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SALEM MEMORIAL.

THAT on ordinary occasions they have deemed it unnecessary to apply for the redress of grievances to the government of their country, confiding in the rectitude and wisdom of its councils; and though their confidence in this respect is undiminished, yet as questions of national moment are now agitated, and aggressions committed on our commerce in a manner unprecedented, they deem it their duty to approach the constituted authorities, and express their sentiments with fidelity and deliberation.

It has been a source of the purest satisfaction to your memorialists, that while foreign nations have been engaged in wars, which, in their nature and consequences, have transcended the limits of human foresight, the U. States have, under the benign care of Providence, been preserved in the enjoyment of peace and liberty. They have beheld with pleasure our commerce, at first feeble and confined, gradually expanding with awakened enterprize, until it has reached the farthest shores, & embraced the most inhospitable climes. This commerce, prosecuted with increasing vigor, and fostered by new aids, has continually brought to our ports the wealth of all nations, and by opening a liberal intercourse, added fresh zeal to foreign industry and domestic labor.

Your memorialists, considering war an evil which could not be confined in its consequences to belligerents, even when prosecuted with good faith and amicable intentions towards neutrals, and believing it the sound policy of the U. S. to avoid every entanglement in it, as injurious to internal improvement and external interests, have witnessed with unhesitating approbation the disposition to neutrality patronized by the general government, at times when national wrongs have been pressed with peculiar aggravations, and seem to point to summary redress. Firmness and moderation have happily secured all the advantages of successful war, and the sober appeal of reason carried convictions to foreign nations. From considerations of a similar nature your memorialists have submitted to the injuries of belligerents during the late European war, and awaited with confidence the decisions of tribunals instituted to adjust national rights, and afford a fair though tardy redress to grievances. To these tribunals, elevated in the presence of the world, as the learned and impartial courts of nations, they hoped that all parties might appeal for justice and receive a righteous award. In some instances they were disappointed; in others they realized their expectations. And even when they could not admit the correctness of decisions, principles were expounded and rules prescribed, which might serve as pole stars for future direction.

Your memorialists however have witnessed with *deep regret* and *deep anxiety*, that to some of these tribunals they can no longer appeal for safety. New interpretations of old rules, and new glosses on ancient doctrines, have been arrayed to control the circuit of neutral commerce, and restrain if not annihilate its most beneficial operations. Their surprize has been greater, because the nation who has adopted them, is one from whom we had a right to expect the most conciliatory conduct, since with her ultimately centre the proceeds of our commerce, and from her we purchase the greatest portion of her staple manufactures. The interests of Great Britain and the U. S. seem in this respect mutual. We consume the products of her industry, and give her in return, besides large sums of money, raw materials, by which she may levy new contributions. Similarity of manners and habits, of education and language, have added artificial inducements for intercourse, and gained for her among us a respect, not slightly to be viewed or inconsiderately forfeited. On all occasions the U. S. have exhibited towards her an amicable interest, and a just, it may be added, a generous policy. If, therefore, we had favors to ask or to receive, our claims have been peculiarly strong upon her, because we have been emphatically the sinews of her opulence. But it is believed that the U. S. never asked of any nation more than justice, and are willing to be bound by the established rules of commerce. Your memorialists therefore express *deep regret*, because a confidence has been shaken which may not easily be restored, & *deep anxiety*, because the principles alluded to, if conceded, must eventually prostrate our trade, or leave it at the arbitrary discretion of belligerents. Whether peace or war prevail, the baneful influence will every where be felt, and in the latter predicament, we shall, as neutrals, share the mischiefs of it, without the chances of benefit.

With these impressions, your memorialists respectfully submit some observations on the nature and importance of the principle avowed by the British admiralty. On the present occasion they would avoid the discussion of contested points respecting the freedom of commerce, on which civilians have entertained different opinions. They would avoid the question, how far even a *direct trade, carried on by neutrals between the colonies and mother country, with bona fide neutral property*, is protected by the law of nations, though it may justly be a ground of national investigation. They are willing to avoid these extrinsic though important subjects, and meet the principle of the English courts upon the laws and usages sanctioned by the practice of nations.

