to them." Blackstone's Commentaries, I, 372. Nor could an alien obtain by any other means a full acquirement in lands. Ibid. Blackstone explains this restriction by saying that

supplement the Treaty of Peace on this point, and further to insure protection of property held in the United States by British subjects in Great Britain and by persons in the United States who had taken the part of the Crown during the Revolution. In the cases which came before it under this article, the Supreme Court displayed the same liberality and justice that characterised its construction of the Treaty of Peace. In the latter were laid the foundations of treaty-interpretation, and in the cases already reviewed the Court had definitely established the principles of the treaty-rights of British subjects to property in the United States. Consequently, it was neither a novel nor a difficult task for the Court to determine the proper meaning of the ninth article of the treaty of 1794. The language of the provision was clear, and the Court did not hesitate to give it full meaning and

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it was deemed that permanent property in lands ought to be contingent upon an equally full and permanent allegiance by the holder to the king. Hence, since aliens could not render such allegiance, they were forbidden to acquire lands outright. However, they were permitted to "acquire a property in goods, money, and other personal estate," for personal property was of a more "transitory and movable nature" than was real property. Ibid.

For this same restriction resulting from the defect of alienage, see the English statutes on the subject. They are 11 Hen. 4, 20 and 26, and are reproduced in Coke on Littleton, I, sec. 2, a. See also Mathew Bacon's New Abridgment of the Law, cited as Bac. Abr., I, 80-83.

complete application. Several cases arose under the ninth article of the Jay Treaty and reached the Supreme Court. In some of them there were involved both the Treaty of Peace and that of 1794, while in others only the latter compact was pleaded. But in both instances the Court had only to apply the pertinent portions of the treaties, and its decisions usually were no more than amplification and extension of what it had held in the earlier treaty cases. For this reason, it does not seem necessary for the cases under Article IX of the Jay Treaty to be examined as fully as were those under the treaty of peace.

The first important case of British property rights under the treaty of 1794 to reach the Court was that of Fairfax's Devisee v. Hunter's Lessee,[152] in 1813. This was a case involving title to lands in Virginia. The lands in question had once belonged to Lord Fairfax, and the plaintiff's title now in question depended for its validity upon the treaty of 1794. Chief Justice Marshall and Mr. Justice Todd were absent from the case

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Thus, whereas the Common Law forbade aliens to acquire property in lands except by purchase, and even then only under restrictions, the treaty of 1794 permits aliens to take and to hold real property by devise, and guarantees titles thus devised.

Story, in his opinion, recognized this situation; but he inferred that by the Common Law an alien could purchase lands without restrictions, although he denied an alien's right to take lands by devise. 7 Cranch, 603, 619.

152. 7 Cranch, 603.

and the Court's opinion was delivered by Mr. Justice Story.[153] Story was "satisfied that the treaty of 1794 completely protects and confirms the title of Denny Fairfax [plaintiff in the case], even admitting that the treaty of peace left him wholly unprovided for."[154] He quoted the ninth article of the treaty of 1794, and then said: "At the time of commencement of this suit (in 1791) he [the plaintiff] was in complete possession and seizin of the land. That possession and seizin continued up to and after the treaty of 1794, which being the supreme law of the land, confirmed the title to him, his heirs and assigns, and protected him from any forfeiture by reason of alienage."[155] Thus, it was found that the treaty of 1794 insures to British subjects the right to transfer and to hold property in the United States by devise.[156] The existence of a bona fide title at the

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153. Ibid., 618.
154. Ibid., 627.
155. Ibid.
156. The Court really went one step further. Lord Fairfax, a citizen and an inhabitant of Virginia, died in December, 1781, while the Revolution was still in progress. By his will he devised certain Virginia lands to Denny Fairfax. 7 Cranch, 603, 607. Thus, in sustaining Denny Fairfax's title to the lands, the Supreme Court really held that during the course of a war a citizen may devise property to an alien enemy. On this point Mr. Justice Story maintained that "the capacity of an alien enemy [i. e., to receive lands by devise] does not differ in this respect from that of an alien friend." Ibid., 621. In the case of Jackson v. Clarke (1818), 3 Wheaton, 1, the Court employed Article IX of the treaty to protect and validate the title of an ex-alien enemy to lands

time the treaty was concluded, as a prerequisite to the protection of such title under Article IX, as was held here, had been announced earlier in the cases of Owings v. Norwood's Lessee,[157] and Smith v. The State of Maryland.[158] The same view was reiterated later.[159] Similarly, in the case of Harden v. Fisher,[160] it was held that in order to be protected by that part of the ninth article which declares that British subjects then holding lands in the United States, and their heirs and

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in the United States that had been devised to him in tenancy, during the course of the Revolution, by a subject of Great Britain. Thus, an alien enemy, resident within enemy territory, could, during a war, devise American lands to another alien enemy, also resident within enemy territory. See also Craig v. Radford (1818), 3 Wheaton, 594.

This seems to be far from conforming to the provisions of the Common Law. Blackstone, after reviewing the privileges of aliens under English law, gives this explanation: "When I mention these rights of an alien, I must be understood of alien friends only, or such whose countries are in peace with ours; for alien enemies have no rights, no privileges, unless by the king's special favor, during the time of war." Op. cit., I, 372-73.

Mr. Justice Johnson, although dissenting from the majority opinion in the case above, agreed that the treaty of 1794 protected all bona fide titles which were in existence at the time the treaty was made, and which were comprehended by Article IX. 7 Cranch, 603, 629.

157. 5 Cranch, 344 (1809). Vide supra, p.55.
158. 6 Cranch, 286 (1810). Vide supra, p.56.
159. Jackson v. Clarke (1818), 3 Wheaton, 1, and Society for the Propagation of the Gospel v. The Town of Pawlet (1830), 4 Peters, 480.
160. 1 Wheaton, 300 (1816).

assigns, in respect to those lands and the remedies incident thereto, should not be regarded as aliens, the parties must show that the title was in them or their a cestors at the time the treaty was made.[161] It was not necessary, said the Court, that actual possession and seizin be shown, but only that an indefeasible title existed in the parties when the treaty was concluded.[162] The benefits and protection of Article IX were deemed by the Court to extend to British mortgagees as well as to British aliens having a complete title;[163] and it was held that corporations were as much within the purview of the article as were individuals.[164] In one other case the Court showed liberality in construing the ninth article of the treaty.[165] In Craig v. Radford, it adopted the view that even a defeasible title, vested during the Revolution in a British subject, unless divested prior to the treaty of 1794, was confirmed a d

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161. See also Orr v. Hodgson (1819), 4 Wheaton, 453; and Blight's Lessee v. Rochester (1822), 7 Wheaton, 535, 544.
In the case of Sutton v. Sutton (1830), the English High Court of Chancery upheld this portion of Article IX of the treaty in favor of the title of an American to la ds in England. 1 Russell and Mylne, 663.
162. Orr v. Hodgson (1819), 4 Wheaton, 453.
163. Hughes v. Edwards (1824), 9 Wheaton, 489.
164. Society for the Propagation of the Gospel v. New Haven (1823), 8 Wheaton, 464; and Ibid. v. Wheeler, et al. (1814), 2 Gall, 105.
165. 3 Wheaton, 594 (1818).

protected by the ninth article of that compact.[166]

Two cases that arose under the treaties of 1778 and 1800 with France reached the Supreme Court. Article XI of the former compact provided that the nationals of either of the parties could acquire lands within the jurisdiction of the other,[167] while by Article VII of the latter agreement, citizens of either party holding lands within the territory of the other were free to dispose of such lands as they chose.[168] In 1817, in the case of Chirac v. Chirac,[169] the Court held that by "every principle of fair construction, this article gave to the subjects of France a right to purchase and hold lands in the United States."[170] It was further held that the privileges of Article VII of the treaty of 1800 extended to those who took by descent as well as to those who acquired by purchase.[171]

Ten years later, in Carneal v. Banks,[172] the Court held that a title, once vested in a French subject under the treaty of 1778, was not divested by the abrogation of that treaty and the expiration of the convention of 1800.

