

JUSTICE TO CUBA.

Cuban Belligerency Acknowledged by the United States According to Important Official Declarations—The Courts of the Union Bound to Deal with the Cubans as Belligerents.

The United States government has acknowledged the existence of a civil war in Cuba, inasmuch as it has mediated between the contending parties, or at least tendered its good offices to settle the difficulty giving rise to that war.

In Wheaton's Reports, vol. 2, p. 476, the case of the Spanish "*Industria Esphaceli*" is referred to as follows:—

"When a civil war rages in a foreign nation, one part of which separates itself from the old established government and erects itself into a distinct government, the courts of the Union must view such newly established government as it is viewed by the legislative and executive departments of the government of the United States.

If that government remains neutral, but recognizes the existence of civil war, the courts of the Union cannot consider as criminal those acts of hostility which war authorizes and which the new government may direct against its enemy.

The same testimony which would be sufficient to prove that a vessel or person is in the service of an acknowledged State, is admissible to prove that they are in the service of such newly erected government. Its seal cannot be allowed to prove itself, but may be proved by such testimony as the nature of the case admits; and the fact that a vessel or person is in the service of such government may be established otherwise, should it be impracticable to prove the seal.

The general principle applied by the writers on the law of nations to the case of a civil war, considers the war (as between the contending parties) as just on both sides, and that each is to treat the other as a public enemy; according to the established usages of war. So, also, it is the duty of other nations to remain neutral, and not interfere with the exertion of complete & divergent rights of both parties within the territory which is the scene of their hostilities.

Dr. Franklin held that to deny belligerent rights to a State because it had not been recognized as independent is the doctrine of the dark ages, unworthy of civilized nations.

In Sparks' "Diplomatic Correspondence," vol. 2, p. 121, appears the following note to Mr. Bernstorff, Minister of Foreign Affairs in Denmark, viz:—

PASSY, Dec. 22, 1779.

SIR—I have received a letter from Mr. De Chezeau, Consul of France at Bergen, in Norway, acquainting me that two ships—viz., the *Belzeby* and the *Union*, prizes taken from the English on their coasts by Captain Laudal, commander of the Alliance frigate, appertaining to the United States of America, which prizes having met with bad weather at sea that had damaged their rigging and had occasioned leaks and been weakly manned, had taken shelter in the supposed neutral port of Bergen, in order to repair their damages, procure an additional number of sailors and the necessary refreshments; that they were in the said port enjoying, as they conceived, the common rights of hospitality, established and practised by civilized nations, under the care of the above said Consul, when, on the 25th of October last, the said ships, with their cargoes and papers, were suddenly seized by officers of his Majesty the King of Denmark, to whom the said port belongs, the American officers and seamen turned out of their possession and the whole delivered to the English Consul.

Mr. de Chezeau has also sent me the following as a translation of his Majesty's order by which the above proceedings are said to be authorized, viz:—

The English Minister having insisted on the restitution of two vessels which had been taken by the American privateer called the Alliance, commanded by Captain Laudal, and which were brought into Bergen—viz., the *Belzeby*, of Liverpool, and the *Union*, of London—his Majesty has granted this demand on this account—because he has not as yet acknowledged the independence of the colonies associated against England, and because that these vessels, for this reason, cannot be considered as good and lawful prizes. Therefore the said two ships shall be immediately liberated and allowed to depart with their cargoes.

By a subsequent letter from the same Consul I am informed that a third prize belonging to the United States—viz., the *Channing Polly*, which arrived at Bergen after the others—has also been seized and delivered up in the same manner, and that all the people of the three vessels, after being thus stripped of their property (for every one had an interest in the prizes), were turned on shore to shift for themselves, without money in a strange place, no provision being made for their subsistence or for sending them back to their country.

Permit me, sir, to observe on this occasion that the United States of America have no war but with the English; they have never done any injury to other nations, particularly none to the Danish nation; on the contrary, they are, in some degree, its benefactors, as they have opened a trade, of which the English made a monopoly, and of which the Danes may have now their share, and, by dividing the British empire, have made it less dangerous to its neighbors. They conceived that every nation whom they had not offended was by the rights of humanity their friend; they confided in the hospitality of Denmark, and thought themselves and their property safe when under the roof of his Danish Majesty. But they find themselves stripped of that property and the same given up to their enemies on this principle only, that no acknowledgment had yet been formally made by Denmark of the independence of the United States; which is to say that there is no obligation of justice towards any nation with whom a treaty promising the same has not been previously made. This was indeed the doctrine of ancient barbarians, a doctrine long since exploded, and which it would not be for the honor of the present age to revive, and it is hoped that Denmark will not, by supporting and persisting in this decision, obtained of his Majesty apparently by surprise, be the first modern nation that shall attempt to revive it.

