

FRANKLIN AND THE RULE OF FREE SHIPS, FREE GOODS.

BY SIMEON E. BALDWIN.

Early in the present year an American ship, the *William P. Frye*, carrying to Great Britain goods of the character of conditional contraband owned by British subjects, was arrested and sunk by a German cruiser.

Our government made claim upon Germany for reparation, on the ground that the destruction of the vessel was a violation of international law. The reply maintained that it was not such a violation, but at the same time acknowledged liability on another ground, namely that the act was a violation of the rights of the United States under their treaty with Prussia, made in 1828.

This renewed certain provisions in former treaties between the United States and that Power. The first of these dated back to 1785, and was signed in our behalf by Franklin, Jefferson, and John Adams. Franklin set his hand to it at Passy, on July 9; Jefferson added his signature at Paris, a few days later; and Adams his at London early in August. The Prussian plenipotentiary executed it in September, at the Hague.

Its twelfth article contained the controlling rule, so far as the sinking of the *Frye* is concerned.

In case either of the contracting Powers should be at war with a third, it declared that "the free intercourse and commerce of the subjects or citizens of the party remaining neuter with the belligerent Powers shall not be interrupted. On the contrary,

in that case, as in full peace, the vessels of the neutral party may navigate freely to and from the ports and on the coasts of the belligerent parties, free vessels making free goods, insomuch that all things shall be adjudged free which shall be on board any vessel belonging to the neutral party, although such things belong to an enemy of the other; and the same freedom shall be extended to persons who shall be on board a free vessel, although they should be enemies to the other party, unless they be soldiers in actual service of such enemy."

The *Frye* was carrying enemy's goods to an enemy's port. She was carrying them to a "strategic area" or "war zone" marked off by Germany as waters on which commerce with this enemy could not be carried on, except at the risk of capture. It was practically impossible to take her to a German or Austrian port, for the submission of the legality of the seizure to a Prize Court. She would almost certainly have been re-captured by the Channel fleet. Her destruction, except for the Treaty of 1785, might have raised several questions of the first importance; one as to whether a belligerent Power can thus fence off an area of the high seas so as to make it an offence against her right, to take a neutral ship across it on a commercial voyage to her enemy's country; another as to whether, if so, the ship could lawfully carry contraband food stuffs; and another as to whether, if the voyage were illegal, the ship could be destroyed, at the will of the commander of the cruiser by which the arrest was made.

It was the great good fortune of the United States that this ancient treaty made these questions of no importance. The very day, I believe, after our claim for indemnity was received by Germany, came her acknowledgment of its justice by reason of this stipulation, made by Frederick the Great, and throwing upon the whole German empire of today, an inherited obligation.

This week's newspapers print despatches showing that the affair in all its aspects is to be finally settled in the best possible way, namely by proceedings of a summary nature instituted under the provisions of the Hague Convention of 1907 for the pacific settlement of international disputes.

Before the Revolution Franklin had become convinced that the rule of *free ships, free goods* was a proper one for all nations to adopt.¹

It had been recognized in Holland as early as the fifteenth century.² France had given it a place in her treaty with Turkey in 1604³, but she had rejected it in her maritime ordinance of 1681; and again in 1744. It was to her, however, that Franklin determined to appeal for aid, whenever she was ready to acknowledge our independence, in settling the commercial policy of the United States on the proper basis.

He was made by the Continental Congress, on November 27, 1775, one of the secret committee on foreign correspondence. The members chosen were five, Benjamin Harrison of Virginia heading the list. They apparently organized by the election of Franklin as chairman; for on December 12, 1775, his name stands first in the signatures of three of them to a letter of instructions to Arthur Lee, then in London; and on March 2, 1776, in the commission to Silas Deane, as a foreign representative, which all five sign, Franklin's name again heads the list. The same is true of the instructions given to Deane on the following day. At this time Robert Morris had taken the place of Judge Johnson on the committee.⁴

Not long afterwards another committee of five was appointed to prepare a plan of treaties. The

¹ *Political, Miscellaneous and Philosophical Pieces, etc.*, by Benjamin Franklin, London, 1779, page 54.