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166. This case was similar to Fairfax's Devisee v. Hunter's Lessee (1813), 7 Cranch, 603. Mr. Justice Washington held that the basic principle in the cases was the same. 3 Wheaton, 594, 599-600.
167. Malloy, op. cit., 471-73.
168. Ibid., 498-99.
169. 2 Wheaton, 259.
170. Ibid., 271.
171. Ibid., 259.
See also Geofroy v. Riggs (1890), 133 U. S., 258, 266.
172. 10 Wheaton, 181 (1827).

The cases that have been considered thus far constitute the main body of the Supreme Court's interpretation of the three major treaties relating to the rights of aliens in the United States immediately following the Revolution. It may be seen that under the provisions of those compacts there arose a significant body of private litigation in American courts. In the cases of this description that reached the Supreme Court, there were presented problems of the highest importance. The proper bases for judicial interpretation of international compacts was one such problem. Another centered around the post-war civil rights of aliens in the United States. These questions were presented to the Court at a time when circumstances were anything but propitious. Domestic stability was not then achieved, and the new national government was on trial to vindicate its existence. In the matter of foreign affairs, a bad situation was rendered dangerous by the existence in many quarters of an anti-British faction of alarming proportions.

But in spite of these adversities, the Supreme Court discharged the burdens imposed upon it in a manner commensurate with their importance. In prescribing the principles that ought to govern judicial interpretation of treaties, the Court laid a foundation that was at

once judicious and conducive to approbation. When it came to determining the rights of British subjects and litigants under the treaties of 1783 and 1794 the Court displayed a zealous regard for justice and a remarkable freedom from popular prejudice. If in doing so it aroused the certain hatred of some, it also won permanent respect at home and approbation from abroad. Those portions of the treaties with Great Britain that related to rights of British subjects were intended as law to cover that type of private litigation. The Supreme Court regarded them as such and as binding upon American courts. It interpreted and applied those provisions in a highly reasonable manner, and in doing so it contributed greatly to the confidence of other nations in the United States.

Chapter II

NEUTRALITY AND INTERNATIONAL LAW

While the rights of aliens constituted an important post-Revolutionary problem, another, and perhaps a more serious, question was that of American neutrality and neutral rights during the Continental wars from 1793 to 1814. The conditions are well known. The French Revolution reached its height and was followed by the Napoleonic Era. The whole of Europe was precipitated into a prolonged struggle on land and sea. The United States had entered into treaties of amity and commerce with France, Great Britain, and Spain, but she nevertheless attempted to maintain neutrality. To do so, however, was indeed a difficult task. A divided, but nonetheless intense, public opinion, coupled with national injuries and frequent violations of the country's neutral rights by the belligerents, made it almost impossible for the United States to refrain from participating in the conflict. Indeed, the United States was eventually drawn into the struggle, but at a very late date and not purely to redress

earlier injuries.[1]

Throughout the course of the Continental hostilities, serious questions arose and had to be settled. In addition to the treaties mentioned above, the United States was a party to a treaty of alliance with France. This treaty had been negotiated in 1778, and it committed France to aid the states in their war for independence. That aid had been given, but the subsequent negotiations at Paris, plus a debt claim, had caused France to be none too kindly disposed toward the United States.[2] With the coming of the Continental wars, however, France sought American aid under the earlier treaty.

Thus, as a party to treaties with three of the major belligerents, the United States found itself in a difficult situation. The exact relation that each treaty sustained to the others, and the obligations and privileges of the United States under each, were indeed puzzling questions that faced the administrations. It was in determining these questions that the Supreme Court played an important part. It could pass upon

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1. See Julius W. Pratt, Expansionists of 1812. Here it is maintained that the primary reason for the entry of the United States, as well as for the recalcitrance of the New England section, was not the securing of neutral commercial rights, but rather the desire of the agrarian West and South to obtain portions of Canada.
2. Willis Fletcher Johnson, America's Foreign Relations, I, 120-122.

them, of course, only when it heard actual cases under them.[3] But many such cases arose, and those that came before the Supreme Court form an important chapter in the judicial background of the nation's early struggle for neutral rights and neutrality.

President Washington and his Cabinet were extremely anxious for the United States to remain entirely neutral in the Continental wars, and, insofar as possible, to be unmolested by them. To this end the President issued his famous Neutrality Proclamation of April 22, 1793.[4] The French minister, Genet, had aroused in the United States a great deal of popular sympathy for France.[5] Some of his activities, of course, were regarded by the administration as unwarranted and as transcending his mission.[6] One such activity that greatly annoyed the government was the fact that Genet proceeded to fit out privateers in American ports and to set up prize courts in the United States to condemn such vessels as were captured by those privateers.[7] This was embarrassing to the government, and since the problem was not covered by

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3. Miller, J., Head Money Cases (1884),112 U.S.,580,598-599.
4. Ford (Ed.), op. cit., XII, 281-282.
5. Johnson, op. cit., I, 177-178.
6. Ibid.
7. Warren, op. cit., I, 105; Johnson, op. cit., I, 178-179.

federal law it became exceedingly difficult to enforce the Neutrality Proclamation. Owing to the novelty and importance of the situation, as well as to the intensity of public opinion, the administration was forced to exercise caution in dealing with the case. If, however, there could have been obtained from the federal courts a judicial decision to the effect that they possessed powers of Admiralty to punish violations of international law, then there would have been a definite basis for further action in prohibiting Genet's prize activities.

It seems that in 1793 an opportunity to render just such a decision was presented to the United States District Court in Pennsylvania.[8] Two American vessels, The William and The Fanny, were captured in American territorial waters by French privateers. The vessels were libeled by their American owners, and the case came before the federal court. The question was one of jurisdiction -- whether or not a federal court had power in Admiralty to pass upon the validity of such a prize.

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8. The following case was not reported by Dallas, and the account is taken from Warren, op. cit., I, 106-7.