The principle recently established by Great-Britain, is, as your memorialists understand it, that *it is not competent for a neutral to carry on in war any trade, which he is not accustomed to do in peace; and that he shall not be permitted to effect that in a circuitous, which is inhibited in a direct trade.* As corollaries from this principle, she insists that the colonial trade, exercised by neutrals, shall not extend beyond the accustomed peace establishment; and that whenever the neutral imports into his own country colonial produce, with the intention to tranship it to the mother country, if a direct intercourse be interdicted in peace, the circuity of the route shall not protect the property from confiscation. It seems admitted, that such circuitous route, with such intention, is not considered as evidence of enemy's property, confiscable within ordinary rules, but as a distinct, substantial, condemnatory principle, independent both in efficacy and application. For it yields not to the most clear proof of neutral property, or innocent though misdirected conduct. The unaccustomed trade, or the importation with specific intentions, are the tests by which every voyage is to be tried.

If these doctrines form a part of the law of nations, however mischievous they may be in operation, the U. S. must submit to them, until relaxed by particular convention. Though our commerce should be oppressed, and our enterprise crushed, yet are we bound to acquiesce, if the sanction of universal practice require it?

Your memorialist, however, beg leave before they consider the law of nations in this particular, to advert to a few of the consequences resulting from this rule, and if they do not greatly mistake, from thence will arise a strong argument of its inadmissibility.

In the first place, great evils must in the nature of things result from the indefiniteness of what is the accustomed trade. Nations are continually changing their policy, their imports and exports, their manufactures, their staples, and their commercial connexions. In peace as well as in war, peculiar circumstances induce them to open or close a traffic, and these circumstances arise as often from accidental caprice as political wisdom. Beside these, the silent operation of time, by destroying old sources of revenue, and developing new wants, and in a more important view, by erecting the grandeur of one state on the destruction of another, with secret fatality changes the channels of commerce, and forbids it to flow in an uniform course. It seems conceded on all sides, that the rule shall not apply to every case, and that those changes, which seem not the result of a necessity imposed by an enemy, are exempted from its operation. But how shall these limits be defined? Every nation varies its policy in this respect in time of war; and even G. B. relaxes her navigation act to meet the ordinary exigences of it. On such occasions she admits neutrals to import into her dominions articles not the growth of their own country. She admits foreigners into her mercantile as well as military marine. She opens her colonies to importations strictly forbidden in peace, and allowed with jealous caution, even under the pressure of war. To changes of this nature, if they do not arise out of the predominance of the enemy's force, or out of any necessity resulting therefrom, her own civilians avow the rule of accustomed trade shall not extend. According to them, it is not every convenience or even every necessity arising out of the state of war, but that necessity which arises out of the impossibility of otherwise providing against the urgency of the distress inflicted by the hand of a superior enemy, that can be admitted to produce such an effect. But in what manner shall this impossibility be determined? How shall we distinguish between the ordinary and the extraordinary necessities of war—between those evils inflicted by a superior force, and those resulting from general embarrassment? How shall we distinguish, which is the predominant power, when one may be conqueror at one point, and conquered at another—one all powerful by sea, another all powerful by land? How shall we provide for or foresee the changes of the day, when time with unmeasured rapidity retrieves losses in the hour of defeat, and destroys a power in the hour of victory? In the opinion of your memorialists, there is but one test of such predominancy, and that within the old law of nations. It is, when the belligerent is able to blockade the ports of his enemy; and then his right to exclude neutrals is coextensive with this ability to blockade. If any other test be resorted to, if the unlimited ingenuity of admiralty discretion be exercised in the application or denial of the rule, the rights of neutrals will change with the policy of an administration, and rise and fall with the pressure of hostilities and the security of depredation. Surely no principle of the law of Nations can be bottomed on so fluctuating a basis. It would reverse the nature of all law, which is fixed and determinate, and substitute a discretion little less injurious than despotism.