The United States, oppressed by and at war with one of the most powerful nations of Europe, may well be supposed incapable, in their present infant state, of exacting justice of other nations not disposed to grant it; but it is human nature that injuries as well as benefits received in time of weakness and distress—national as well as personal—make deep and lasting impressions; and those ministers are wise who look into futurity and quench the first sparks of misunderstanding between two nations, which neglected, may in time grow into a flame, all the consequences whereof no human prudence can foresee, which may produce much mischief to both and cannot possibly produce any good to either. I beg leave through your Excellency to submit these considerations to the wisdom and justice of his Danish Majesty, whom I infinitely respect, an who, I hope, will consider and repeal the orders above recited, and that if the prizes, which I hereby reclaim in behalf of the United States of America, are not actually gone to England they may be stopped and delivered to Mr. De Chezeau, the Consul of France at Bergen, in whose care they before were, with liberty to depart for America when the season shall permit. But if they should be already gone to England I must claim from his Majesty's equity the value of the said prizes, which is estimated at £50,000 sterling, but which may be regulated by the best information that can by any means be obtained. With the greatest respect,

BENJAMIN FRANKLIN.

CUBAN PRIVATEERS CANNOT BE TREATED AS PIRATES.

Opinions of the Attorneys General of the United States, &c., published under the inspection of Henry D. Gelpin. Vol. II., p. 1,065. Washington City: 1841.

ATTORNEY GENERAL'S OFFICE, May 17, 1838.

SIR—From an examination of the various documents this day referred to me in the case of the Texan armed schooner *Invincible* I gather the following facts:—

The American brig *Pocket* sailed from New Orleans, in which port she had been duly registered and cleared in April last, for Brazos Santiago, a port within the limits of Texas. When approaching the termination of her voyage she was captured by the armed Texan schooner *Invincible*, sailing under the flag of the recently constituted republic of Texas, on the alleged ground that she was laden with provisions, stores and munitions of war, destined for the use of the Mexican army under the command of General Santa Anna, and carried into Galveston Bay, where the cargo was landed and used or held by the Texan authorities and the vessel released. These facts being made known to Commodore Dallas, the officer commanding the United States naval forces in the West Indies and the Gulf of Mexico, with a sworn appeal from the insurers and other persons interested in the protection of our commerce of those seas, that officer deemed it his duty to regard the *Invincible* as a pirate, and to treat her as such. He therefore promptly despatched the United States ship *Warren*, Master Commandant Taylor, with orders to cruise for the *Invincible*, and in the event of falling in with her to capture her, and send her to New Orleans to be delivered up for adjudication. Pursuant to these orders the *Invincible* was captured on the 29th ult., with the principal part of the crew. Both vessel and men were sent to New Orleans, and delivered to the civil authorities to be proceeded against on the charge of piracy. Under these circumstances, my opinion is required upon the question whether the charge of piracy can be sustained.

In answer to this question I have the honor to state that, in my opinion, the capture of the American ship *Pocket* can in no view of it be deemed an act of piracy, unless it should appear that the principal actors in the capture were citizens of the United States. The ninth section of the Crimes act of the 30th of April, 1790, declares "That if any citizen shall commit any piracy or robbery, or any act of hostility against the United States, or any citizen thereof, upon the high seas, under color of any commission from any foreign prince or State, or on pretence of authority from any person, such offender shall, notwithstanding the pretence of any such authority, be deemed, adjudged and taken to be a pirate, felon and robber, and on being thereof convicted, shall suffer death." This provision is yet in force, and should it be found that any of those who participated in the capture of the *Pocket* are American citizens the flag and commission of the government of Texas would be insufficient to protect them from the charge of piracy. It is, however, not suggested in the papers before me that any citizens of the United States were engaged in the capture, and if it is assumed that the actors in it were aliens, it must then, I think, be admitted that the capture, however unjustifiable in other respects, can never be regarded as piracy. Where a civil war breaks out in a foreign nation, and part of such nation erects a distinct and separate government, and the United States, though they do not acknowledge the independence of the new government, do yet recognize the existence of a civil war, our courts have uni-

formly regarded each party as a belligerent nation, in regard to acts done *jure belli*. Such may be unlawful when measured by the laws of nations, or by treaty stipulations; the individuals concerned in them may be treated as trespassers, and the nation to which they belong may be held responsible by the United States; but the parties concerned are not treated as pirates. It is true that where persons acting under a commission for one of the belligerents make a capture, ostensibly in the right of war, but really with the design of robbery, they will be held guilty of piracy. In the present case there is not the least reason to believe that the capture was made with any such criminal intent. It would seem to be an infraction of the treaty made in 1831 between the United States and the United Mexican States (of which Texas was then a constituent part), and here may be other reasons for doubting its legality as an act done in the right of war; but that it was really done in that character, and no other, is very clear. The existence of a civil war between the people of Texas and the authorities and people of the other Mexican States was recognized by the President of the United States at an early day in the month of November last. Official notice of this fact, and of the President's intention to preserve the neutrality of the United States, was soon after given to the Mexican government. This recognition has been since repeated by numerous acts of the Executive, several of which had taken place before the capture of the *Pocket*. On the assumption that the actors were aliens, the case is therefore fairly brought within the principle above stated, and the charge of piracy cannot be sustained." I am, sir, &c., R. F. BUILEL.