Washington and his Cabinet were deeply interested in the outcome of the case. On June 15, 1793, Hamilton wrote to Rufus King regarding it. He stated that although "a Court of a neutral nation will not examine the question of prize or not prize between belligerent powers, yet this principle must except the case of the infraction of the jurisdiction of the neutral power itself. . ."[9] The judge in the case, however, gave an adverse decision by denying the District Court's jurisdiction. As a result, the problem was further from settlement than it had been. That President Washington, however, was determined practically to deny the decision is shown by his subsequent action. He instructed the Governor of Pennsylvania to place guards over the William,[10] and he issued an Executive order that thenceforth all prizes captured by French privateers, in violation of American neutrality and brought into the ports of the United States, were to be restored to their owners.[11] Genet apparently protested against this action, and Jefferson, as

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9. Henry Cabot Lodge (Ed.), The Works of Alexander Hamilton, VIII, 304. See also Hamilton's "No Jacobin" papers, Ibid, IV, 198-229.
10. Warren, op. cit., I, 107-8. See also a letter from Jefferson to Genet, August 7, 1793. H. H. Washington (Ed.), The Writings of Thomas Jefferson, IV, 27.
11. Lodge (Ed.), op. cit., XII, 314-316.

Secretary of State, replied that the question would be determined eventually by "an appeal to the Court of last resort."[12]

In the meantime, Washington, acting through Jefferson, had taken a step that was designed to facilitate final settlement of the problem, and at the same time to furnish him with support for more vigorous action. The members of the Supreme Court were asked to give an advance opinion on the matter.[13] Hamilton framed a series of questions relating to international law, neutrality, and the interpretation of the treaties with France and Great Britain, and these were also communicated to the Supreme Court.[14] On August 8, the Judges of the Court replied that they considered it against propriety for them to give an extra-judicial opinion on the question.[15] Thus, although a fundamental principle of American government was laid down by the Court,[16] the administration was again deterred from taking definite and final action.

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12. Warren, op. cit., I, 108.
13. Ford (Ed.), op. cit., XII, 311.
14. Warren, op. cit., I, 109; Washington (Ed.), op. cit., IV, 22.
15. Henry P. Johnston (Ed.), The Correspondence and Public Papers of John Jay, III, 488-489.
16. The Court has consistently acted upon this principle. In Heyburn's Case (1793), 2 Dallas, 409, the Court declared its functions to be purely judicial. See also Dewhurst v. Coulthard (1794), 3 Dallas, 409. This doctrine was reiterated in 1911 in the case of Muskrat v. United States, 219, U. S., 347.

Meanwhile, the whole question of neutrality was rendered more complex by a case involving the criminal aspect of treaties.[17] It seems that on July 27, 1793, an indictment was found in Philadelphia against one Gideon Henfield. It was charged that Henfield had served as prize-master on a French privateer that had been fitted out in an American port and was engaged in capturing vessels of nations with which the United States was at peace, in violation of American laws and treaties. The main question was whether or not a person guilty of violating an American treaty and international law was liable to criminal punishment in federal courts.[18] The jury acquitted Henfield, but the case seems to have aroused a good deal of excitement.

These were the circumstances under which the general question of neutrality was placed. That important problem was perplexed by the existence of doubt as to the Admiralty jurisdiction of federal courts and their consequent power to interrupt French prize procedure

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17. Apparently, the following case was not reported in the regular manner. It is mentioned in Warren, op. cit., I, 112-114, and reference to it was made by Jefferson in communicating with Genet, as appears infra., note 18.
18. In the case of the United States v. Ravara (1793), 2 Dallas, 297, it had been held by the United States Circuit Court in Pennsylvania that the Federal Circuit Courts had jurisdiction over common law crimes against the U. S. See Jefferson's letter of June 1, 1793, to Genet. Washington, op. cit., III, 571.

in the United States by assuming unto themselves such duties. But that doubt was not long to remain, for Jefferson's earlier prophecy to Genet, that the question would finally be settled by "an appeal to the Court of last resort," materialized with the case of Glass, et al. v. The Sloop Betsey, in February, 1794.[19]

The facts in the case, as set forth on the Court's record, were these: a French privateer, called the Citizen Genet, captured as prize on the high seas the sloop Betsey, and sent her into Baltimore. The owners of the captured vessel and her cargo filed a libel in the District Court of Maryland by which they claimed restitution, since the Betsey was owned by subjects of the king of Sweden, a neutral power, and her cargo was owned jointly by Swedes and Americans. The captor then filed a plea to the jurisdiction of the District Court, which was allowed. The Circuit Court affirmed the decree, and thereupon the case was appealed to the United States Supreme Court.[20]

The basic question was whether or not a United States court, acting under its Constitutional powers in Admiralty, had jurisdiction, in a case like the one at hand, to entertain the libel of the owners

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19. 3 Dallas, 6.
20. Ibid.

and to decree restitution of a vessel so captured. The appellees urged that for an American court to assume such jurisdiction would be an express violation of Article XVII of the French treaty of 1778; but, as the appellants showed, that Article related only to "ships and goods taken by France from her enemies."[21]

After several days' consideration of the case, the Court stated that, in addition to the question concerning the jurisdiction of the District Court, another question seemed pertinent. It was, whether or not any foreign power had a right, in the absence of "positive stipulations of a treaty," to set up in the United States an admiralty jurisdiction to make adjudication of prizes captured on the high seas by such foreign power's subjects or citizens from its enemies.[22] Although this question had not been brought up during the arguments, "the Court deemed it of great public importance to be decided; and, meaning to decide it, they declared a desire to hear it discussed."[23] To this invitation, Peter S. Duponceau, as counsel for the appellees, stated that the parties "did not conceive themselves interested in the point," and that the French

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21. Ibid., 11-12. Malloy, op. cit., I, 474.
22. 3 Dallas, 6, 15.
23. Ibid.

Minister had not given any instructions for arguing it.[24] Mr. Chief Justice Jay then gave the unanimous opinion of the Court.

He stated that every District Court possessed "all the powers of a court of Admiralty, whether considered as an instance, or as a prize court," and that the District Court in Maryland was competent to determine the question of restitution in the case under consideration.[25] Thus, the Supreme Court definitely established that federal courts had full powers in Admiralty; and in doing so it served notice to the belligerent powers that such jurisdiction would be exercised to determine all legal points involved in prizes brought by them into American ports.

But this was only the positive portion of a dual declaration by the Court. Correlatively and negatively, the Court proceeded to announce "that no foreign power can of right institute, or erect, any court of judicature of any kind, within the jurisdiction of the United States, but such only as may be warranted by, and be in pursuance of treaties. . ."[26] Specifically, the Court decreed "that the admiralty jurisdiction, which has been exercised in the United States by the

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24. Ibid., 15-16.
25. Ibid., 16.
26. Ibid.

Consuls of France, not being so warranted, is not of right."[27]

This was just the decision that President Washington had hoped for. It constituted not only a judicial pronouncement upon neutrality, but, more important, it was a promise that federal courts would be positively active in helping to maintain that neutrality.[28] The decision naturally won the hatred of pro-French Americans, but it was to serve as the basis for the maintenance of future peace, especially during the period of the Latin American revolutions when the Court heard many cases involving violations of the neutrality of the United States.

