REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

Commission established under the Convention concluded between the United States of America and Great Britain on 8 February 1853

Case of the Enterprise v. Great Britain, opinions of the Commissioners and decision of the Umpire, Mr. Bates, dated 23 December 1854; case of the Hermosa v. Great Britain, decision of the Umpire, Mr. Bates; and case of the Creole v. Great Britain, decision of the Umpire, Mr. Bates

Commission établie en vertu de la Convention conclue entre les États-Unis d'Amérique et la Grande-Bretagne le 8 février 1853

Affaire Enterprise c. Grande-Bretagne, opinions des Commissaires et décision du Surarbitre, M. Bates, datée du 23 décembre 1854; Affaire Hermosa c. Grande-Bretagne, décision du Surarbitre, M. Bates; et Affaire Creole c. Grande- Bretagne, décision du Surarbitre, M. Bates

23 December 1854

VOLUME XXIX, pp.26-53

NATIONS UNIES - UNITED NATIONS

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United States Commissioner

Rights of navigation—free and absolute right to navigate the ocean, common highway of nations—exclusive jurisdiction on the high seas of the laws of each country over its vessels—obligation for every ship to carry a flag and have a declared nationality under penalty of being treated as a pirate—right of all nations to freely use the ocean, except for the portion of sea immediately contiguous to the land—right of passage through this protected portion—limitation of jurisdiction of coastal State to certain fiscal and protection purposes over the waters immediately adjoining its territory—the use of coastal waters viewed as incidental right to the use of the land.

Right of refuge in case of distress—absolute right to seek shelter in a foreign harbour because of weather distress—right of refuge viewed as an incidental right to the navigation of the ocean—all incidental rights are based on necessities arising from the prior and original right—a right to the end uniformly carries with it a right to the means required to attain that end—vessels exempted from liabilities to local law when driven by distress within the ordinary jurisdiction of another country—entitlement to compensation for property seized in this context by the authorities of the foreign port.

Slavery as a legal institution under international law—question of the extraterritoriality of the abolition of slavery throughout British dominions—forced liberation of slaves of another government considered as an illegal interference of one nation with another, and in conflict with their own right of self-government and the established relations of their country—slave trade not considered as criminal traffic by the laws

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[*] Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party*, vol. IV, Washington, 1898, Government Printing Office, p. 4350.

[**] *Ibid*., p. 4374.

[***] *Ibid*., p. 4375.

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[*****] *Ibid*., p. 4374.

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of nations—law viewed as a question of fact without basis in morality or justice—legitimate compensation of forced liberation of slaves.

British Commissioner

Right of navigation—absolute exemption of jurisdiction from foreign laws for vessels at sea—limited exemption of jurisdiction from local laws for vessel in foreign ports, even if brought by reason of distress—a cargo of vessel considered legal under United States laws but illegal according to British law considered as liable to confiscation if brought within British jurisdiction, exempted from penalty under circumstances of necessity.

Slavery under international law—recognition by American law itself of an essential difference between property in slaves and property in things—institution of slavery depending solely upon laws of each individual State in which it is allowed—a municipal law forbidding slavery, being in strict harmony with the law of nature, does not violate the law of nations.

Conflict of municipal laws under international law—no nation can be called upon to permit the operation of foreign laws within its territory when those laws are contrary to its interests or its moral sentiments—international law viewed as an equal arbitrator between nations—international law cannot compel one country to reject the law of nature and its own law in favour of a foreign local law in opposition to both.

Umpire

Slavery under international law—slavery existing by law in several countries could not be considered contrary to the law of nations.

Rights of navigation—right to navigate the ocean and to seek shelter in case of distress—right to retain the application of the law of the vessel's own country over the ship, her cargo and her passengers—violation of the laws of nations and the laws of hospitality by authorities of British dominions—shortage of provision and water considered as distress situation.

Commissaire des États-Unis

Droits de navigation—droit absolu de naviguer librement sur l'océan, voie commune de toutes les nations—compétence exclusive des lois de chaque État sur ses navires naviguant en haute mer—obligation pour chaque navire d'arborer un pavillon et d'avoir une nationalité déclarée sous peine d'être considéré comme un navire pirate—droit de toutes les nations d'utiliser librement l'océan, excepté la portion de mer immédiatement contigüe à la terre—droit de passage à travers cette portion protégée—limitation à certaines finalités de protection et de fiscalité de la compétence de l'État côtier sur les eaux immédiatement adjacentes à son territoire—utilisation des eaux côtières considérée comme un droit accessoire de l'utilisation de la terre.

Droit de refuge en cas de détresse—droit absolu de chercher refuge dans un port étranger en cas de mauvaises conditions météorologiques—droit de refuge considéré comme un droit accessoire à la navigation sur les océans—tous les droits accessoires sont fondés sur des nécessités découlant du droit antérieur et originel—un droit de

finalité implique également les moyens requis pour atteindre cette finalité—exemption des responsabilités selon le droit local pour les navires entraînés sous la juridiction ordinaire d'un État étranger par leur état de détresse—droit à compensation pour les biens saisis dans ce contexte par les autorités d'un port étranger.

Légalité du régime d'esclavage en droit international—question de l'extraterritorialité de l'abolition de l'esclavage à l'ensemble des dominions britanniques—la libération forcée d'esclaves dépendants d'un autre gouvernement est considérée comme une interférence illégale par une autre nation et comme étant en conflit avec la souveraineté de ce gouvernement et les relations établies entre ces États—le commerce d'esclaves n'est pas considéré comme un trafic illicite selon le droit des gens—le droit est vu comme une question de fait non fondée sur la morale ou la justice—compensation légitime pour la libération forcée d'esclaves.

Commissaire britannique

Droit de navigation—immunité absolue de juridiction des lois étrangères sur les navires en mer—immunité restreinte de juridiction des lois locales sur les navires stationnés dans les ports étrangers, même s'ils y sont arrivés en raison de leur état de détresse—une cargaison de navire considérée comme légale en vertu des lois américaines mais illégale en vertu du droit britannique est réputée comme passible de confiscation si elle est saisie sous juridiction britannique, excepté dans les cas de nécessité.

Esclavage en droit international—reconnaissance par le droit américain lui-même de la différence entre la propriété d'esclaves et la propriété d'objets—le régime juridique de l'esclavage dépend uniquement des lois de l'État individuel qui l'autorise—une loi interne interdisant l'esclavage, en parfaite harmonie avec le droit naturel, ne saurait violer le droit de gens.

Conflit de lois internes en droit international—il ne peut être exigé d'aucune nation que celle-ci permette que des lois étrangères s'appliquent sur son territoire alors que ces dernières vont à l'encontre de ses intérêts ou son sens moral—droit international considéré comme un arbitre équitable entre les nations—le droit international ne peut obliger un État à rejeter le droit naturel et ses propres lois au profit d'une loi nationale étrangère contraire aux deux derniers.

Surarbitre

Esclavage en droit international—l'esclavage existant en droit dans plusieurs pays, il ne peut être considéré comme contraire au droit des gens.

Droits de navigation—droit de naviguer sur l'océan et de chercher refuge en cas de détresse—droit de maintenir l'application du droit du pays d'origine sur le navire, sa cargaison et ses passagers—violation du droit des gens et des lois de l'hospitalité par les autorités des dominions britanniques—la pénurie de provisions et d'eau est considérée comme un cas de détresse.

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Opinion of Mr. Upham, United States Commissioner, in the case of the *Enterprise*

In March, 1840, resolutions were submitted to the United States Senate relative to this claim, by Mr. Calhoun, which were adopted by that body, and which briefly set forth the principles on which the claim is based.

These principles are:

> That a vessel on the high seas, in time of peace, engaged in a lawful voyage, is, according to the law of nations, under the exclusive jurisdiction of the state to which she belongs; and that, if such vessel is forced, by stress of weather or other unavoidable circumstance, into the port of a friendly power, her country, in such case, loses none of the rights appertaining to her on the high seas, either over the vessel or the personal relations of those on board.

It was contended that the *Enterprise* came within these principles, and that the seizure and liberation of the negroes on board of her, by the authorities of Bermuda, was a violation of these principles and of the law of nations. . . .

I shall endeavor to ascertain what this law is. Before proceeding, however, to give my views fully on this subject, I shall advert briefly to the various points taken in the argument addressed to us by the learned counsel for the British Government.