TO THE PRESIDENT OF THE UNITED STATES.

The ports of the United States should be open to Cuba on an equality with Spain, according to the following declaration of the Executive, namely:—

MESSAGE OF THE PRESIDENT OF THE UNITED STATES AT THE COMMENCEMENT OF THE FIRST SESSION OF THE SIXTEENTH CONGRESS (COMMUNICATED TO CONGRESS DECEMBER 7, 1819).

In the civil war existing between Spain and the Spanish provinces in this hemisphere the greatest care has been taken to enforce the laws intended to preserve an impartial neutrality. Our ports have continued to be equally open to both parties and on the same conditions, and our citizens have been equally restrained from interfering in favor of either to the prejudice of the other. The progress of the war, however, has operated manifestly in favor of the colonies, Buenos Ayres still maintaining unshaken the independence which it declared in 1816 and has enjoyed since 1810. Like success has also attended Chile and the provinces north of the La Plata, bordering on it, and likewise Venezuela.

THE UNITED STATES ACKNOWLEDGE OFFICIALLY THE RIGHTS OF EVERY AMERICAN COLONY WHICH REVOLTS AGAINST ITS METROPOLIS.

The Union admits the flag of every insurrectionary party against the metropolitan government, provided it pays customs dues.

American State papers collected by Walter Lowry and Walter S. Franklin, vol. 4, p. 424 and 656.

MONROE, SECRETARY OF STATE, TO MR. ORRIS, JANUARY 19, 1816.

You demand next that Mr. Toledo and others whom you mention, charged with promoting revolt in the Spanish provinces and exciting citizens of the United States to join it, shall be arrested and tried, their troops disbanded and dispersed.

You intimate that troops are levying in Kentucky, Tennessee, Louisiana and Georgia for the invasion of the Spanish provinces, of whom 1,000 are from Kentucky and 300 from Tennessee, to be commanded by American citizens; but you do not state at what points these men are collected or by whom commanded, and as to the troops said to be raised in Louisiana and Georgia your communication is still more indefinite. The information recently obtained by this department from persons of high consideration is of a very different character. It is stated that no men are collected, nor is there evidence of an attempt or a design to collect any in Kentucky, Tennessee or Georgia for the purpose stated, and that the force said to be assembled under Mr. Toledo is very inconsiderable and composed principally of Spaniards and Frenchmen. If any portion of it consists of citizens of the United States their conduct is unauthorized and illegal. This force is not within the settled parts of Louisiana, but in the wilderness, between the settlements of the United States and Spain, beyond the actual operation of our laws.

I have to request that you will have the goodness to state at what points in Kentucky, Tennessee, Louisiana and Georgia any force is collected, the number in each instance and by whom commanded. If such force is collected or collecting within the United States for the purpose suggested, or other illegal purpose, it will be dispersed and the parties prosecuted according to law.

The government is under no obligation, nor has it the power by any law or treaty to surrender any inhabitant of Spain or the Spanish provinces on the demand of the government of Spain; nor is any such inhabitant punishable by the laws of the United States for acts committed beyond their jurisdiction, the cases of pirates alone excepted. This is a fundamental law of our system. It is not, however, confined to us; it is believed to be the law of all civilized nations where not particularly varied by treaties.

In reply to your third demand—the exclusion of the flag of the revolting provinces—I have to observe that in consequence of the unsettled state of many countries, and repeated changes of the ruling authority in each, there being at the same time several competitors and each party bearing its appropriate flag, the President thought it proper some time past to give orders to the collectors not to make the flag of any vessel a criterion or condition of its admission into the ports of the United States.

Having taken no part in the differences and convulsions which have disturbed those countries, it is consistent with the just principles, as it is with the interests, of the United States to receive the vessels of all countries into their ports, to whatever party belonging and under whatever flag sailing, pirates excepted, requiring of them only the payment of the duties and obedience to the laws while under their jurisdiction, without advertent to the question whether they had committed any violation of the allegiance or laws obligatory on them in the country to whom they belonged, either in assuming such flag or in any other respect.

In the differences which have subsisted between Spain and her colonies the United States have observed all proper respect to their friendly relations with Spain. . . . All that your government had a right to claim of the United States was that they should not interfere in the contest, or promote by any active service the success of the revolution, admitting that they continued to overlook the injuries received from Spain, and remained at peace. This right was common to the colonists. With equal justice might they claim that we would not interfere to their disadvantage; that our ports should remain open to both parties, as they were before the commencement of the struggle; that our laws regulating commerce with foreign nations should not be changed to their injury. On these principles the United States have acted. I have the honor to be, &c., JAMES MONROE.