The following year the Court decided two more cases that involved the United States in its relations to France under treaties. The first was that of the United States v. Judge Lawrence,[29] and it centered around Article IX of the Consular Convention of 1788. That article provided, in substance, that consuls and vice-

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27. Ibid.
28. See the communication of Mr. Pickering, as Secretary of State, to Mr. Pinckney, Minister of the United States to France, January 16, 1797. Annals of Congress, 4th Cong., 2nd Sess., App. 2713. M. Adet, the French Minister, had complained of the decisions in the following cases: Glass v. Sloop Betsey (1794), 3 Dallas, 6; Talbot v. Jansen (1795), 3 Dallas, 133; Guyer v. Michel (1796), 3 Dallas, 285; United States v. Richard Peters (1795), 3 Dallas, 121; and United States v. La Vengeance (1796), 3 Dallas, 297. Ibid.
29. 3 Dallas, 42.

consuls might cause the arrest of masters of ships and members of ship-crews, who deserted and were apprehended. It was prescribed that such arrests were to be made on warrants issued by the courts, judges, or other competent authorities, upon a written request by the consul or vice-consul of the foreign state, and that such request was to be accompanied by the ship's roll.[30]

On the Court's record of this case it appears that the master of a certain French vessel had deserted his ship, and had taken a residence in New York. It further appears that the French Vice-Consul apprehended the deserter, and, pursuant to the Convention, sent a written request to Judge Lawrence, of the United States District Court in New York, for a warrant to issue for the arrest of the deserter. It also appears that when the judge requested the ship's roll, as prescribed in the Convention, and when the French Vice-Consul obtained a copy of the roll, Judge Lawrence refused to issue the warrant because of lack of the original roll of the ship.[31] The French Minister then complained to President Washington, and Attorney-General Bradford requested the Supreme Court to issue a mandamus to Judge Lawrence ordering the warrant to issue.[32]

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30. Malloy, op. cit., I, 494.
31. 3 Dallas, 42, 42-43.
32. Ibid., 44-45.

The Court denied the Attorney-General's motion, and stated that the mandamus ought not to issue, because, it was held, the Court had no power to compel a judge, acting in a judicial capacity, to make a decision according to any judgment other than his own.[33] The interpretation of Article IX of the Consular Convention was deemed by the Court to be irrelevant.[34] This decision certainly did not mitigate the tenseness of the relations between France and the United States, but it confirmed the freedom of the judiciary from coercion by the political departments of the government.

At its August term in 1795, the Court heard only two cases, but both were prize cases involving the neutrality of the United States.[35] That of Talbot v. Jansen was important because it involved American neutrality in relation to treaties with both France and Holland, antagonistic belligerents, and because it illustrates the difficulty the United States government faced in forcing its own citizens to obey neutrality laws. The following facts appear on the record: a Dutch brigantine, the Vrow Christiana Magdalena, was taken possession of on the high seas by an armed vessel called L'Ami de la Liberte, under the command of one Edward

33. Ibid., 54.
34. Ibid., 55.
35. The cases were The United States v. Richard Peters, 3 Dallas, 121, and Talbot v. Jansen, ibid., 133.

Ballard. This occurred on May 16, 1794; and on the following day captor and captive were met by another armed schooner named L'Ami de la Point Petre, William Talbot, master. The latter ship and the original captor proceeded with the captive Magdalena to Charleston, there to condemn her as prize of a French privateer.[36] From the evidence it was shown that Ballard was a citizen of the United States, and that his vessel was an American ship that had been illegally fitted out within the jurisdiction of the United States. Talbot had also been an American citizen, but he claimed to have obtained French citizenship on December 28, 1793, and to have received from the Governor of Guadaloupe a privateering commission.[37] Jansen, master of the Dutch brigantine, filed a libel against his captors in the United States District Court in South Carolina, in which he prayed for restitution of the vessel. Such was ordered by the District Court, and, upon appeal by the libelees, by the United States Circuit Court also. By writ of error the case was then appealed to the Supreme Court.[38]

The duty of the Court was to determine the validity of the capture, prize or no prize. But in

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36. 3 Dallas, 133, 133-134.
37. Ibid., 134.
38. Ibid., 133-137.

order to effect such a determination, it was necessary to inquire into other factors. First of all, the nationality of the captors, both masters and ships, had to be settled. This brought up the whole question of expatriation -- the right, the means, and the fact or non-fact -- because Talbot claimed to be a naturalized French citizen. The treaties with France and Holland also demanded construction. Thus, the Court faced a difficult task, but one which it met with decision and force.

The members of the Court gave their opinions seriatim.[39] They were unanimous in agreeing that the first capture, made by Ballard, was illegal and invalid, because Ballard was not a French citizen and admittedly had no commission.[40] They were also unanimous in measuring the validity of Talbot's subsequent capture by the legitimacy of Ballard's act. It was maintained by each member of the Court that Ballard and Talbot were confederates, and that whatever technical legitimacy

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39. Mr. Justice Wilson refrained from giving an opinion as he had decided this cause in the Circuit Court. Ibid., 168.
40. Ibid., 152-155; 166-167; 168-169. It is interesting to note that Mr. Justice Paterson thought that Ballard "was, and still is, a citizen of the United States; unless, perchance, he should be a citizen of the world." Ibid., 153. On the other hand, Iredell maintained that, since Ballard had renounced his allegiance to his native state and had not become a French citizen, he had no citizenship whatever. Ibid., 166.

might otherwise have attached to the latter's acts was lost by his culpable -- even criminal -- association with the former. The Court affirmed the decrees of the courts below, and gave damages to the appellee.[41]

It is clear that in this case the Court took a broad rather than a narrow view of the circumstances. It appears that Talbot was actually a French citizen by naturalization, and that he did have a privateer's commission issued by the Governor of Guadaloupe. But the Court took the view that the capture of the Dutch vessel was a unitary act -- an entity -- composed of the action of both Ballard and Talbot, and that the whole was no more valid than its illegitimate lesser part. The language of the Justices was clear and forceful. That of Mr. Justice Paterson was personal and reproving. The Court preferred to judge the capture more upon the basis of Talbot's and Ballard's intention to violate the law of nations and American neutrality, than upon the ostensible legality of the act. The case is significant in that it shows unmistakably that the Court was committed to the task of maintaining and enforcing, in its proper capacity, the nation's obligations under treaties and neutrality; and that it was not

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41. Ibid., 169-170.

to be deterred from this course by technicalities or superficialities.

In four other cases during 1795 and 1796 the Court had to face the question of neutrality in regard to France. In the case of The United States v. Richard Peters,[42] which was one of the two cases decided by the Court in its August term of 1795,[43] it was clearly shown that the Court only wished to do justice in deciding questions of neutrality, and that it in nowise sought to discriminate against France or to render decisions prejudicial to her legal rights. Here it was held that the courts of the United States had no jurisdiction over the public vessels of a foreign belligerent. The Court further held that only the tribunals of a belligerent power had jurisdiction over cases of capture made by a public vessel of that power, even though such vessel had been illegally fitted out in the ports of a neutral.[44] This decision was made upon the basis of "the laws of nations, and the treaties subsisting between the United States and the Republic of France."[45]

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42. 3 Dallas, 121.
43. Talbot v. Jansen was the other.
44. 3 Dallas, 121, 129-130.
45. Ibid., 129.