These points are:

1. "That laws have no force, in themselves, beyond the territory of the country by which they are made."

My reply is that this is usually the case; but it is subject to the important addition that the laws of a country are uniformly in force, beyond the limits of its territory, over its vessels on the high seas, and continue in force in various respects within foreign ports, as we shall hereafter show.

2. It is contended "that by the comity of nations the laws of one country are, in some cases, allowed by another to have operation within its territory; but, when it is so permitted, the foreign law has its authority in the other country from the sanction given to it there and not from its original institution."

3. "That every nation is the sole judge of the extent and the occasions on which it will permit such operation, and it is not bound to give such permission where the foreign law is contrary to its interests or its moral sentiments."

As to these points, I concede that there are many laws of a foreign country, in reference to its own citizens or their obligations, that another nation may enforce or not, where the citizens of such a country voluntarily come within its borders in order to place themselves under its jurisdiction. But there are cases where persons are forced by the disasters of the sea upon a foreign coast, where, as I contend, a nation has fundamental and essential rights within the ordinary local limits of another country, of which it can not be deprived, and that are operative and binding by a sanction that is wholly above and beyond the mere assent of any such state or community.

Such rights are defined by jurists as the absolute international rights of states. I might also add, it is not now a question whether the doctrines of international law shall prevail either in England or America.

"International law," says Blackstone, "has been adopted in its full extent by the common law of England; and whenever any question arises which is properly the subject of its jurisdiction, it is held to be a part of the law of the land." (Black. Com. vol. 4, p. 67.)

International law is also recognized by the Constitution of the United States, and it is made the duty of Congress to punish offenses against it.

4. It is contended "that England does not admit within its territory the application of any foreign laws establishing slavery, having abolished the *status* of slavery throughout its dominions."

This position is open to the exception taken to the second and third propositions, and is subject to the same reply.

5. It is contended "that the condition of apprenticeship, as permitted to remain in the West India Islands by the act of 3 and 4 Wm. IV. ch. 73, is no exception to the abolition of slavery throughout the British dominions;" because, it is said, the system is entirely different from slavery in point of fact, and because, however near a resemblance it may bear to it, it could afford no justification for an English court to hold that another sort of slavery was valid.

Our reply to this is, that slavery does not necessarily depend on the length of time the bondage exists, but on its character.

The apprenticeship system continued, as to a portion of those to whom it was applicable, for twenty-one years; and few persons can calculate on a lease of life for a longer time.

Apprentices also were liable to be bought and sold or attached for debt. The system therefore had all the worst characteristics of slavery.

Further, the act abolishing slavery acknowledged the legality and validity of slavery as an institution, as it rendered compensation for the liberation of slaves according to their respective valuations, and also gave to the owners of slaves the benefit of a term of intermediate service. If it was not considered right to liberate *British* slaves except on these conditions, how can it be right to compel the liberation of American slaves, casually thrown within the country, when no such compensation has been made or term of service secured to their owners?

This forced liberation of the slaves of another government without compensation is placed on the ground of the universal "abolition of slavery throughout the British dominions." Such abolition, however, was not effected by this act, as the sixty-fourth section provides "that nothing in the act contained doth or shall extend to any of the territories in the possession of the East India Company, or to the Island of Ceylon, or to the Island of St. Helena." It was merely enjoined on the East India Company by Parliament at the same

session "that they should forthwith take into consideration the means of mitigating slavery in their possessions, and of extinguishing it as soon as it should be practicable and safe," and slavery was not abolished in those provinces for some years subsequent to that period.

It is also said "that the provincial government of Bermuda, after the passage of the general act abolishing slavery, abolished the apprenticeship system prior to the liberation of the slaves on board the *Enterprise*," but such abolition was not made till, under the general law, they had received compensation for their slaves.

6. "The principle on which the right of everyman to personal liberty within British territory is attached is that some law must be appealed to to justify the restraint of liberty; and that neither the apprentice law nor any other law can be appealed to to justify the restraint of these negroes."

To this we reply that the law of the country from which the vessel comes, as sustained and enforced by the law of nations, can as well be appealed to on this subject as on any other. It is expressly admitted in the argument that the law of nations may be appealed to, as exempting property, other than slaves, in cases of shipwreck and disaster, and exempting vessels of war from ordinary municipal jurisdiction; and this is done by giving to the law of nations, in such case, the force and effect of municipal law, which is all that is asked to be done in this case.

7. It is contended "that slavery is not a relation which the British Government, by the comity of nations, is bound to respect."

But such is not the doctrine of the British courts. They hold themselves bound, by the comity of nations, to respect both slavery and the slave trade; and they uphold and sustain it in their decisions, where the rights of other nations are concerned.

In 3 Barn. & Ald. 353, *Maddrazzo* v. *Willes*, Chief Justice Abbott says "it is impossible to say that the slave trade is contrary to the law of nations"; and Lord Stowell says, in *Le Louis*, 2 Dodson's Admiralty Reports, 210, "that the slave trade is not piracy or crime by the law of nations, and is therefore not a criminal traffic by such law; and every nation, independent of treaty relations, retains a legal right to carry it on." . . .

I shall now proceed, as I proposed, to state my views as to the principles of international law applicable to cases of this description. They are . . . :

I. That each country is entitled to the free and absolute right to navigate the ocean as the common highway of nations, and while in the enjoyment of this right retains over its vessels the exclusive jurisdiction of its own laws.

The Emperor Antoninus said "though he was the lord of the world, the law only was the ruler of the sea."

Grotius says "that the sea, whether taken as a whole or as to its principal parts, can not become property. For the magnitude of the sea is so great it is

sufficient for all peoples' use. There is a natural reason which prevents the sea from being made property, merely because occupation can only be applied to a thing which is bounded. Now, fluids are unbounded and can not be occupied except as they are contained in something else, as lakes and ponds are occupied, and rivers as far as their banks; but the sea is not contained by the land, being equal to the land, or greater, so that the ancients say the land is bounded by the sea." (Grotius, book 2, ch.2, sec. 3.)

Vattel says "that the right of navigating the open sea is a right common to all men; and the nation that attempts to exclude another from that advantage does her an injury, and furnishes her with sufficient grounds for commencing hostilities." And "that nation which arrogates to itself an exclusive right to the sea does an injury to all nations, and they are justified in forming a general combination against it, in order to repress such an attempt." (Vattel, book 1, ch. 23, secs. 282, 283.)

Indeed, the free right of each nation to navigate the ocean is now nowhere contested, and it carries with it, as a necessary result, the exclusive jurisdiction on the high seas of the laws of each country over its own vessels.

Phillimore, in his recent work on International Law, Vol. I. p. 352, says that "all authorities combine, with the reason of the thing, in declaring that for all offenses on the high seas the territory of the country to which the vessel belongs is to be considered as the locality of the offence, and that the offender must be tried by the tribunals of his country;" and "it matters not," he says, "whether the injured person, or the offender, belongs to a country other than that of the vessel." The rule is applicable to all on board. It is further well declared that this right to navigate the ocean is a national one, and can not be exercised by an individual except under the patronage and protection of his government. Thus it is holden "that every ship is bound to carry a flag, and to have on board ship's papers indicating to what nation it belongs, whence it sailed, and whither it is bound, under the penalty of being treated as a pirate." (I. Phill. Internat. Law, 216.)

A vessel, wherever she is borne on the high seas, is bound, therefore, to have a national character, and is part and parcel of a recognized government.

It is contended—

II. That a vessel impelled by stress of weather, or other unavoidable necessity, has a right to seek shelter in any harbor, *as incident to her right to navigate the ocean*, until the danger is past and she can proceed again in safety.

This position I propose to sustain on three grounds: By authority; by the concession of the British Government in similar cases; and by its evident necessity as parcel of the free right to navigate the ocean, and therefore a necessary incident of such right.