² Grotius, *de Jure Belli ac Pacis*, III, 1, 5, 4, note.

³ Woolsey, *International Law*, section 174.

⁴ Clark, *Silas Deane*, 42; *Diplomatic Correspondence of the American Revolution*, II, 78.

members, in the order named by the Congress, were Dickinson, Franklin, John Adams, Harrison, and Robert Morris. They constituted also the Committee on Secret Correspondence, except that the place on that of the junior member, John Jay, was given to John Adams.

They reported on July 20, 1776. The report was recommended, with amendments, in August, and the committee enlarged by the addition of Richard H. Lee of Virginia, and James Wilson of Pennsylvania. The plan reported for a treaty with France was finally adopted, with certain amendments, on September 17, 1776.⁵ It can hardly be doubted that the commercial provisions were framed by Franklin. No other member of the committee had anything approaching his acquaintance with negotiations of a diplomatic character.

Article XVI provides that the ships of either contracting Power carrying contraband goods to an enemy of the other, shall not be confiscated as lawful prize, though such goods may be. Article XVII establishes the rule of "enemy's ships, enemy's goods."

Article XXVI reads thus:

"It shall be lawful for all and singular the subjects of the most Christian king, and the citizens, people and inhabitants of the said States, to sail with their ships with all manner of liberty and security, no distinction being made, who are the proprietors of the merchandises laden thereon, from any port to the places of those who now are, or hereafter shall be, at enmity with the most Christian king, or the United States. It shall likewise be lawful for the subjects and inhabitants aforesaid to sail with the ships and merchandises aforementioned, and to trade with the same liberty and security from the places, ports and havens of those who are enemies of both, or either party, without any opposition or disturbance whatsoever, not only directly from the places of the enemy aforementioned to neutral places, but also from one place belonging to an enemy to another place belonging to an enemy, whether they be under the jurisdiction of the same prince, or

⁵ Journals of Congress, II, 360; Secret Journals, II, 14.

under several. And it is hereby stipulated, that free ships shall also give a freedom to goods; and that every thing shall be deemed to be free and exempt, which shall be found on board the ships belonging to the subjects of either of the confederates, although the whole lading, or any part thereof, should appertain to the enemies of either; contraband goods being always excepted. It is also agreed, in like manner, that the same liberty be extended to persons who are on board a free ship, with this effect, that although they be enemies to both, or either party, they are not to be taken out of that free ship, unless they are soldiers and in actual service of the enemies."

Congress, in their instruction to our representatives, sent over with this project, authorized them to waive Article XVI and XXVI, so that free ships should not make free goods.⁶

The negotiations by our three commissioners (Franklin, Deane, and Arthur Lee) which followed at Paris, were mainly conducted by Franklin, and he was able to save both these articles.⁷ In the treaty, signed February 6, 1778, Article XVI appears as Article XIII, and Article XXVI as Article XXIII.

Before accepting his mission to France in 1776, Franklin had not been entirely friendly to our offering terms of alliance to foreign Powers. He had said on the floor of Congress "that a virgin State should preserve the virgin character, and not go about suitoring for alliances, but wait with decent dignity for the application of others," and in recalling this during the next year, in a letter of March 21, 1777, to Arthur Lee, he adds, "I was overruled—perhaps for the best."⁸

The fact that the United States were under no treaty obligations our Commissioners were soon able to use as a means of promoting the French alliance. On September 8, 1777, in a letter to the committee of Congress on Foreign Affairs, they took occasion

⁶ Secret Journals, I, 29.

⁷ Diplomatic Correspondence of the American Revolution, III, 48.