Three other similar cases were decided by the Court in 1796. Two of them, Geyer v. Michel[46] and The United States v. La Vengeance,[47] did not directly involve treaty relations, but they had been objects of protest by the French Minister, Adet, when they were before the lower courts.[48] The case of Moodie v. The Ship Phoebe Anne,[49] however, directly involved Article XIX of the treaty of amity and commerce with France. That article provided that upon urgent necessity, French vessels, either public or private, might enter ports of the United States and "be supplied with all things needful for repairs."[50] On the record the following circumstances appear: a British vessel, the Phoebe Anne, had been captured by a French privateer and sent into Charleston. The British consul there filed a libel demanding restitution, because, he alleged, the French privateer had, prior to the capture, illegally augmented her force in the port of Charleston.[51] The case came from the United States Circuit Court in South Carolina to the Supreme Court by error.[52]

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46. 3 Dallas, 285.
47. 3 Dallas, 297.
48. 4th Cong., 2nd Sess., App. 2713. See Warren, op. cit., I, 118, note.
49. 3 Dallas, 319.
50. Malloy, op. cit., I, 475.
51. 3 Dallas, 319.
52. Ibid.

Mr. Chief Justice Ellsworth gave the Court's opinion. He declared that the mere replacement of force, such as the vessel in question had undergone in Charleston, was a repair and not an augmentation of force. Thus, the Court held that the privateer had conformed to Article XIX of the treaty, and that the capture was therefore valid.[53]

A review of the foregoing cases shows that during the early years of the Continental wars the United States Supreme Court aided materially in maintaining the nation's neutrality. It did so in the face of hostile public opinion, and in a judicious and impartial manner that was unimpeachable. But it must be remembered that during the time these cases arose the United States was in nowise a participant in the hostilities.

The years of transition from the eighteenth century to the nineteenth, however, were more than a mere temporal transition. They witnessed important changes in the policies and destinies of the United States. Outward neutrality was practically abandoned, and the nation prosecuted an "unofficial war" against France. The Federalist party lost its control of the

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53. Ibid.

administration, and the Jeffersonian group assumed power. John Marshall became Chief Justice of the Supreme Court. Party politics became intense and centered about the Federal Judiciary. It was during this period and under these circumstances that the case of The United States v. The Schooner Peggy[54] came before the Supreme Court. This case was of great importance because it so directly affected both the foreign and domestic matters of the government, and its significance can be properly understood only by viewing the case in relation to its background.

After repeated difficulties with France, the United States, in 1798, resorted to reprisals upon the sea that partook of the character of war.[55] Although no formal declaration of war was issued, the commanders of armed American vessels, public and private, were directed to capture or destroy French vessels found within the territorial waters of the United States or upon the high seas.[56] The treaties of 1778 with France were abrogated by an act of Congress

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54. 1 Cranch, 103.
55. John Spencer Bassett, The Federalist System, pp.218-251.
56. Ibid. Annals of Congress, 5th Cong., 3rd Sess., App. 3733, 3747, 3754.

on July 7, 1798.[57] Thus, not until the two nations concluded a treaty of peace, commerce, and navigation, on September 30, 1800, was there a complete legal basis for intercourse between them, or for litigation in American courts by French nationals.[58]

A few months later, before the defeated Federalists surrendered office, Congress passed the Circuit Court Act of February 13, 1801.[59] Jefferson's dislike and fear of the Federal Judiciary were intensified by the passage of this act, and his views were shared generally by members of his party.[60] President Adams' "midnight appointments" also furnished a source of Jeffersonian hostility to the Judiciary.[61]

This was the situation when the case of The United States v. The Schooner Peggy came before the Federal Courts in 1800. The chief facts, as set forth on the Supreme Court's record, were these: on April 24, 1800, the Trumbull, an armed American vessel commanded

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57. Annals of Congress, 5th Cong., 3rd Sess., App. 3754. See also Hooper, Admr. v. United States (1887), 22 C. Cl., 408; The Brig William (1888), 23 C. Cl., 201; The Ship James and William (1902), 37 C. Cl., 303; The Schooner Endeavor (1909), 44 C. Cl., 242.
58. In the case of Cushing, Admr. v. United States (1886), 22 C. Cl., 1, it was held that the treaty was not one of peace, because it did not conclude or recognize a war or state of hostility.
59. Annals of Congress, 6th Cong., 2nd Sess., App. 1534. Charles Warren, The Supreme Court in United States History, I, 185; Bassett, op. cit., pp. 293-294.
60. Warren, op. cit., I, 185-189.
61. Of course, it was from one such appointment that the famous case of Marbury v. Madison arose. 1 Cranch, 137.

by David Jewett, who had a valid commission from the President to capture French ships upon the high seas, captured the French schooner Peggy in the Caribbean. The United States District Court in Connecticut first heard the case on a libel, and decided that the capture was not valid, the schooner was not lawful prize, and ordered restitution of the schooner and her cargo to the owners.[62] "From this decree," it is stated in Cranch's Reports, "the attorney for the United States, in behalf of the United States and the commander, officers and crew of the Trumbull, appealed to the Circuit Court. . ."[63]

The Circuit Court on appeal reversed the decree of the lower court. It declared the capture was valid and the prize was lawful, and ordered condemnation of the schooner.[64] But it is important to note that the Circuit Court gave its decree of condemnation on September 23, 1800, only three days after the treaty with France was concluded.[65] By Article IV of that treaty this provision was made:

> Property captured, and not yet definitely condemned, or which may be captured before the exchange of ratifications, (contraband goods

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62. 1 Cranch, 103, 104.
63. Ibid., 104.
64. Ibid., 106.
65. Ibid., 107.

> destined to an enemy's port excepted) shall be mutually restored.

It was further agreed:

> This article shall take effect from the date of the signature of the present convention. And if, from the date of the said signature, any property shall be condemned contrary to the intent of the said convention, before the knowledge of this stipulation shall be obtained; the property so condemned shall without delay be restored or paid for. [66]

This treaty was ratified by the United States Senate on February 3, 1801.[67]

Thus, when Jefferson assumed office, the situation was rather peculiar. The Circuit Court had decreed condemnation of the captured Peggy three days after the treaty was concluded. But the provisions of Article IV of that compact complicated the matter. It was provided that captured property not definitely condemned on September 30, 1800, should be restored, and the article was to be effective from the date of signature. On that day it is certain that no definite condemnation of the Peggy had been decreed, because the Circuit Court did not issue its decree until three days thereafter. Thus, it might be maintained that Jefferson could legally have set aside the Circuit Court's decree by restoring the ship and cargo to their owners. But such an assumption would have to be based

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66. Malloy, op. cit., I, 497.
67. Annals of Congress, 6th Cong., 2nd Sess., App. 1205.

upon the finality of the Circuit Court's decree, so far as judicial action in the matter was concerned. Such, however, was not the case. Upon the Circuit Court's pronouncement, an appeal was made to the Supreme Court on a writ of error, dated October 2, 1800.[68]

Soon after Jefferson came into office he took action on the matter. Since the treaty had already been ratified, Jefferson proposed to give it effect. He directed the United States attorney to see that proceeds from the sale of the tentatively condemned Peggy, then in custody of the Clerk of the United States Court, were paid to the French claimants.[69] It appears that the Clerk, for his part, refused to comply with these instructions, and that he requested the newly-created Circuit Court to pass on the matter by issuing a restraining order.[70] The Clerk's objections seem to have been that the action requested by Jefferson was unconstitutional, since it amounted to an appropriation of money by the President.[71] The new Circuit Court seems to have agreed with these views and to have issued an order that the sale money be paid into the government treasury.[72] Thus, the new judiciary

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68. 1 Cranch, 103, 108.
69. Warren, op. cit., I, 198.
70. Ibid.
71. Ibid.
72. Ibid., 199.

which was so detested by Jefferson, had presumed to countermand his order.