1. The effect of stress of weather in exempting vessels from liabilities to local law, when they are driven by it within the ordinary jurisdiction of another country, is well settled by authority in various classes of cases, viz, in

reference to the blockade of harbors and coasts; of prohibited intercourse of vessels between certain ports that are subject to quarantine regulations; intercourse between certain countries, or sections of countries, which is interdicted from motives of mercantile policy, and in cases of liability to general customs duties. (Authorities on these points will be found in the *Frederick Molke*, 1 Rob. Rep. 87; the *Columbia*, id. 156; the *Juffrow Maria Schroeder*, 3 Rob. 153; the *Hoffnung*, 6 id. 116; the *Mary*, 1 Gall. 206; *Prince* v. *U. S.*, 2 Gall. 204; *Peisch* v. *Ware*, 4 Cranch, 347; Lord Raymond, 388, 501; Reeves's Law of Shipping, 203; the *Francis and Eliza*, 8 Wheaton, 398; Sea Laws, arts. 29, 30, and 31, and the *Gertrude*, 3 Story's Rep. 68.)

In the last-named case the learned judge remarks "that it can only be a people who have made but little progress in civilization that would not permit foreign vessels to seek safety in their ports, when driven there by stress of weather, except under the charge of paying impost duties on their cargoes, or on penalty of confiscation where the cargo consisted of prohibited goods." (See also Kent's Commentaries, 145, and authorities there cited.)

The authority of writers on international law is also directly in point. Vattel holds to the free right of all nations to the use of the ocean, with the exception that a portion of the ocean, immediately contiguous to the land, is subject to each government for the purposes essential to its protection. Even here, however, he says: "Other nations have a right of passage through such portions of the sea when not liable to suspicion, and in cases of necessity the entire right of the government ceases, as, for instance, where a vessel is obliged to enter a road in order to shelter herself from a tempest. In such case she may enter wherever she can, provided she cause no damage, or repair any damage done. This is a remnant of his primitive freedom of which no man can be supposed to have divested himself; and the vessel may lawfully enter, in spite of such foreign government, if she is unjustly refused admission." (Vattel, book 1, ch. 23, sec. 288.)

Again, he says in another section, "a vessel driven by stress of weather has a right to enter, even by force, into a *foreign port*." (Vattel, book 2, ch. 9, sec. 123; Puffendorf, book 3, ch. 3, sec. 8.)

Vattel thus considers this an absolute right that may be asserted at any hazard, and not a right resting in comity or dependent on a license that may be modified or revoked. In the resort to force for the preservation of such rights he is sustained by Phillimore and other modern writers on international law who hold that the violation of rights *stricti juris*, or the absolute rights of nations, "may be redressed by forcible means." (Phill. International Law, sec. 143.) Grotius, Puffendorf, and other writers lay down as a general principle the rule which is applicable to this case: "That, in extreme necessity, the primitive right of using things revives, as if they had remained in common, and that such necessity in all laws is excepted." (Grotius, book 2, ch. 2, sec. 6; Puffendorf, book 2, ch. 6, secs. 5 and 6; Vattel, book 2, ch. 9, secs. 119 and 120; Bowyer's Commentaries on Public Law, p. 357.)

2. The principles of law laid down by these various writers are also sustained by admissions of the British Government, and by the allowance and adjustment of claims of precisely the same character as the one before us.

In the correspondence between the two governments in reference to this claim, it is admitted by Lord Palmerston, "that where a ship, containing irrational animals or things, is driven by stress of weather into a foreign port, it would be highly unjust that the owner should be stripped of what belongs to him, through the application of the municipal law of the state to which he had not voluntarily submitted himself."

This is an admission of the high injustice of seizing all property, except in slaves; but the British Government have in other cases conceded the application of the same principle to slaves.

This was done in the case of the *Comet*, to which I have before alluded, which was similar, in all essential particulars, to this case. The *Comet* sailed from the District of Columbia in 1830, for New Orleans, having a number of slaves on board; she was stranded on one of the false keys of the Bahamas, and the crew and persons on board were taken by the wreckers into the port of Nassau, where the slaves were seized by the authorities of the island and liberated.

The case of the *Encomium* is of the same description. She sailed from Charleston in 1834, with slaves on board; was stranded in the same place, and the crew and persons on board were taken into the same port, where the slaves were seized and liberated by the authorities.

Claim was presented for redress for these injuries, and after full discussion of the subject, compensation was made by the British Government for the slaves thus liberated; and this compensation was rendered solely on the principle now contended for, that where a vessel is forced by stress of weather into a foreign port, she carries with her her rights existing on the high seas as to the vessel, property, and personal relations of those on board, as sustained by the laws of her own country.

That such was the ground on which these claims were allowed and paid is manifest, because they were slaves of a foreign country, brought within the limits of the British Government, but not held there in bondage by any British law.

So far was this from being the case, that the statute of 5 Geo. IV. ch. 113, then in force, expressly prohibited bringing slaves from other countries into places within British jurisdiction, or retaining them there, under heavy penalties; and all persons offending against this law were declared to be felons, and were liable to be transported beyond sea, or to be confined and kept at hard labor for a term of not less than three, nor more than five years.

There was, then, no British law in existence by which these slaves could be holden; and the claim to compensation rested solely on the laws of the United States, which were holden to be rightfully operative, and in force against the

persons claimed as slaves, under the circumstances in which the vessel was driven into port.

This result it is impossible to avoid, and the principle asserted is fully sustained by these cases. I am aware that the claim of the *Enterprise*, which was pending at the same time, was disallowed, on the ground of a subsequent change in the local law in reference to slavery. The slaves of the *Comet* and the *Encomium*, however, were not holden by any of the local laws of the island, but were there in violation of them. The repeal of such local law, therefore, can in no manner affect the principle of the decision.

3. A further reason assigned for the point now under consideration is its evident necessity as a part of the free right of each nation to navigate the ocean, and as a necessary incident of such right.

Writers on public law, we have seen, assert a right to enter a foreign port, when driven there by stress of weather, on the ground of necessity. This necessity arises from perils on the deep, to which all navigation on the ocean is subject; and if such perils from this cause give the right of refuge, it becomes necessarily what I claim for it—an incidental right to the navigation of the ocean.

It is a necessity essential to the enjoyment of a clear and undeniable right; and whatever is essential to the enjoyment of a right, or is a necessary means of its use, is, *ex vi termini*, a necessary incident of such right.

This connection I have not seen adverted to; and it is not laid down by the writers cited, as it was not essential to their purpose to follow out the origin or causes from which the necessity arose. It is clearly embraced, however, in their propositions, and is important in this case, as it determines the true character of the rights arising from this necessity in a manner that admits of no question or controversy.

The claim is thus an incident to an absolute and essential right of nations, and is not a claim to the mere favor of any people, which they may give or deny at pleasure, out of any supposed exclusive jurisdiction of their own.

All incidental rights are based on necessities arising from the prior and original right. A right to the end uniformly carries with it a right to the means requisite to attain that end, or, as is stated by Mr. Wheaton, "draws after it the incidental right of using all the means which are necessary to the secure enjoyment of the thing itself." (Wheat, part 2, ch. 4, secs. 13 and 18.)

Further, incidental rights, of a similar character and attended with precisely the same result as to entry within the territorial jurisdiction of another government, have been asserted in connection with the right to navigate the ocean, and are holden as undoubted law. Thus the right to navigate the ocean is holden to give the right, *as incidental to it*, to persons inhabiting the upper sections of navigable rivers to pass by such rivers through the territory of other governments in order to reach the ocean, and thus participate in the commerce of the world.

Great Britain claimed and exercised this right with all its incidents against Spain in the navigation of the Mississippi; and when a Spanish governor undertook at one time to forbid it, and cut loose vessels fastened to the shores, it is asserted by Mr. Wheaton that a British vessel moored itself opposite New Orleans, and set out guards, with orders to fire on persons who disturbed her moorings. The governor acquiesced in the right claimed, and it was afterwards exercised without interruption. (Wheaton, part 2, ch. 4, sec. 18; Grotius, book 2, ch. 2, secs. 12 and 13; ch. 3, secs. 7-12; Vattel, book 2, ch. 9, secs. 126-130; ch. 10, secs. 132-134; Puffendorf, book 3, ch. 3, secs. 3-6.)

The right to the use of navigable rivers, further, is holden to draw after it, as a means necessary to its enjoyment, the right to moor vessels to the banks of such rivers within another country, and the very right we here contend for—"to land in case of distress," and, where a vessel is damaged, to deposit her cargo on the shore until the vessel can be repaired and it can proceed in safety. (Wheaton's Internat. Law, Part 2, ch. 4, secs. 13-18; Grotius, Book 2, ch. 2, secs. 11-15; Puffendorf, Book 3, ch. 3, secs. 3-8; Vattel, Book 1, ch. 9, sec. 104; Book 2, ch. 9, secs. 123-139.)