In another view, the rule appears to your memorialists not less untenable and unjust. It is stated as a part of it, that if colonial produce be imported by any person, with an intention to tranship it on his own account to the mother country, it is subject to confiscation; but if imported for the purpose of general commerce, and thrown into the market for general transhipment, it is within the exception. To distinguish between general and particular intentions, and to separate things so subtle in their own natures, and almost incapable of proof, for the purposes of national decisions, seems a refinement reserved for the present age. In the nature of things it can hardly be possible to determine the intention of a merchant in importation. These may be formed and fixed at one moment, and abandoned from change of circumstances at another. The situations of foreign markets, the plenty or deficiency of supply at home, the nature of his funds, the success of his incipient voyage, and numerous other accidents must continually change the destination of importations and divert them into various channels. In no case therefore can there arise an indisputable presumption, that a merchant imports with a determination to export. Indeed, as his intention must frequently be ambulatory, the presumption lies as strongly the other way. And even if in a few instances, that intention could be ascertained, thousands of cases must arise, in which it would be impossible to form a criterion for judgment—All must be doubt, caprice, or speculative construction.

These objections lie in the embarrassments attending the exercise of the rule respecting intentions. But a more serious one may be urged against it, grounded upon its inefficacy, as it respects both the neutral and the belligerent. As it respects the neutral, if the rule is once known, transfers of property will be immediately made. There will be an impossibility of preventing frauds in these transfers, if they deserve the name, by any tests applicable to them, unless restrictions are imposed or evidence required, which no authorities could procure, and no independent nation ought to submit to. As it respects the belligerent, the same produce after sale would according to his own principles be admissible to the ports of his enemy; and in that way the same assistance be supplied, and the same embarrassments be prevented. The importer will communicate a title to his vendee, which he does not himself possess, and clothe his agent with an authority, which he cannot exercise at his own hands. The rule therefore would require the mere formality of a sale, but would effect none of the consequences, which it professes to value; and its foundation would be shaken by the extent of its exceptions. Considered in this view, your memorialists cannot but suppose, that no such modification will ultimately prevail; but by degrees the restriction will be absolute *against all neutral carriage of colonial produce to the mother country under every variety of intention.* In any other way it might be nugatory, and with this unmeasured influence it must be ruinous.

The foundation of this modern doctrine is laid in this principle, *that the neutral has no right by an extension of this trade, to afford supplies to the belligerent, because by such trade he assists the belligerent to ward off the blows of his enemy, and oppose for a longer period the dominion of his force.* But to this your memorialists deem it a conclusive answer, that this proposition proves too much; that, if true, it is a foundation for a far more broad and sweeping principle; that every commerce with the belligerent is inhibited to neutrals, *for every commerce assists him in resistance, and diminishes his necessities.* A doctrine thus comprehensive has never yet been avowed, and it is presumed never will be. Yet such must be the logical conclusion; and it shews irresistibly the absurdity of the assumed premises. The accustomed as well as unaccustomed trade, is within the terms, and must stand or fall together. Either the doctrine is unsound, and assumed as a mere pretext for predatory seizures, or neutrals have no rights as such, and must endure the calamities inflicted by belligerents in a contest, in which they have no voice, and from which they can reap only injury.