But all of this occurred pending the appeal of the case to the Supreme Court. The appeal was heard in December of 1801, and Chief Justice Marshall gave the Court's opinion. He stated that the Peggy was within the purview of Article IV of the treaty of 1800 and that she ought to be restored.[73] He did not consider the vessel as having been "definitively condemned" by the decree of the earlier Circuit Court. He maintained that the "last decree of an inferior court is final in relation to the power of that court, but not in relation to the property itself, unless it be acquiesced under."[74] It was admitted that "every condemnation is final as to the court which pronounces it," but a distinction was drawn between condemnation and final condemnation. The one leaves the controversy pending, while the other "terminates definitely the controversy between the parties."[75] In the case of the Peggy, said Marshall, the Circuit Court's decree of condemnation was appealed from, and since, on appeal, it might have been reversed, it was not to be regarded as a definitive condemnation. Hence, the Peggy fell

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73. 3 Cranch, 103, 108.
74. Ibid., 109.
75. Ibid.

under that portion of the treaty which contemplated captured property not definitely condemned.[76]

After reiterating the legal supremacy of treaties and their obligatory effect upon courts, Marshall then turned to the application of the treaty of 1800. He declared that when a treaty affects the individual rights of litigants, "that treaty as much binds those rights, and is as much to be regarded by the court, as an act of congress";[77] and although restoration might ordinarily be an executive act, since the execution of treaties is within the sphere of that department, yet for the Court to order condemnation when the supreme law provides for restoration, would be obviously improper.[78]

But it might be objected that the sole province and duty of an appellate court is to determine whether the judgment of the court below was correct or erroneous. This, Marshall admitted to be the general rule; but he declared that "if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied."[79] Thus, the Court held a treaty to be legally supreme and binding on courts, even when such treaty

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76. Ibid.
77. Ibid., 110.
78. Ibid.
79. Ibid.

was in the nature of an interlocutory act. Marshall did admit that in "mere private cases between individuals," courts ought to guard against a construction which, by retroactive operation, would affect the rights of the litigants; but he declared that "in great national concerns, where individual rights, acquired by war, are sacrificed for national purposes, the contract making the sacrifice ought always to receive a construction conforming to its manifest import."[80]

The Court reversed the judgment of condemnation, although admitting that it was "rightful when rendered."[81]

Only one other treaty case reached the Supreme Court before the United States entered upon the War of 1812. In the neutrality cases considered thus far, the Court had striven to give to treaties a just construction, and at the same time to proclaim neutral rights. After the Treaty of Ghent the Court was given an opportunity to enlarge upon its views relative to the rights of neutrals. The American colonies of Spain were in revolt, and as a result, many cases of prize and neutrality under the treaty of 1795 came before the Supreme

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80. On this point he concluded by remarking that in such cases, where the government has surrendered "the vested rights of its citizens," it was for the political departments, and not for the courts, to determine the matter of indemnity. Ibid.
81. Ibid.

Court. In deciding these cases the Court took occasion frequently to issue important pronouncements and dicta upon international law. Between 1815 and 1822 the United States took a definite stand upon many important questions of international law; and in determining those questions the Supreme Court played a principal part.

In 1808 the case of Fitzsimmons v. The Newport Insurance Company came before the Court.[82] The case centered around these facts: an American brig, the John, was on a voyage from Charleston to Cadiz and was captured by a British ship of war on July 16, 1800. The captured vessel was sent to Gibraltar for adjudication, and was there condemned by a court of Vice-Admiralty as lawful prize. The suit was brought by the owners of this brig to recover from the underwriters the amount of a policy insuring the vessel.[83]

In order to decide the case it was necessary for the Court to determine the legality of the seizure. If the capture was lawful, then the plaintiff clearly had no recourse against the underwriters; but if the brig was seized unlawfully, then it was plain that the insurers were liable. Article XVIII, paragraph 3, of

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82. 4 Cranch, 185.
83. Ibid.

the Jay Treaty covered the question of such captures as between Great Britain and the United States, in the following terms:[84]

> And whereas it frequently happens that vessels sail for a port or place belonging to an enemy, without knowing that the same is either besieged, blockaded or invested: it is agreed that every vessel so circumstanced may be turned away from such port or place; but she shall not be detained, nor her cargo, if not contraband, be confiscated, unless, after notice, she shall again attempt to enter; but she shall be permitted to go to any port or place she may think proper.

It appears that the American brig had cleared from Charleston without knowledge of the fact that Cadiz was blockaded by the British, and that before reaching the latter port she had been arrested by a British squadron.[85] The master of the American vessel was then informed that Cadiz was blockaded, and upon being asked where he would go if released, he replied that he would proceed to Cadiz unless he received new orders.[86] The British commander thereupon placed a prize crew on board the brig and sent her to Gibraltar, where she was condemned.[87]

Since the sole question to be decided in the case was the legality of the capture, it was natural that Article XVIII of the treaty of 1794 should

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84. Article XVIII of Jay's Treaty.
85. 4 Cranch, 185.
86. Ibid., 186.
87. Ibid.

be invoked. In delivering the opinion of the Court, Chief Justice Marshall declared that "neither the law of nations nor the treaty admits of the condemnation of a neutral vessel for the intention to enter a blockaded port, unconnected with any fact."[88] By thus distinguishing between a mere intention to enter the blockaded port, and an actual attempt to enter it, the Court denied the validity of the capture under the treaty of 1794.[89]

In spite of the effort with which the Court strove to aid in maintaining neutrality by rendering liberal decisions in cases involving the question, the United States entered upon a war against Great Britain in 1812. If the finality of the victory of the United States in that conflict is to be judged by the terms of the Treaty of Ghent, then it must be evident that the whole question of neutrality was no nearer a settlement than it had been in 1812.[90] It seems that the rights and obligations in international law of a neutral were no more clearly defined than they had been before the Napoleonic Era. To be sure, the United States had taken a definite stand on some questions respecting neutrality, and the Supreme Court had made an appreciable beginning in formulating a

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88. Ibid., 199.
89. Ibid., 200-202.
90. John H. Latane, American Foreign Policy, pp. 156-158.

judicial code governing cases of prize and neutrality. But even so, many points remained to be decided, and an opportunity for the Court to expand its views on the problem of neutrality and international law was not long in coming.