It is holden also in civil law that the use of the shores of navigable rivers and of the ocean is incident to the use of the water. (Inst. Book 2, title 1, secs. 1-5.)

For the convenient use of navigable rivers by nations bordering upon them, treaties have been usually made, specifying rules and regulations in reference to their use; but it is well settled that such treaties recognize and sustain the right of use, and do not originate it.

It may be said that the right of shelter from the land, which is claimed as an incident to the use of the ocean, can not be set up at the same time with the right over the ocean, which is admitted to a certain extent as incident to the land. But these rights do not conflict with each other. The right of a state bordering on the ocean to a given extent over the waters immediately adjoining attaches for certain fiscal purposes and purposes of protection. But the jurisdiction thus obtained is by no means exclusive. Sovereignty does not necessarily imply all power, or that there can not coexist with it, within its own dominions, other independent and coequal rights.

Indeed, the exception taken furnishes a strong argument in favor of the principle we contend for, because the same rule of justice that gives for certain purposes jurisdiction over the waters, as incident to the use of the land, extends, for like reasons, a right over the land for temporary use and shelter, as incident to the use of the ocean. The rule operates with equal validity and justice both ways, and its application in the one case sustains and justifies it in the other. If either right must give way there seems to be no good reason why the older and better right of the nations to the free navigation of the ocean, with its incidents, should be surrendered to the exclusive claims of any single nation on its borders. But this is not necessary, as both rights in their full perfection may exist together.

I now come to the third proposition.

III. That as the right of shelter, by a vessel, from storm and inevitable accident, is incident to her right to navigate the ocean, it necessarily carries with it her rights on the ocean, so far as to retain over the vessel, cargo, and persons on board the jurisdiction of the laws of her country.

This is clearly the necessary result of the prior position. It is laid down, as an elementary proposition, by Vattel, "that where an obligation gives a right to things without which it can not be fulfilled, each absolute, necessary, and indispensable obligation produces, in this manner, rights equally absolute, necessary, and indefeasible." (Vattel, Book 2, ch. 9, sec. 116.)

Wherever the use of a minor sheet of water may be claimed as incident to that of a larger, it is, while in use, a substitute for it, and draws after it, as of course, all the rights and privileges connected with the enjoyment of the principal right itself.

The entrance of a vessel into a foreign harbor, when compelled by stress of weather, is a matter of right. She goes there on a highway which, for the time being, is her own. She is, as when on the ocean, part and parcel of the government of her own country, temporarily forced, by causes beyond her control, within a foreign jurisdiction. Her presence there under such circumstances need not excite anymore feeling than when on the ocean. It is a part of her voyage, temporarily interrupted by the vicissitudes of the sea, but carrying with it the protection of the sea, and the property and relations of the persons on board can not, in such case, be interfered with by the local Jaw, so as to obstruct her voyage or change such relations, so long as they do not conflict with the law of nations.

These positions do not seem to be contested, as a general rule; but it is said that, since the abrogation of slavery in England, the principles thus laid down will not apply to slave property. And this brings me to the fourth point to be considered.

IV. That the act of 3 and 4 Wm. IV, ch. 73, abolishing slavery in Great Britain and her dependencies, could not have the effect to overrule the rights laid down in the foregoing propositions.

It has been contended that the law abolishing slavery overruled the law of nations, on the ground that slavery is contrary to natural right, and is, in fact, beyond the protection of all law. Authorities have been cited as tending to sustain this doctrine, going back to the earliest adjudged case in France where the question was elaborately examined, and it was held that the institution of slavery, in the absence of specific law could not be sustained under any subsisting usage or custom of that country, as it was contrary to the laws of nature and humanity, and slaves could not breathe in France.

Long after this, the Somerset case, sustaining the same principle, came up in England, and from that time this has been considered the leading case on the subject; and the declaration founded upon it, "that slaves can not breathe

in England," has been usually regarded as a sentiment; peculiarly applicable to British soil and institutions.

The doctrine of the Somerset case, and the expressions of numerous distinguished English and American jurists sustaining it, including Chief Justice Marshall, Mr. Justice Story, and Chief Justice Shaw, have been fully cited in this case, "that slavery is against the law of nature;" "has no foundation in natural or moral right;" "is odious," etc. . . .

I see no occasion to dissent from the full effect of the adjudications cited or the sentiments expressed; but they do not settle any question of international right arising in this case, or define any line of limitation betwixt conflicting jurisdictions, or sustain at all the point to which they are cited—that slavery can not subsist by valid law.

What is law is a question of fact; and though its original institution may have been of doubtful morality or justice, it is still law. It is a dangerous doctrine that all law, not originally conceived and promulgated in *abstract right*, is invalid, or is to be instantly overthrown.

This is readily shown by extending the inquiry to other subjects. By what *abstract* or *natural* right, I might ask, is one man born to rule over another or one set or class of men by birth to become legislators for others? There is no such natural inequality. There is no principle of abstract right to sustain such an order of things. But we must deal with institutions as they are and relations as they subsist. Reforms must advance gradually. The time will doubtless come when all things not founded in right will cease; when there will be no privileged classes by birth; no compulsory support of one religions sect by another to which it is conscientiously opposed; no sales of religious presentations; no slavery.

But these Gordian knots that have been compacted for centuries and are intertwined and bound up in all the relations of men are not to be severed at a blow. Each nation must deal with them in its own time and manner. Such measures of reform can not be promoted by the illegal interference of one nation with another or by forcing upon shipwrecked individuals temporarily thrown within the limits of another land laws in conflict with their own right of self-government and the established relations of their country.

These views are sustained by the concurrence of some of the ablest English jurists and the settled adjudications of English law. Thus it has been holden, though the slave trade is declared to be contrary to the principles of justice and humanity, that no state has a right to control the action of any other government on the subject, (The *Amedie*, 1 Dod. 84 n; the *Fortuna*, 1 Dod. 81; the *Diana*, 1 Dod. 101), and that no nation can add to the law of nations by its own arbitrary ordinances {*Pollard* v. *Bell*, 8 Term Rep. 434; 2 Park on Insurance, 731), or privilege itself to commit a crime against the law of nations by municipal regulations of its own (*Le Louis*, 2 Dod. 351).

It is also holden that a foreigner, in a British court of justice, may recover damages in respect of a wrongful seizure of slaves. (*Maddrazzo* v. *Willes*, 3

Barn. & Ald. 353; the *Diana*, 1 Dod. 95.) And in the case of *Le Louis*, 2 Dod. 238, above cited, Sir Willam Scott (Lord Stowell) says, though the slave trade is unjust and condemned by the laws of England, it is not, therefore, a criminal traffic by the laws of nations; and every nation, independent of its relinquishment by treaty, has a legal right to carry it on. "No one nation," he says, "has a right to force the way to the liberation of Africa by trampling on the independence of other states, or to procure an eminent good by means that are unlawful, or to press forward to a great principle by breaking through other great principles that stand in the way."

And when pressed in the same case with the inquiry, "What would be done if a French ship laden with slaves should be brought into England?" he says, "I answer without hesitation, restore the possession which has been unlawfully divested; rescind the illegal act done by your own subjects, and leave the foreigner to the justice of his own country."

The doctrine that slavery can not be sustained by valid law must be set at rest by these authorities.

There is but one other ground on which it can be contended that the act of 3 and 4 Will. IV. ch. 73, overrules the principles I have laid down, and that is that the municipal law of England is paramount to the absolute rights of other governments when they come in conflict with each other. Such a position virtually abolishes the entire code of international law. If one state can at pleasure revoke such a law any other state may do the same thing, and the whole system of international intercourse becomes a mere matter of arbitrary will and of universal violence.

It appears to me, from a full examination of the law applicable to the case, that the *Enterprise* was entitled, under the immediate perils of her condition, to refuge in the Bermudas; that she had a right to remain there a sufficient time to accomplish the purpose of her entry and to depart as she came; that the local authorities could not legally enter on board of her for the purpose of interfering with the condition of persons or things as established by the laws of her country, and that such an exercise of authority over the commerce and institutions of a friendly state is not warranted by the laws of nations.

For these reasons I am of opinion that the claim before the commission is sustained and that the owners of slaves on board the *Enterprise* are entitled to compensation for the illegal interference with them by the authorities of Bermuda.