⁸ *Ibid.*, II, 298.

to say that as we had no treaty with France or any other nation giving to free ships the privilege of making free goods, it might be advisable for our cruisers on the ocean to arrest French vessels trading with Great Britain and confiscate their cargoes, on payment of the freight due on it.⁹ Later, in November, 1777, they issued instructions to the captains of American armed vessels authorizing the capture of any neutral ship carrying contraband to the British forces acting against the United States.¹⁰

Franklin would, no doubt, have been glad, should we maintain our independence, to put our trade relations with all foreign Powers, in time of war, on a much broader foundation. He had the general look-out on the world which belongs to a philosopher who would have all men do as much good to other men, and to men of other nations, as was reasonably possible, and as little harm. He was for free trade in peace, and for trade as nearly free as might be, in war. "To lay duties," he wrote to James Lovell, of the Committee of Congress on Foreign Affairs, in July, 1778, "on a commodity exported, which our neighbors want, is a knavish attempt to get something for nothing. The statesman who first invented it, had the genius of a pickpocket, and would have been a pickpocket, if fortune had suitably placed him."¹¹

To his mind, naval war had for ages been mainly a series of gigantic thefts. Enemy's ships were liable to seizure as prize of war. If they were freighted with goods of a neutral Power, these goods were liable to seizure also. Such seizures could be made by private marauders, who were not deemed pirates because they fought under a commission from their country, and must prove that they did not go beyond it, in their country's courts.

⁹ Diplomatic Correspondence of the American Revolution, II, 390.

¹⁰ *Ibid.*, 425.

¹¹ Bigelow, *Works of Franklin*, VI, 200.

Franklin's philosophy of civilization had taught him that privateering was a barbarous practice that ought to be suppressed; that neutral ships, at least when not unlawfully carrying contraband to enemy's ports ought, with their cargoes, to be immune from seizure, even if the goods belonged to subjects of the enemy; and that special treaties might safely guarantee some protection, even if the ship were laden with contraband.¹² He endeavored to have a provision for the abolition of privateering (Art. XXIII) included in our treaty of peace with Great Britain, but even his own colleagues in the negotiation did not favor it.¹³ One of them, indeed, John Adams, at a later period, writing in 1800, as President of the United States to the Secretary of State, went so far as to condemn the *free ships, free goods* rule as visionary and impracticable. If, he said, the principle "were once really established and honestly observed, it would put an end forever to all maritime war, and render all military navies useless. However desirable this may be to humanity, however much so philosophy may approve it, and Christianity desire it, I am clearly convinced it will never take place. The dominant power on the ocean will forever trample on it. . . . We must treat the subject with quiet attention, and if all other nations will agree to it, we will. But while one holds out, we shall be the dupes, if we agree to it. Sweden and Denmark, Russia and Prussia, might form a rope of sand. But no dependence can be placed on such a maritime coalition."¹⁴

Two years later, George Caines of New York thus expressed what was probably the general sentiment of the bar of the Eastern States, in his *Lex Mercatoria Americana*, in commenting on the French treaty of

¹² See *Ibid.* VII, 70, 62, 68; VIII, 248, 287; IX, 88; Diplomatic Correspondence of the American Revolution. III, 701.

¹³ Diplomatic Correspondence of the American Revolution, VI, 210, 409; IV, 57.

¹⁴ Works of John Adams, IX, 86.

1800, renewing the rule in that of 1778, that free ships made free goods.¹⁵

"In compliance with the new fangled freedom of modern France, our late treaty with that people recognizes the monstrous inconvenience of neutral bottoms making neutral goods: it is hoped that the veil of peace will forever hide from our sight the baneful results of such a convention; a compact which unnerves the arm of the warrior, and flattens the edge of his sword."

All New England, a few years later, was inclined to the same opinion, as she saw rich prize cargoes coming into her ports in the war of 1812.

Our treaty of 1778 with France, which was in a peculiar sense the work of Franklin, and the articles as to commerce in war which we have particularly considered, gave great satisfaction to the neutral commercial Powers. In a few months (by an ordinance of July 26, 1778) France extended the benefit of it provisions in this respect to all of them.¹⁶

It was not long before the Armed Neutrality gave the views by which they were dictated a far wider extension. On February 28, 1780, the Empress of Russia issued her declaration of neutral rights in the matter of trade, which applied the same principles; and this, before long, received the general adherence of the European continent, and led ultimately to the Declaration of Paris in 1856, in which the rule of Free Ships, Free Goods was explicitly included.