Hardly had the War of 1812 closed before the attention of the United States was turned to events in Latin America. The American colonies of Spain and Portugal were in open revolt against their European rulers, and sought to gain independence by the violent expedient of warfare. Public opinion in the United States strongly favored the revolting colonies, but the government attempted to pursue a neutral policy. There arose practically the same difficulties that had faced the administration immediately prior to the War of 1812. Privateering was attractive, and it was difficult to prevent the fitting out of privateers in ports of the United States. The Spanish treaty of 1795 was still in existence, and it was the chief instrument covering the relations between Spain and the United States. Some of the terms of this compact were given judicial interpretation. Between the years 1815 and 1822, there came before the Supreme Court of the United States six cases involving the Spanish treaty of 1795. It was in deciding these cases

that the Court not only contributed its part in maintaining the neutrality of the nation, but also issued significant pronouncements upon international law.

The first of this class of cases to reach the Supreme Court was that of The Nereide, in 1815.[91] An armed British ship, the Nereide, had been chartered by Manuel Pinto, a native of Buenos Ayres, to carry certain lawful goods from London to Buenos Ayres. On December 19, 1813, the Nereide was captured by an American privateer and brought to New York for adjudication. Here the captured vessel and that portion of the cargo belonging to British subjects were condemned without claim, while the remainder of the cargo, which was claimed by Pinto, was also condemned on a hearing. The case then came to the Supreme Court on appeal.[92]

The question to be determined was the legality of the condemnation of that portion of the cargo belonging to Spanish subjects. By Article XV of the Spanish treaty of 1795, it was agreed that, as between the contracting parties, free ships made free goods.[93] This was a positive statement and, although it did not directly apply to the case at hand, it was the only

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91. 9 Cranch, 388.
92. Ibid., 389-390.
93. Ibid., 418; Malloy, op. cit., II, 1645.

agreement between the two states relating to the liberty of trade upon the high seas. It was only natural, then, that it should be referred to by counsel and Court. It was urged by the captors that since it was stipulated in the treaty that free ships made free goods, then the converse proposition was to be inferred. Thus, if enemy ships made enemy goods, then the capture of the Nereide, as well as the subsequent condemnation of her cargo, had been rightful, inasmuch as the United States and Great Britain were open enemies at the time.

Mr. Chief Justice Marshall delivered the opinion of the Court. "The rule," he said, "that the goods of an enemy found in the vessel of a friend are prize of war, and that the goods of a friend found in the vessel of an enemy are to be restored, is believed to be a part of the original law of nations, as generally, perhaps universally, acknowledged. Certainly it has been fully and unequivocally recognized by the United States. The rule is founded upon the simple and intelligible principle that war gives a full right to capture the goods of an enemy, but it gives no right to capture the goods of a friend."[94]

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94. 9 Cranch, 388, 418-419.

A more concise statement of Marshall's view on this point is this: "The character of the property, taken distinctly and separately from all other considerations, depends in no degree upon the character of the vessel in which it is found."[95] By thus appealing to what he regarded as the "simple and natural principle of public law," Marshall was of the opinion that the flag of a vessel imparted nothing to the cargo, unless by express agreement between states.

Such an agreement was, of course, contained in the treaty of 1795 with Spain. There it was stipulated that the two parties would, in their relations with each other, regard free ships as making free goods.[96] According to Marshall's view, this agreement was an exception to the basic rule of international law. But even so, it was part of a treaty, and thereby governed the relations between the two states. The only question was whether or not the converse proposition, that enemy ships made enemy goods, was to be inferred.

This query Marshall answered in the negative. "Treaties are formed upon deliberate reflection," he said, and "if an omitted article is not necessarily

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95. Ibid., 419.
96. Vide supra, p. 100.

implied in one which is inserted, the subject to which the article would apply remains under the ancient rule."[97] It is true, he said, that the two principles in question have been closely associated; but they have always been regarded as two distinct maxims, and never as one.[98] Marshall declared that it was "clearly understood in the United States, so far as an opinion can be formed on their treaties, that the one principle is totally independent of the other."[99]

By so construing international law and Article XV of the treaty of 1795, it was natural that Marshall should pronounce invalid the condemnation of the Spanish portion of the cargo of the Nereide. What the Supreme Court really did was to hold that a neutral might lawfully employ an armed belligerent vessel to transport goods, and that such goods did not lose their neutral character by virtue of the armament or the character of the vessel. It is clear, then, that the Court was going far to assert and to uphold the rights of neutrals upon the high seas.

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97. 9 Cranch, 388, 419.
98. As Marshall pointed out, the famous Armed Neutrality was an attempt forcibly to modify international law by asserting the doctrine of free ships, free goods. But even here, the doctrine and its converse proposition were held to be distinct. 9 Cranch, 388, 420-421.
99. Ibid., 421. See also Jefferson to Genet, July 24, 1793 (Washington, op. cit., IV, 23-25), and to Robert R. Livingston, September 9, 1801, ibid., IV, 408. It is interesting to note that in giving the opinion of the Court, Marshall took occasion to pay a high tribute to Jefferson and the other members of President Washington's first Cabinet. 9 Cranch, 389, 422.

Two years later, in the case of The Pizarro,[100] the Court again adopted a view favorable to neutrals. Article XVII of the Spanish treaty of 1795 prescribed that in case one of the parties should become engaged in war, the ships of the other state were to carry sea-letters and certificates, describing the vessels and their cargoes, as identification.[101] On the record of the Court it appears that in July of 1814, the Pizarro, a Spanish vessel, was captured by an American privateer and brought into Savannah for adjudication. After the decision below, the captors appealed the case to the Supreme Court. They argued that since the Pizarro failed to carry a sea-letter or certificate, as prescribed by the treaty, she was not within the protection of that compact.[101]

In delivering the opinion of the Court, Mr. Justice Story held that the failure of a vessel of one of the contracting parties to be properly documented was "no substantive ground for condemnation."[103] Such a circumstance, he said, "only justified the capture, and authorized the captors to send the ship to a proper port for adjudication."[104] There the nationality of the

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100. 2 Wheaton, 227.
101. Malloy, op. cit., II, 1646-1647.
102. 2 Wheaton, 227, 228-230.
103. Ibid., 244.
104. Ibid.

vessel was to be determined by a "competent tribunal," and if found to be that of the other party to the treaty, the vessel was not to be regarded as prize.[105]

In 1819 the case of La Nuestra Senora de la Caridad[106] came before the Supreme Court. The circumstances of the case were rather peculiar, but they furnished an opportunity for the Court to make clear its position in the matter of neutrality.

The following facts appear on the record: On January 21, 1815, a privateer flying the flag of the Province of Carthagena, one of the United Provinces of New Granada, captured on the high seas the Spanish vessel, La Nuestra Senora de la Caridad. The captor placed a prize crew on board the captured vessel and attempted to take her into the port of Carthagena, there to condemn her and her cargo. The voyage to

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105. Ibid. See also Article XVII of the Spanish treaty of 1795.
In the case of The Amiable Isabella (1821), 6 Wheaton, 1, the Court held that insofar as this article of the treaty purported to give effect to passports as to ownership of vessels, it was imperfect and inoperative inasmuch as the form of such passport was not annexed to the treaty. According to the treaty, the Court held, free ships made free goods; but since the form of passport, by which the freedom of vessels was to have been determined was never annexed to the treaty, the proprietary interest of the ships was to be established by ordinary rules of prize courts. If the proprietary interest of a vessel be thus determined as Spanish, then the cargo on board was to enjoy full protection, to whomsoever it might belong.