Opinion of Mr. Hornby, British Commissioner, in the case of the *Enterprise*

The facts in this case are, shortly, as follows: During the early part of the year 1835, the American brig *Enterprise*, having on board a large number of slaves, while on her voyage from Alexandria, in the District of Columbia, to Charleston, in South Carolina, was driven from her course by prevailing con-

trary winds, and *being, by the delay thus occasioned, in want of provisions, put into the port of Hamilton*, in the Bermudas. On her arrival she was boarded by the colonial authorities and taken possession of on the ground of having slaves on board. Possession, however, was given up on the authorities being informed of the circumstances under which the vessel had put in.

Before, however, the ship could leave the harbor a writ of *habeas corpus* was obtained at the instance of an association of free blacks in the island and served upon the captain, requiring his appearance before the court and the production of the slaves still remaining on board. Upon the argument of the case the court declared that there was no law authorizing the detention of the slaves, and they were accordingly set at liberty.

Under these circumstances the United States Government claim compensation at the hands of the British Government in respect of the loss sustained by the owners of the slaves by their release, basing their demand on the following propositions: "That a vessel on the high seas, in time of pence, engaged on a lawful voyage, is, according to the law of nations, under the exclusive jurisdiction of the state to which she belongs; and that *if such vessel is forced, by stress of weather or unavoidable circumstance*, into the port of a friendly power, her country in such case loses none of the rights appertaining to her on the high seas, either over the vessel or the personal relations of those on board."

Mr. Webster, in his letter to Lord Ashburton on the 1st of August 1842 states the second of these propositions in somewhat different language. He says: "If a vessel be driven by stress of weather into the port of another nation it would hardly be alleged by anyone that by the mere force of such arrival within the waters of the state the law of that state would so attach to the vessel as to affect existing rights of property between persons on board, whether arising from contract or otherwise. The local law would not operate to make the goods of one man to become the goods of another man; nor ought it to affect their personal obligations or existing relations between themselves."

It is undoubtedly true, as a general proposition, that a vessel driven by a stress of weather into a foreign port is not subject to the application of the local laws, so as to render the vessel liable to penalties which would be incurred by having voluntarily come within the local jurisdiction. The reason of this rule is obvious. It would be a manifest injustice to punish foreigners for a breach of certain local laws unintentionally committed by them, and by reason of circumstances over which they had no control.

Thus, to cite one of the most ordinary instances in which the rule is applied: A storm drives a vessel, having a perfectly legal cargo according to the laws of the country from which it sailed, or to which it is bound, into the port of a country where such a cargo is illegal and contraband. To subject this cargo to the same penalty as if it were clandestinely smuggled would be unjust. Our law, therefore, says: "The laws of the country which gives you a national character shall be considered as protecting you, and if it is not an illegal cargo in your own country it shall not be so considered in the country into

which you have been involuntarily brought." And this is precisely what was done in the case of the *Enterprise*. The cargo was legal according to the laws of America, illegal according to the laws of England, and if brought within British jurisdiction it rendered the vessel liable to confiscation. It was brought within that jurisdiction, but under circumstances which exempted it from the penalty, and accordingly so far the rule of international law was admitted and allowed to prevail. But more is demanded, for the claim is for indemnity, because the cargo had, by mere act and operation of natural law and of English law, resumed a character denied it by American law. While the vessel is to the extent alluded to free from the operation of local laws, it by no means follows that it is entitled to absolute exemption from the local jurisdiction; as, for example, it can scarcely be contended that persons on board the vessel would not be subject to the local jurisdiction for crimes committed within it. If acts of violence were committed on board against subjects of the country to which the port belonged, or if a subject should be wrongfully detained on board, the local tribunals would be entitled to interfere to preserve the peace or protect the injured person This position may be illustrated by the law applicable to the case of vessels of war entering a foreign port. It is admitted by most, if not all, of the writers on international law that national vessels are exempt from the local law. (See the case of the *Santissima Trinidad*, 7 Wheaton, 352; Wheaton's International Law, Vol. I. p. 115; Phillimore's Comm. on International Law, pp. 368, 373.) They are, as it were, entitled to a species of extraterritoriality; yet it has been held by the Executive of the United States, on the authority of two Attorneys-General, that a foreign vessel of war entering its harbor is not entitled to absolute exemption from its jurisdiction. . . .

This explanation of the law of nations shows that when a vessel is in a foreign port under such circumstances as entitle it to exemption from the application of the local law, the exemption can not be put on the same ground as the immunity from interference of a vessel on the high seas, for there in time of peace it is absolute. There is no right on the part of a foreign court even to inquire into the legality of anything-occurring in the vessel of another country while at sea; but within the territories of a country the local tribunals are paramount, and have the right to summon all within the limits of their jurisdiction, and to inquire into the legality of their acts and determine upon them according to the law which may be applicable to the particular case. It appears to me, therefore, that it can not with correctness be said "that a vessel forced by stress of weather into a friendly port is under the exclusive jurisdiction of the state to which she belongs in the same way as if she were at sea." She has been brought within another jurisdiction against her will, it is true, but equally against the will and without fault on the part of the foreign power; she brings with her (by the law of nations) immunity from the operation of the local laws for some purposes, but not for all, and the extent of that immunity is the proper subject of investigation and adjudication by the local tribunals. Let us consider, then, the principles which ought to guide the local courts in this investigation.

It is true that by what is termed the "comity of nations" the laws of one country are, in some cases, allowed by another to have operation; but in those cases the foreign law has its authority in the other country from the sanction, and to the extent only of the sanction, given to it there, and not from its original institution. On this subject Vattel observes: "It belongs exclusively to each nation to form its own judgment of what its conscience prescribes to it—of what it can or can not do, of what is proper or improper for it to do; and of course it rests solely with it to examine and determine whether it can perform any office for another nation without neglecting the duty which it owes to itself; and for any other state to interfere, to compel her to act in a different manner, would be an infringement of the liberty of nations." (Story's Conflict of Laws, chap. 2, sec. 37, citing Vattel, Prelim. Diss. pp. 61, 62, sec. 14, 16; Story's Conflict of Laws, chap. 2, sec. 25; and see also sec. 24.)

From these principles it results that no nation can be called upon, or ought, to permit the operation of foreign laws within its territory when those laws are contrary to its interests or its moral sentiments. . . .

The question then resolves itself into this: In what cases and to what extent does the law of nations require that the local law shall admit the application of the rules of the foreign law instead of its own? It is conceded that the foreign law must be admitted to regulate the rights of property (properly so called) concerning chattels on board the vessel, and for some other purposes; but the question we have now to determine is whether the law of nations requires that the local law, which ignores and forbids slavery, shall admit within its jurisdiction the foreign, which maintains slavery.

Now, the two fallacies which appear to me to pervade the whole of the argument in support of the claim and deprive it of its whole force are these: First, that slaves are property in the ordinary sense of the word; and, secondly, that international law requires that the right of the master to the person of his slave, derived from local law, shall be recognized everywhere.

It is true that by the municipal law of particular countries slaves may be treated as, and may even be declared to be, property, and this has, in past times, been the case in some portions of the English dominions; but there is an essential difference between the rights of owners in their slaves and ordinary property. This difference is clearly laid down by an eminent American judge in the case of the *Commonwealth* v. *Aves*, 18 Pickering's Reports, 216. Chief Justice Shaw there says, "That it is not speaking with strict accuracy to say that a property can be acquired in human beings by local laws. Each State may, for its own convenience, declare that slaves shall be deemed property, and that the relations and laws of personal chattel shall be deemed to apply to them; but it would be a perversion of terms to say that such local laws do *in fact* make them personal property *generally*; they can only determine that the same rules of law shall apply to them as are applicable to property, and this effect will follow only as far as such laws *proprio vigore* can operate."

Mr. Webster, however, does not hesitate to place the relation of slavery on the same footing with that of marriage and parental authority; but the answer to this attempted comparison consists in this, that all nations and societies acknowledge marriage and parental authority. They are, indeed, the very foundation of society; they may vary in form, but the essence remains the same; they can not so much be said to be in conformity with the law of nature as to be themselves natural laws. This is not the case with slavery, which is contrary to the law of nature, and, so far from being acknowledged by all nations, is now repudiated by almost all. Property in things, however, being recognized in all countries, it follows that in case of shipwreck "the local law would not operate to make the goods of one man to become the goods of another." But to make this dictum an authority for the principle contended for, it must first be established that there is no distinction between property in man and property in beasts and things.