Other considerations add force to the preceding remarks. It is well known that in time of war neutrals cannot carry on even their accustomed trade in its full extent. They are prohibited from trading in contraband goods, and to blockaded ports. Variations necessarily arise in the relations of the hostile powers, which the neutral ought to possess a right to turn to his profit, as an indemnity for the obstructions of his old trade. When exercised in the mildest form they produce oppressive searches and delays, expensive litigation and often total failure of any otherwise lucrative voyage. Reason would therefore seem to declare, that for hazards of this nature the benefits arising to neutrals from war are not more than a just equivalent. But if the obstructions be inforced, and no new channels permitted, it seems hardly too much to say, that they must lead to an extinction of all neutral commerce. If one belligerent adopt the rule, another has the same right; and regulations of colonial monopoly would then serve as false laws only to ensnare, and betray neutral navigation. It is somewhat singular, that a belligerent should invite a trade with itself, which it declares fraudulent with its enemy; and should lift the arm of power to crush the neutral, *whose conduct is criminal only when it ceases to be partial.*

Such are the remarks your memorialists respectfully submit upon the rule considered in itself; on this examination they confess it appears to them fundamentally incorrect. It subjects commerce to fluctuating decisions, overthrows the ordinary rules of evidence, and places an immense power to be wielded at the uncontrolable discretion of magistrates appointed by a single party. It wants therefore all the discriminative features of a fundamental proposition of the law of nations—uniformity, precision and general applicability. It would, in their opinion, if established, create greater evils than it professes to redress, by perpetuating strife, destroying the emoluments of trade, embarrassing commercial intercourse, and letting loose the passions to prey on the miseries, and plunder the property of the innocent. It would subject neutrals to hazards nearly as perilous as those of actual hostilities; and independent of its influence in stimulating to revenge and retaliation, it would transfer the benefits of peace to any victorious usurper of the ocean.

But your memorialists are unwilling to rest the question on the preceding grounds, however supported by reason. They appeal to higher considerations, and deny that the rule is, or ever has made, a part of public law, or acquired by usage or prescription, any authority among nations. They admit that uninterrupted and general usage, fortified by open acquiescence, forms a strong argument, perhaps a conclusive proof, of the adoption of any rule. That if such usage had existed in the present case, and had been invariably pursued, the presumption would have been violent, that the doctrine was just, and ought not now to be shaken. But your memorialists have in vain sought in ancient jurists, universally consulted and approved, any principle that bears in its bosom the present. On the contrary, every page appears to give a direct contradiction. They adhere to the ancient interpretation of the law of nations, which pronounces that the goods of an enemy are lawful prize, and those of a friend free; that the neutral, except in cases of blockade and contraband, has a right to the uninterrupted pursuit of his commerce, when carried on with his own property, at all events in a direct trade from his own country. Such your memorialists deem to have been the incontestible rights of neutrals, established for more than two centuries by universal acknowledgment, and acted upon, while a flourishing intercourse subsisted among all maritime nations. During the same period, Great Britain, France, Spain, Portugal and Holland, possessed extensive colonies, and engaged in commercial enterprizes with an uncommon spirit of rivalry. Had therefore any such rule, as is now claimed, existed, innumerable cases must have occurred in the controversies of these nations to legitimate its introduction and authorise its application. Yet no instance has been adduced in diplomatic or admiralty annals, which savours of a reference to such a rule. The approved publicists, to whom in national contests appeals are made, intimate none, and lay down the law in as broad and satisfactory terms, as your memorialists.

Your memorialists are aware, that even the advocates of Great Britain have not pretended to ascertain the existence of the pretended rule previous to the year 1756. To this period they refer for its first establishment, and from this origin deduce its universal reception. They pretend not to quote any foreign adjudications in point, but rest satisfied, that their own courts were competent to establish the law, and to give it binding efficacy over all nations. To such conclusions your memorialists confess themselves unable to bow. They conceive, that it is not within the authority of any nation to legislate for the rest; and that the law of nations being founded on the tacit convention of the nations, that observe it, can be binding only on those nations who have adopted it. Any other conclusion would lead to the most mischievous consequences, and oblige every nation to vindicate every other from aggressions, though its own rights might be undisputed. To give any precedent therefore a binding authority among nations, it must have been recognised as such by them, and no argument of its admission can be drawn from their silence, when the subject did not necessarily engage their immediate interest. An injurious pretension, when not applied to a particular state, might be easily dismissed without consideration.