106. 4 Wheaton, 497.

Carthagena, however, was interrupted by a privateer of the United States, the Harrison. The latter seized the captured Spanish vessel, and, suspecting her cargo to be British, took it on board and proceeded to Wilmington, North Carolina, and there proceeded against the captured cargo as prize of war. The masters of the Spanish and Carthagenian vessels filed cross claims, and the United States Circuit Court decreed restoration of the cargo to the original Carthagenian captor. The case was then appealed to the Supreme Court by the Spanish claimant.[107]

As Mr. Justice Johnson said, in delivering the opinion of the Court, the only question to be decided was whether or not an original Spanish owner was entitled to the aid of the Courts of the United States "to restore to him property of which he had been dispossessed by capture, under a commission derived from the revolted colonies."[108] The treaty of 1795 was dismissed by the Court as inapplicable. That compact enjoined restitution only in case the capture was made

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107. Ibid., 497-500;501.
108. Ibid., 501.
In the cases of United States v. Palmer (1818), 3 Wheaton, 610; The Estrella (1819), 4 Wheaton, 298; and Divina Pastora (1819), 4 Wheaton, 52, the Supreme Court had decided this same question adversely to the Spanish claimants.

by pirates or within the jurisdiction of the United States,[109] and since the capture in the case at hand was made upon the high seas by a duly commissioned privateer, the terms of the treaty were held to be inapplicable.[110]

Having thus disposed of the question of the treaty of 1795, the Court took occasion to reiterate its views on neutrality. "War notoriously exists," said Mr. Justice Johnson, "and is recognized by our government to exist, between Spain and her colonies. . . No neutral nation can act against either without taking part with the other in the war. . . And no friendly nation ought to demand of the courts of this country to do an act which may involve it in a war with the victor. Our duty is, where the property of either is brought innocently within our jurisdiction, to leave things as we find them; much more to restore them to that state from which they have been forcibly removed by the act of our own citizens."[111]

This position was vigorously reaffirmed by the Court in 1821, in the case of The Amiable Isabella.[112] Here were presented the questions of the applicability

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109. Article IX; Malloy, op. cit., II, 1643.
110. 4 Wheaton, 497, 502.
111. Ibid.
112. 6 Wheaton, 1.

of the Spanish treaty of 1795 to vessels fraudulently documented,[113] and the interpretation of the treaty itself. The binding effect of treaties was reasserted by the Justices. Mr. Justice Story referred to the treaty of 1795 as a compact "which we are bound to observe with the utmost good faith, and which our government could not violate without disgrace, and which this court could not disregard without betraying its duty."[114] A similar view was expressed by Mr. Justice Johnson. He said: "Where no coercive power exists for compelling the observance of contracts but the force of arms, honor and liberality are the only bonds of union between the contracting parties, and all minor considerations are to be sacrificed to the great interests of mankind."[115] He continued by stating that although it was "a melancholy truth that nations and their courts are too often inclined to restrict or enlarge construction" of a treaty because of policy or circumstances, it was nevertheless his intention "to give this treaty the same construction against an American captor, as ought to be given in the courts of the opposite contracting party."[116] Mr.

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113. Vide supra, p. 105, note 105.
114. 6 Wheaton, 1, 68.
115. Ibid., 85.
116. Ibid., 88-89.

Justice Johnson not only believed that the "execution of one treaty in a spirit of liberality and good faith" was "a higher interest than all the predatory claims of a fleet of privateers,"[117] but he also maintained the independence of the Judiciary. "Considerations of policy," he said, "and the views of the administration" were "wholly out of the question" in the Supreme Court.[118] He continued: "What is the just construction of the treaty, is the only question here. And whether it chime in with the views of the government or not, this individual [the claimant in the case] is entitled to the benefit of that construction."[119]

From this it is evident that during the period of the revolt of Spain's American colonies, the Supreme Court was determined to uphold the sanctity of treaties in spite of popular opinion and administrative policy.

The sincerity of the Court's attitude in the preceding case was amply proven in the case of The Bello Corrunes, in 1821.[120] Here the Court held that where citizens of the United States had taken from a state at war with Spain a commission to cruise against that power,

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117. Ibid., 91.
118. Ibid., 92.
119. Ibid.
120. 6 Wheaton, 152.

in violation of Article XIV of the treaty of 1795,[121] such an act was to be considered as piratical, at least for civil purposes. As a result, the offending parties were not privileged to appear in the Courts of the United States and claim the property thus taken.[122]

In the following year, 1822, the last major case of this group reached the Supreme Court. The case of La Santissima Trinidad[123] came before the Court just as the United States recognized the successful Latin American governments, and only one year before President Monroe's famous message was issued to Congress. In this case the whole question of the neutrality of the United States in the wars between Spain and her American colonies was reviewed. Daniel Webster served as counsel,[124] and he seems to have won distinction by his arguments in the case.[125]

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121. Malloy, op. cit., II, 1645.
122. 6 Wheaton, 152.
In the case of La Santissima Trinidad (1822), 7 Wheaton, 283, the Court held such infection of piracy was confined to those citizens of the United States who served on private armed vessels, and did not extend to those who served upon public vessels. 346-347.
123. 7 Wheaton, 283.
124. Ibid., 316.
125. Warren, op. cit., II, 34-35.

The case served to clarify several points. Most important of all, the manner in which the United States officially regarded the revolting colonies was clearly set forth. "The government of the United States has recognized the existence of a civil war between Spain and her colonies," said Mr. Justice Story, "and has avowed a determination to remain neutral between the parties, and to allow to each the same rights of asylum, and hospitality and intercourse."[126] He stated that each of the contestants was deemed by the United States to enjoy "the sovereign rights of war," and then declared this view to be binding upon the courts of the United States until Congress should prescribe a different rule.[127] From this it seems that where no higher rule prevails, such as a statute or a treaty, the Judiciary of the United States is subservient to the political departments of the government, and is bound by their acts.[128]

The Court then examined Article VI of the Spanish treaty of 1795.[129] It was held that this article

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126. 7 Wheaton, 283, 337.
127. Ibid.
128. This is certainly true in cases of recognition. See Oetjen v. Central Leather Company (1918), 246 U. S., 297.
129. By this article each state agreed to protect the property of the citizens or subjects of the other resident within its jurisdiction. Malloy, op. cit., II, 1643.

applied only to the protection and defense of Spanish vessels within the territorial jurisdiction of the United States, and that it prescribed restitution of such vessels only when captured within that jurisdiction.[130]

It is clear that by 1822, only one generation after its establishment, the Supreme Court of the United States had laid the foundations for judicial interpretation of treaties. It had prescribed and had employed rules and principles of interpretation that were both judicious and expedient. It had essayed to champion the rights of neutrals upon the high seas, and it did so in the face of a bitter and antagonistic public opinion. It had also expounded international law in a manner of scholarly and practical anticipation of the future. In performing these tasks the Supreme Court may have earned for itself the antagonism of many persons, but it also firmly established the Judiciary of the United States as hidden lawmaker.

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130. 7 Wheaton, 283, 346.

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