In the case of *Jones* v. *Vanzandt* (2 McLean, 596) it was held that no action could be maintained at common law for assisting a slave to escape, or harboring him after his escape into a free State, and that damages were only recoverable in such a case by virtue of the Constitution of the United States. In giving judgment in that case Mr. Justice McLean observed: "The traffic in slaves does not come under the constitutional power of Congress to regulate commerce among the several States. *In this view the Constitution does not consider slaves as merchandise.* This was held in the case of Grooves and Slaughter. (18 Peters.) The Constitution nowhere speaks of slaves as property. . . . The Constitution treats of slaves as persons." "The view of Mr. Madison, who thought it wrong to admit in the Constitution the idea that there could be property in man, seems to have been carried out in this most important instrument. Whether slaves are referred to in it as the basis of representation, as migrating, or being imported, or as fugitives from labor, they are spoken of as persons." "What have we to do with slavery in the abstract? It is admitted by almost all who have examined into the subject to be founded in wrong, in oppression, in power against right."

There is yet another case which affords a further striking illustration of the fact that American law recognizes an essential difference between property in slaves and property in things, so as to affect the rights of the owner independently of his will. The second section of the fourth article of the Constitution protects every slave owner from loss of his slaves by means of their flying into a free State; it gives him aright to follow the slave and seize him wherever he may find him. Yet, in the case of *The Commonwealth* v. *Holloway (2 Sergt. and Rawle, 304)*, it was held that where a female slave fled into Pennsylvania, and there gave birth to a child, though she herself might be reclaimed by the owner, her child could not but remain free by virtue of the law of the State, which declared that "no man or woman of any nation shall at any time hereafter be deemed, adjudged, or holden within the territories of this commonwealth, as slaves or servants for life, but as free men and women." Now, it is obvious that if the property in the female slave were regarded in the same light as property in an animal, the ordi-

nary rule of law, "*partus sequitur ventrem*," referred to by the learned agent of the British Government, would have been applicable. In that case, as in the present, the slave owner might have said as he now says: "It was not by my consent that that which by the laws of my country I am entitled to claim as my property has been brought within the operation of your laws. My slave and her increase are mine; am I to be deprived of that increase because it has been by misadventure cast away upon your soil." But the American law, in the case before me, as the English law, answers: "It may be that in your own State you would have had the right you claim; but we do not acknowledge that you have a right of property in this human being as you could have in a horse or dog; if you had, your consent alone would be considered in the matter; but as it is, here is an intelligent being who is entitled to be dealt with by our law, which we sit here to administer, and not yours, as a man, and by that law it is declared that no man shall be a slave." In the case also of *Prigg* v. *The Commonwealth of Pennsylvania* (16 Peters, 608), it was again held that the offspring of a fugitive slave could not be reclaimed by the owner. On the authority, then, of these cases, it may be considered as settled that by the law of the United States the presence or absence of consent or voluntariness on the part of the owner has nothing whatever to do with the question of whether his slave, when within the territory of a State, no matter how brought, which does not acknowledge slavery, shall be free or not. The answer that must be given by the local tribunals, when called upon, must depend upon the positive law of the place. In the United States, the Constitution has provided an answer in the fourth article; but when the circumstances are such that the letter of that enactment or some other is not applicable, the American law declares, like the English law, that it does not recognize property in man, but regards them all alike, whether black or white, as entitled to be free.

Mr. Justice Story thus distinctly explains the general principle of public law on this subject, and the modifications which have been introduced by the United States Constitution: "By the general law of nations *no nation is bound to recognize the state of slavery as to foreign slaves found within its territorial dominions*, when it is in opposition to its own policy and institutions, in favor of the subject of other nations where slavery is recognized. If it does, it is a matter of comity and not a matter of international right. The state of slavery is deemed to be a municipal regulation, founded upon and limited, to the range of territorial laws. This was fully recognized in Somersett's case. It is manifest, then, from this consideration of the law that if the Constitution had not contained this clause, every nonslaveholding State in the Union *would have been at liberty to have declared free all slaves coming within its limits and to have given them entire immunity and protection against the claims of their masters*." And again he says: "The duty to deliver up fugitive slaves, in whatever State of the Union they may be found, and of course the corresponding power in Congress to use the appropriate means to enforce the duty, *derive their sole* validity and obligation exclusively from the Constitution of the United States, and are there for the first time recognized and established in that peculiar character." (See also, id. ch. iv. sec. 96, pp. 165-6, of 3d edit.)

That foreign nations, then, are not bound by any rule of international law to recognize slaves as property, and award to their owners the immunity which by the comity of nations is usually granted in respect of ordinary chattels, is clear from the course of legislation pursued by the United States; for, if they could be so bound, no law or action of the United States would have been necessary to compel one State denying the right and existence of property in a slave to deliver up a fugitive to another State admitting and maintaining the right, and for this reason that the law of nations, being as binding between State and State as between the United States and foreign countries, would have been sufficient for the purpose, and no special law would have been necessary. By what right, then, or by force of what argument, can the United States insist that Great Britain is to be bound by the law of nations to do that which, by its own legislation, it has proved beyond all question the separate States were not and could not be bound to do?

It is evident, therefore, from a view of the American authorities alone, that the institution of slavery depends solely upon the laws of each individual State in which it is allowed, and that from its very nature it is only coextensive with the territorial limits of such laws. An American writer thus describes it: "It is an institution," says he, "in which the slave has no voice. It operates *in invitum*. The slave is no party, either practically or theoretically, to the law under which he lives in servitude. It is, moreover, an exceptional law; one which depends solely for its observance on the *continuance of the power* who made it. *The moment that power ceases, the objects of it are free to exercise their natural rights, which revive to them, because they were held only in subjection or abeyance by superior force*, but which could not be disturbed, alienated, or forfeited, except for some crime, springing as they do from the immutable and eternal principles of nature and justice."

It appears to me then to be clearly established by all the authorities on the subject, that nations or states are not bound to recognize the relation of master and slave which may be enacted by foreign law.

In the case of *Forbes* v. *Cochrane* (2 B. and C. 448) Mr. Justice Holroyd says: "A man can not found his claim to slaves upon any general right, because by the English law such right can not be considered as warranted by the general law of nations; and if he can claim at all, it must be by virtue of some right which he had acquired by the law of the country where he was domiciled; that when such rights are recognized by law, they must be considered as founded not upon the law of nature, but upon the particular law of that country, and must be coextensive, and only and strictly coextensive, with the territories of that state; but when the party gets out of the territory where it prevails, no matter under what circumstances, and under the *protection of another power, without any wrongful act done by the party giving the protection*, the right of the master, which is founded on the municipal law of the place only, *does not continue*."

The fallacy contained in the argument in opposition to this view of the law consists in ignoring the slave as a man, and in supposing him to be possessed of no rights, as against the individual endeavoring to keep him in slavery, which a foreign nation is justified in taking into consideration.

As a man, the slave is as much entitled to appeal to the protection of our laws as his owner, and his claim must be adjudicated upon in conformity with the same principles. In the country whence he came, his voice could not be heard in the local courts, to assert the rights which he derived from nature, as against the municipal laws of the place where he was domiciled. When he is driven, together with his so-called owner, to the shores of this country or its colonies, those rights of his master which are founded on natural law, such as property, marriage, etc., etc., are respected. Why then are we to be deaf to the appeal of the slave, when he also asks to have his rights, which are equally founded on natural law, respected ? We have to choose between the natural law, supported by our own law, and foreign municipal law in direct opposition to both.

The choice is none of our seeking, it is cast upon us by chance. It would be to make international law a partial tyrant rather than an equal arbitrator between nations—to hold that one country can be bound under any circumstances, without fault of its own, to reject the law of nature and its own law, in favor of a foreign local law in opposition to both. . . .

Lord Palmerston, in effect, states the principle thus announced when, with the concurrence of those eminent men who now fill the highest judicial seats in the country, viz, the present lord chancellor, the lord chief justice of England, and the judge of the admiralty court, he declares that a distinction exists between laws bearing upon the personal liberty of man and laws bearing upon the property which man may claim in irrational animals or in inanimate things.