Our Congress, in the fall of 1780, voted to support the Russian declaration, and instructions to that end, prepared by Robert R. Livingston, were issued accordingly to our naval commanders.¹⁷

In 1782, Sweden offered, unasked, to make a treaty with us, and on this basis. The suggestion was made directly and solely to Franklin.¹⁸ He reported it to

¹⁵ Page 122.

¹⁶ Merlin, *Repertoire de Jurisprudence*, *Prise Maritime*, XXVI, 61.

¹⁷ Journals of Congress, VI, 210, 241; Bancroft, *History of the United States*, VI, 358.

¹⁸ Bigelow, *Works of Franklin*, VI, 374, 383; VIII, 108, 237, 279, 296, 298.

Congress and carried it successfully out, Congress soon afterwards approving a project for its execution. In this treaty, signed by him for the United States at Paris, April 3, 1783, Article VII is substantially identical with Article XXVI of our treaty with France.

In February, 1784, John Adams, then our minister at the Hague, wrote to Dr. Franklin and John Jay, who with him had authority to negotiate foreign treaties, that the Prussian minister at that court had told him that his sovereign would be glad to make a commercial treaty with the United States. They immediately replied advising him to open negotiations on the principles which governed our then recent treaties with Holland and Sweden. This was done; and the King agreed to take the latter of these as the general model to be followed. Early in April, he drew, with his own hand, a project for such a treaty, and sent it to Adams. Franklin and Jay, whom he consulted by letter, suggested a few changes of slight importance, which Frederick accepted. The project was then, early in May, forwarded to Congress for ratification.¹⁹

Before it arrived, on May 7, 1784, Jay had been appointed Secretary for Foreign Affairs, and Jefferson given his place to act with Adams and Franklin in negotiating commercial treaties. Meanwhile Jefferson, who was then in Congress, had been appointed chairman of a committee on foreign correspondence. Their report, together with the subject of general instructions to our ministers for negotiating commercial treaties, was finally acted upon, on the day named. Certain points were agreed on which must "be carefully stipulated."

Two of these were thus stated:

"4. That it be proposed, though not indispensably required, that if war should hereafter arise between the two contracting parties, the merchants of either country, then

¹⁹ *Life and Works of John Adams*, VIII, 183, 189-203.

residing in the other, shall be allowed to remain nine months to collect their debts and settle their affairs, and may depart freely, carrying off all their effects without molestation or hindrance; and all fishermen, all cultivators of the earth, and all artisans or manufacturers, unarmed and inhabiting unfortified towns, villages or places, who labour for the common subsistence and benefit of mankind, and peaceably following their respective employments, shall be allowed to continue the same, and shall not be molested by the armed force of the enemy, in whose power, by the events of war, they may happen to fall; but if any thing is necessary to be taken from them for the use of such armed force, the same shall be paid for at a reasonable price; and all merchants and traders exchanging the products of different places, and thereby rendering the necessaries, conveniences and comforts of human life more easy to obtain and more general, shall be allowed to pass free and unmolested; and neither of the contracting powers shall grant or issue any commission to any private armed vessels empowering them to take or destroy such trading ships, or interrupt such commerce.

"5. And in case either of the contracting parties shall happen to be engaged in war with any other nation, it be further agreed, in order to prevent all the difficulties and misunderstandings that usually arise respecting the merchandise heretofore called contraband, such as arms, ammunition and military stores of all kinds, that no such articles carried by the ships or subjects of one of the parties to the enemies of the other, shall on any account be deemed contraband, so as to induce confiscation and a loss of property to individuals. Nevertheless it shall be lawful to stop such ships, and detain them for such length of time as the captors may think necessary to prevent the inconvenience or damage that might ensue from their proceeding on their voyage, paying, however, a reasonable compensation for the loss such arrest shall occasion to the proprietors; and it shall further be allowed to use, in the service of the captors, the whole or any part of the military stores so detained, paying the owners the full value of the same to be ascertained by the current price at the place of its destination.