But your memorialists, after all the enquiry, which they have been able to make, confess themselves wholly ignorant of any precedent of the present rule in the year 1756. The cases of that period, which are relied on as proof, seem to them *wholly inadequate for the purpose.*—As far as their researches extend, those cases respected the Dutch, and proceeded on a principle entirely different. These were cases, in which Dutch vessels became the carriers of colonial produce, the property of the enemies of Great Britain. This trade was vindicated on the ground of a special treaty between Great Britain and Holland, which provided that free ships should make free goods, and it was ultimately declared illegal, because enemy's goods were protected by that treaty only in the accustomed trade. No controversy appears to have been raised of the security of *neutral property* under similar circumstances. Nor should it be forgotten, that the Dutch protested in terms of the warmest reprobation against these condemnations, and asserted them to be contrary to the general law as well as the faith of treaties. These cases seem therefore certainly to fall in analogy with those which they are cited to govern. In the one the property is *neutral*; in the other *hostile*; in the one the trade is for the sole benefit of the neutral; in the other for the sole benefit of the belligerent. In a word, the one respects the rights of peaceful nations according to the public law, the other the construction of particular treaties. The precedent seems therefore to want every essential similitude, and is traverseable in every variety of application.

Yet admitting the precedent to be in point, if it stand solitary, if it have subsequently slumbered during nearly fifty years, unacknowledged abroad and unenforced at home, it surely cannot weigh on the present occasion. It is conceded by the British civilians, that during the American revolution the doctrine was entirely pretermitted, and the commerce of neutrals was pursued according to the ancient code. Many cases of this period might be cited from the admiralty records, which overthrow the rule; and expressly vindicate the opposite. If precedents are to decide the judgments of a tribunal established in G. B. under her sole appointment, and acting with open powers, must surely, when acquiescence creates the law, complete the renunciation of the contested rule. It is in vain to resort to conjectures or ingenious subtilities to fritter away authorities; the faith of the nation has been pledged by its tribunals, and it is too late now to travel out of the record. Place the whole argument of precedent in its strongest light, and it will appear that in the year 1756 the doctrine was first assumed, and in the year 1801 was first executed.

So far, however, from being recognised, this pretended rule of the year 1756 was pointedly denied at the moment of its introduction by the power affected by it; and on its late resuscitation has met the determined reprobation of the U. S. Our minister at the court of London, on the developement of it in the year 1801 remonstrated against it, in a spirited memorial. Indeed Russia, France, Sweden, Denmark, Prussia, Portugal and Austria in the celebrated league of armed neutrality in the year 1780 expressly declared, and Great Britain was then compelled to admit, as the law of nations, that all neutrals may freely navigate from port to port and on the coasts of the nations at war. Contraband articles and blockaded ports were the only admitted exceptions.—This solemn protest of Europe, after an elaborate discussion, in which all neutral nations assisted, is singly opposed by the instructions of Great Britain, and is to be outweighed by an obscure and resisted precedent. Nay more, the united voice of the marine world and the practice of ages, must yield to the interested decisions of a single state, and change with the varying policy of its cabinet. There is indeed no difficulty in referring principles to former times, when it suits the public convenience; and as the argument of ancient usage is of deep concern in national pretentions, it is too often a cover for unjustifiable spoliations.

With these preliminaries, your memorialists feel confidence in asserting, that goods not contraband, fairly purchased by the neutral, are free to the marked of every country, and protected from seizure, except in cases of blockade. Guided by these principles, they perceive a plain and honorable path for commerce.—Beyond them all is involved in uncertainty.

It is not the least singularity attending the conduct of the present war, that Great Britain has licensed her subjects in a trade, which she declares fraudulent in others; that she admits them unmolested to supply her enemy with