"If a ship," says his lordship in a dispatch upon this subject, "containing such animals or things, were driven by stress of weather into a foreign port, the owner of the cargo would not be justly deprived of his property by the operation of any particular law which might be in existence in that port, because in such a case there would be but two parties interested in the transaction—the foreign owner and the local authority; and it would be highly unjust that the former should be stripped of what belongs to him through the forcible application of the municipal law of a state to which he had not voluntarily submitted himself.

"But in a case in which a ship so driven into a foreign port by stress of weather contains men over whose personal liberty another man claims to have an acquired right, there are three parties to the transaction—the owner of the cargo, the local authority, and the alleged slave; and the third party is no less entitled than the first to appeal to the local authority for such protection as the law of the land may afford him. But if men who have been held in slavery are brought into a country where the condition of slavery is unknown and forbidden, they are necessarily, and by the very nature of

things, placed at once in the situation of aliens who have at all times from their birth been free.

"Such persons can in no shape be restrained of their liberty by their former master any more than by any other person.

"If they were given up to such former master they would be aggrieved, and would be entitled to sue for damages. But it would be absurd to say that when a state has prohibited slavery within its territory, this condition of thing must arise, namely, that as often as a slave ship shall take refuge in one of the ports of that state, liability must necessarily be incurred, either to the former owner of the slaves, if the slaves be liberated, or to the slaves themselves, if they are delivered up to the former owner.

"If, indeed, a municipal law be made which violates the law of nations, a question of another kind may arise. But the municipal law which forbids slavery is no violation of the law of nations. It is, on the contrary, in strict harmony with the law of nature; and therefore, when slaves are liberated according to such municipal law, there is no wrong done and there can be no compensation granted."

I have hitherto considered this case upon general principles, because, as other cases may occur, it is important to lay down general rules; but the special circumstances of the case would disentitle the claimants to compensation.

One ground, if indeed it be not the chief ground, upon which this claim has been rested is that the *Enterprize* was compelled by *necessity* to put into the port of Bermuda, and that on this account the owners of the slaves were entitled to claim exemption from the operation of English law. I do not think, however, that any such case of necessity has been made out as would give rise to the exemption contended for, if under any circumstances it could arise. It is not pretended that the *Enterprize* was forced by storm into Bermuda. All that is asserted is that her provisions ran short by reason of her having been driven out of her course. No case of pressing, overwhelming need is shown to have existed; but, to avoid the inconvenience of short rations (and, considering the nature of the cargo, it was an inconvenience which a very slight delay was likely to occasion), the master put into an English harbor to procure supplies. These facts do not certainly disclose that paramount case of necessity which has been insisted on throughout the argument, and which alone (if any circumstances could give rise to the exemption upon which this claim is supported) could form the basis of such an appeal as the present. If a mere scarcity of provisions, which might arise from so many causes, is to be considered not only as a sufficient excuse for the entrance of a vessel into a British port with a prohibited cargo but is also to entitle it to an exemption from the operation of the English law, it is impossible to say to what the admission of such a principle might lead, or what frauds on the part of slave speculators it might induce.

With respect to the cases of the *Comet* and *Encomium* it has been insisted that they are not distinguishable in principle from that of the *Enterprize*, and that, as the English Government granted compensation in these cases, we are bound by the precedent thus made. Those vessels, however, were driven into English ports, and the slaves on board were set free before the passing of the act abolishing slavery. There was, therefore, no importation within the meaning of the act (5 Geo. IV. ch. 113) which declared it illegal to import slaves and made it a felony to do so, and consequently there was no breach of the English law. Being then in an English port, the only question was whether there was any law which prevented their owners retaining possession of them. At that time there was not. Slavery was then in full force in the Bahamas, and of the same kind as that to which the American slaves were subject. The possession of the slaves was not therefore unlawful, nor was the relation between them and their masters liable to be dissolved by the mere accidental arrival of both in the colony. But at the time when the *Enterprize* was brought into the port of Hamilton, Great Britain had utterly and forever abolished the status of slavery throughout the British colonies and plantations abroad (see act of 3 and 4 Wm. IV. ch. 73, sec. 9), and by the act of the colonial legislature the apprenticeship system, created by the act of William IV was dispensed with. Slavery therefore, in no form whatever, was known in the Bermudas at the time the *Enterprize* entered the port. It was impossible, therefore, that any judge called upon to administer the law within these islands could, for any purpose or under any circumstances, recognize the relation of master and slave as subsisting within the reach of his authority.

Under these circumstances I am clearly of opinion that the claim of the owners of the slaves on board the *Enterprize* at the time she put into Port Hamilton can not be sustained and that it ought, upon every principle of law to be rejected.

Decision of the Umpire, Mr. Bates, in the case of the *Enterprise*

This claim is presented on behalf of the Charleston Marine Insurance Company of South Carolina, and of the Augusta Insurance Company in Georgia, for the recovery of the value of seventy-two slaves, forcibly taken from the brig *Enterprize*, Elliot Smith, master, on the 20th of February 1835, in the harbor of Hamilton, Bermuda. The following are the facts and circumstances of the case. The American brig *Enterprize*, Smith, master, sailed from Alexandria, in the District of Columbia, in the United States, on the 22d of January 1835, bound for Charleston, South Carolina. After encountering head winds and gales, and finding their provisions and water running short, it was deemed best by the master to put into Hamilton, in the island of Bermuda, for supplies. She arrived there on the 11th of February. Having taken in the supplies required, and having completed the repair of the sails, she was ready for sea on the 19th with the pilot on board. During the repairs no one from the shore was allowed to communicate with the slaves. The vessel was kept at anchor in the harbor,

and was not brought to the wharf. Being thus ready for sea, Captain Smith proceeded, with his agent, to the custom-house to clear his vessel outward. The collector stated that he had received a verbal order from the council to detain the brig's papers until the governor's pleasure could be known.

The comptroller and a Mr. Tucker then went to the other public offices, and on their return to the custom-house the comptroller, after consulting for a few minutes with the collector, declared that he would not give up the papers that evening, but would report the vessel out the next morning as early as the captain might choose to call for the papers.

In consequence of this decision, the captain immediately noted his protest in the secretary's office against the collector and comptroller for the detention of his ship's papers, and informed the officer of the customs he should hold them responsible; that he (the captain) feared the colored people of Hamilton would come on board his vessel at night and rescue the slaves, as they had threatened to do.

The collector then replied there was no danger to be apprehended, that the colored people would not do anything without the advice of the whites, and they knew the laws too well to disturb Captain Smith. At 20 minutes to 6 o'clock p.m., the chief justice sent a writ of *habeas corpus* on board, and afterwards a file of black soldiers armed, ordering the captain to bring all the slaves before him, the chief justice, which Captain Smith was obliged to do. On the slaves being informed by the chief justice that they were free persons, seventy-two of them declared they would remain on shore, which they did, and only six of them returned on board to proceed on the voyage.

This is believed to be a faithful sketch of the case, from which it appears that the American brig *Enterprize* was bound on a voyage from one port in the United States to another port of the same country which was lawful according to the laws of her country and the law of nations. She entered the port of Hamilton in distress for provisions and water. No offence was permitted against the municipal laws of Great Britain or her colonies, and there was no attempt to land or to establish slavery in Bermuda in violation of the laws.

It was well known that slavery had been conditionally abolished in nearly all the British dominions about six months before, and that the owners of slaves had received compensation, and that six years' apprenticeship was to precede the complete emancipation, during which time apprentices were to be bought and sold as property and were to be liable to attachment for debt.

No one can deny that slavery is contrary to the principles of justice and humanity, and can only be established in any country by law At the time of the transaction on which this claim is founded, slavery existed by law in several countries, and was not wholly abolished in the British dominions. It could not, then, be contrary to the law of nations, and the *Enterprize* was as much entitled to protection as though her cargo consisted of any other description of property The conduct of the authorities at Bermuda was a violation of the laws

of nations, and of those laws of hospitality which should prompt every nation to afford protection and succor to the vessels of a friendly neighbor that may enter their ports in distress.

The owners of the slaves on board the *Enterprize* are therefore entitled to compensation, and I award to the Augusta Insurance and Banking Company or their legal representatives the sum of sixteen thousand dollars, and to the Charleston Marine Insurance Company or their legal representatives, the sum of thirty-three thousand dollars, on the fifteenth of January 1855.