"But if the other contracting party will not consent to discontinue the confiscation of contraband goods, then that it be stipulated, that if the master of the vessel stopped will deliver out the goods charged to be contraband, he shall be admitted to do it, and the vessel shall not in that case be carried into any port, but shall be allowed to proceed on her voyage."²⁰

²⁰ Secret Journals of Congress, III, 452, 456, 483, 484.

It will be observed that this proposes the abolition of privateering, and practical immunity for contraband on a neutral ship.

Jefferson arrived at Paris in August, 1784; and early in the following November the three Commissioners proposed to Prussia a new form of treaty, following the plan which had been approved by Congress in May. In the note making this proposal was enclosed a memorandum in support of its principal features, that is, the abolition of privateering and the prohibition against the forfeiture of contraband goods. This paper bears upon its face strong evidence that it was composed by Franklin. Its style is his, and its arguments are such as he had often urged, both in private and in official correspondence.

Frederick, in January, 1785, accepted most (including 4 and 5) of the terms thus proposed, and suggested others, to some of which our Commissioners gave their assent; a final agreement not being reached until July, 1785.²¹

Congress ratified the treaty in May, 1786. It was the first in recorded history which looked to the abolition of privateering, and none had ever gone farther in extending to lading of whatever sort the freedom of the flag.

These provisions were not equally esteemed by all the Commissioners.

It would seem probable that Jefferson was in favor of both abolishing privateering and making free ships cover even contraband goods. He certainly did not regard *free ships, free goods* as a rule of international law, but it was for that very reason that he advocated its adoption in commercial treaties. Since it was not established by law, let it be by convention.²²

²¹ Diplomatic Correspondence of the United States, 2d Series, F. P. Blair's Ed., II, 113, 198, 217, 219, 237, 267, 269, 305, 325, 373; Life and Works of John Adams, VIII, 222, 238.

²² Writings of Jefferson, I, 92, 93; VIII, 421; XVII, 348; Proceedings, Mass. Historical Soc., 2d Series, I, 24.

Franklin was, and always had been, its hearty friend, and an equally determined enemy of privateering.²³

Adams' views were frankly stated in a personal letter to the Prussian minister at the Hague, written on February 13, 1785, in which he says: "I am weary of the slow motions of other courts and states, as much as I admire the despatch, intelligence, and decision of that of Berlin; and as much as I am charmed to find the King do us the honor to agree to the platonic philosophy of some of our articles, which are at least a good lesson to mankind, and will derive more influence from a treaty ratified by the King of Prussia, than from the writings of Plato or Sir Thomas More."²⁴

Franklin's signature to this great State paper was his last official act as an American minister at a foreign court.

The immunity of contraband from capture, which it promised, was continued by the treaty with Prussia of 1799, but not by that now in force, of 1828. It was in truth, as Adams said, rather a platonic provision. Frederick probably ventured to adopt it the more readily because he regarded its insertion as an experiment in which he risked little, because there was little to risk. *Fiat in vili corpore experimentum.* He did not contemplate the long continuance of the United States. The British envoy at Berlin reported his saying to him, in 1782, that our "great extent of territory alone would be a sufficient obstacle, since a republican government had never been known to exist for any length of time where the territory was not limited and centered." He could not foresee that we were to share his own idealism, and share it in its free, life-giving power, unrestrained by practical conditions of unfriendly environment.

²³ See Bigelow, *Works of Franklin*, IX, 89; *Diplomatic Correspondence of the American Revolution*, I, Sec. 128.

²⁴ *Life and Works of John Adams*, VIII, 225; I, 416.

It may be added that the principle of Free Ships, Free Goods, so far as regards non-contraband, was, six years after Frederick's death, incorporated in the Prussian Code (*Allgemeines Landrecht*), and is now (following the pledges of the Declaration of Paris,) one of the provisions of the Prize Code (*Prisenordnung*, Art. 42) of the German Empire, promulgated in 1909, as revised in 1915.

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