Decision of the Umpire, Mr. Bates, in the case of the *Hermosa*

The umpire appointed agreeably to the provisions of the convention entered into between Great Britain and the United States on the 8th of February 1853, for the adjustment of claims by a mixed commission, having been duly notified by the commissioners under the said convention that they had been unable to agree upon the decision to be given with reference to the claim of H. N. Templeman against the Government of Great Britain; and having carefully examined and considered the papers and evidence produced on the hearing of the said claim; and having conferred with the said commissioners thereon, hereby reports that the schooner *Hermosa,* Chattin, master, bound from Richmond, in Virginia, to New Orleans, having thirty-eight slaves on board belonging to H. N. Templeman, was wrecked on the 19th October 1840 on the Spanish key Abaco.

Wreckers came alongside and took off the captain and crew and the thirty-eight slaves, and, contrary to the wishes of the master of the *Hermosa,* who urged the captain of the wrecker to conduct the crew, passengers, and slaves to a port in the United States, they were taken to Nassau, New Providence, where Captain Chattin carefully abstained from causing or permitting said slaves to be landed, or to be put in communication with any person on shore, while he proceeded to consult with the American consul, and to make arrangements for procuring a vessel to take the crew and passengers and the slaves to some port in the United States.

While the vessel in which they were brought to Nassau was lying at a distance from the wharves in the harbor, certain magistrates wearing uniform, who stated themselves to be officers of the British Government, and acting under the orders of the civil and military authorities of the island, supported by soldiery wearing the British uniform, and carrying muskets and bayonets, took forcible possession of said vessel, and the slaves were transported in boats from said vessel to the shore, and thence, under guard of a file of soldiers, marched to the office of said magistrates, where after some judicial proceedings, they were set free, against the urgent remonstrances of the master of the *Hermosa* and of the American consul.

In this case there was no attempt to violate the municipal laws of the British colonies. All that the master of the *Hermosa* required was that aid and assistance which was due from one friendly nation to the citizens or subjects

of another friendly nation, engaged in a business lawful in their own country, and not contrary to the law of nations.

Making allowance, therefore, for a reasonable salvage to the wreckers, had a proper conduct on the part of the authorities at Nassau been observed, I award to the Louisiana State Marine and Fire Insurance Company and the New Orleans Insurance Company (to which institutions this claim has been transferred by H. N. Templeman), or their legal representatives, the sum of sixteen thousand dollars, on the fifteenth -January 1885, viz, eight thousand dollars to each company.

Decision of the Umpire, Mr. Bates, in the case of the *Creole*

This case having been submitted to the umpire for his decision, he hereby reports that the claim has grown out of the following circumstances:

The American brig *Creole,* Captain Ensor, sailed from Hampton Roads, in the State of Virginia, on the 27th October 1841, having on board one hundred and thirty-five slaves, bound for New Orleans. On the 7th of November, at 9 o'clock in the evening, a portion of the slaves rose against the officers, crew and passengers, wounding severely the captain, the chief mate, and two of the crew and murdering one of the passengers. The mutineers, having got complete possession of the vessel, ordered the mate, under threat of instant death should he disobey or deceive them, to steer for Nassau, in the island of New Providence, where the brig arrived on the 9th of November 1841.

The American consul was apprised of the situation of the vessel and requested the governor to take measures to prevent the escape of the slaves and to have, the murderers secured. The consul received reply from the governor stating that under the circumstances he would comply with the request.

The consul went on board the brig, placed the mate in command in place of the disabled master, and found the slaves all quiet.

About noon twenty African soldiers, with an African sergeant and corporal, commanded by a white officer, came on board. The officer was introduced by the consul to the mate as commanding officer of the vessel.

The consul on returning to the shore was summoned to attend the governor and council, who were in session, and who informed the consul that they had come to the following decision:

1st. That the courts of law have no jurisdiction over the alleged offenses.

2d. That as an information had been lodged before the governor charging that the crime of murder had been committed on board said vessel while on the high seas, it was expedient that the parties implicated in so grave a charge should not be allowed to go at large, and that an investigation ought therefore to be made into the charges, and examination taken on oath; when, if it should appear that the original information was correct, and that a murder had actually been committed, that all parties implicated in such crime or other acts of violence should be detained here until reference could be

made to the Secretary of State to ascertain whether the parties should be delivered over to the United States Government; if not, how otherwise to dispose of them.

3d. That as soon as such examinations should be taken, all persons on board the *Creole* not implicated in any of the offences alleged to have been committed on board that vessel must be released from further restraint.

Then two magistrates were sent on board. The American consul went also. The examination was commenced on Tuesday the 9th, and was continued on Wednesday the 10th, and then postponed until Friday on account of the illness of Captain Ensor. On Friday morning it was abruptly, and without any explanation, terminated.

On the same day a large number of boats assembled near the *Creole,* filled with colored persons armed with bludgeons. They were under the immediate command of the pilot who took the vessel into the port, who was an officer of the government, and a colored man. A sloop or larger launch was also towed from the shore and anchored near the brig. The sloop was filled with men armed with clubs, and clubs were passed from her to the persons in the boats. A vast concourse of people were collected on shore opposite the brig.

During the whole time the officers of the government were on board they encouraged the insubordination of the slaves.

The Americans in port determined to unite and furnish the necessary aid to forward the vessel and negroes to New Orleans. The consul and the officers and crews of two other American vessels had, in fact, united with the officers, men, and passengers of the *Creole* to effect this. They were to conduct her first to Indian Key, Florida, where there was a vessel of war of the United States.

On Friday morning the consul was informed that attempts would be made to liberate the slaves by force, and from the mate he received information of the threatening state of things. The result was that the attorney-general and other officers went on board the *Creole.* The slaves identified as on board the vessel concerned in the mutiny were sent on shore, and the residue of the slaves were called on deck by direction of the attorney-general, who addressed them in the following terms: "My friends," or "my men, you have been detained a short time on board the *Creole* for the purpose of ascertaining what individuals were concerned in the murder. They have been identified and will be detained. The rest of you are free and at liberty to go on shore and wherever you please."

The liberated slaves, assisted by the magistrates, were then taken on board the boats, and when landed were conducted by a vast assemblage to the superintendent of police, by whom their names were registered. They were thus forcibly taken from the custody of the master of the *Creole* and lost to the claimants.

I need not refer to authorities to show that slavery however, odious and contrary to the principles of justice and humanity, may be established by law in any country; and, having been so established in many countries, it can not be contrary to the law of nations.

The *Creole* was on a voyage, sanctioned and protected by the laws of the United States, and by the law of nations. Her right to navigate the ocean could not be questioned, and as growing out of that right, the right to seek shelter or enter the ports of a friendly power in case of distress or any unavoidable necessity.

A vessel navigating the ocean carries with her the laws of her own country, so far as relates to the persons and property on board, and to a certain extent retains those rights even in the ports of the foreign nations she may visit. Now, this being the state of the law of nations, what were the duties of the authorities at Nassau in regard to the *Creole?* It is submitted the mutineers could not be tried by the courts of that island, the crime having been committed on the high seas. All that the authorities could lawfully do was to comply with the request of the American consul, and keep the mutineers in custody until a conveyance could be found for sending them to the United States.

The other slaves being perfectly quiet, and under the command of the captain and owners, and on board an American ship, the authorities should have seen that they were protected by the law of nations, their rights under which can not be abrogated or varied, either by the emancipation act or any other act of the British Parliament.

Blackstone, 4th volume, speaking of the law of nations, states: "Whenever any question arises which is properly the object of its jurisdiction, such law is here adopted in its full extent by the common law."

The municipal law of England can not authorize a magistrate to violate the law of nations by invading with an armed force the vessel of a friendly nation that has committed no offense, and forcibly dissolving the relations which by the laws of this country the captain is bound to preserve and enforce on board.

These rights, sanctioned by the law of nations—viz, the right to navigate the ocean and to seek shelter in case of distress or other unavoidable circumstances, and to retain over the ship, her cargo, and passengers the laws of her own country—must be respected by all nations, for no independent nation would submit to their violation.

Having read all the authorities referred to in the arguments on both sides, I have come to the conclusion that the conduct of the authorities at Nassau was in violation of the established law of nations, and that the claimants are justly entitled to compensation for their losses. I therefore award to the undermentioned parties, their assigns or legal representatives, the sums set opposite their names, due on the 15th of January 1855.