

October 31, 1873, the steamer *Virginius*, flying the American flag and having an American register, was, after an eight hours' chase, overtaken and captured by the Spanish man-of-war *Tornado*. The pursuit began and ended on the high seas. The *Virginius* was taken to Santiago de Cuba, where, after a summary trial by court-martial, ostensibly on a charge of piracy, fifty-three of her officers, crew, and other persons on board, embracing Americans, British subjects, and Cubans, were condemned to death and shot. The rest were held as prisoners. The British man-of-war *Niobe*, which arrived at Santiago November 8, 1873, demanded that no further executions of British subjects should take place till the case should have been investigated by higher powers. The charge of piracy appears to have been based upon the fact that

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the vessel was engaged, in the service of Cuban insurgents, in conveying arms, ammunition, and men to aid the insurrection in Cuba. November 14, 1873, Mr. Fish, who was then Secretary of State, telegraphed to General Sickles, United States minister at Madrid, as follows: "Unless abundant reparation shall have been voluntarily tendered, you will demand the restoration of the *Virginianus*, and the release and delivery to the United States of the persons captured on her who have not already been massacred, and that the flag of the United States be saluted in the port of Santiago, and the signal punishment of the officials who were concerned in the capture of the vessel and the execution of the passengers and crew." In case satisfactory reparation was not assured within twelve days, General Sickles was to close the legation and leave Madrid.^a

November 18, 1873, Admiral Polo, then Spanish minister at Washington, communicated to Mr. Fish a telegram from the Spanish minister of state, declaring that the Spanish Government was "resolved to abide by the principles of justice, to observe international law, to punish all those who shall have made themselves liable to punishment, regardless of their station; to ask reparation for offences that may have been done against us, and in our turn to make due reparation if right and our own conviction should so advise us." The Spanish Government, however, asked for time to ascertain the facts, alleging that a "conspiracy" had been "discovered in Cuba, which was to have acted in concert with the arrival of the vessel, which had already, on former occasions, landed supplies of war and filibustering expeditions, and, on this very occasion, had not her papers in order."^b

"Protocol of the conference held at the Department of State, at Washington, on the 29th of November, 1873, between Hamilton Fish, Secretary of State, and Rear-Admiral Don José Polo de Bernabé, envoy extraordinary and minister plenipotentiary of Spain.

"The undersigned, having met for the purpose of entering into a definitive agreement respecting the case of the steamer *Virginianus*, which, while under the flag of the United States, was on the 31st of October last, captured on the high seas by the Spanish man-of-war *Tornado*, have reached the following conclusions:

"Spain, on her part, stipulates to restore forthwith the vessel referred to, and the survivors of her passengers and crew, and on the 25th day of December next to salute the flag of the United States.

^a Mr. Fish, Sec. of State, to Gen. Sickles, min. to Spain, tel., Nov. 14, 1873, H. Ex. Doc. 30, 43 Cong. 1 sess. 29. See, also, For. Rel. 1874, 923-1117.

^b H. Ex. Doc. 30, 43 Cong. 1 sess. 73.

If, however, before that date Spain should prove to the satisfaction of the Government of the United States that the *Virginianus* was not entitled to carry the flag of the United States, and was carrying it at the time of her capture without right and improperly, the salute will be spontaneously dispensed with, as in such case not being necessarily requirable; but the United States will expect, in such case, a disclaimer of intent of indignity to its flag in the act which was committed.

"Furthermore, if on or before the 25th day of December, 1873, it shall be made to appear to the satisfaction of the United States that the *Virginianus* did not rightfully carry the American flag, and was not entitled to American papers, the United States will institute inquiry, and adopt legal proceedings against the vessel, if it be found that she has violated any law of the United States, and against any of the persons who may appear to have been guilty of illegal acts in connection therewith; it being understood that Spain will proceed, according to the second proposition made to General Sickles, and communicated in his telegram read to Admiral Polo on the 27th instant, to investigate the conduct of those of her authorities who have infringed Spanish laws or treaty obligations, and will arraign them before competent courts and inflict punishment on those who may have offended.

"Other reciprocal reclamations to be the subject of consideration and arrangement between the two Governments; and, in case of no agreement, to be the subject of arbitration, if the constitutional assent of the Senate of the United States be given thereto.

"It is further stipulated that the time, manner, and place for the surrender of the *Virginianus*, and the survivors of those who were on board of her at the time of her capture, and also the time, manner, and place for the salute to the flag of the United States, if there should be occasion for such salute, shall be subject to arrangement between the undersigned within the next two days.

"HAMILTON FISH.

"JOSÉ POLO DE BERNABÉ."

The text of this protocol may be found in H. Ex. Doc. 30, 43 Cong. 1 sess. 81; 63 Br. & For. State Papers, 1872-73, 389.

For the agreement entered into, Dec. 8, 1873, as to the details mentioned in the last paragraph of the protocol, see H. Ex. Doc. 30, 43 Cong. 1 sess. 84.

As to the trial of General Burriel, see President's message, Jan. 21, 1876, H. Ex. Doc. 90, 44 Cong. 1 sess.

"It is a well-established principle, asserted by the United States from the beginning of their national independence, recognized by Great Britain and other maritime powers, and stated by the Senate in a resolution passed unanimously on the 16th of June, 1858, that

'American vessels on the high seas in time of peace, bearing the American flag, remain under the jurisdiction of the country to which they belong, and therefore any visitation, molestation, or detention of such vessels by force, or by the exhibition of force, on the part of a foreign power is in derogation of the sovereignty of the United States.'

"In accordance with this principle, the restoration of the *Virginianus* and the surrender of the survivors of her passengers and crew, and a due reparation to the flag, and the punishment of the authorities who had been guilty of the illegal acts of violence, were demanded. The Spanish Government has recognized the justice of the demand, and has arranged for the immediate delivery of the vessel, and for the surrender of the survivors of the passengers and crew, and for a salute to the flag, and for proceedings looking to the punishment of those who may be proved to have been guilty of illegal acts of violence toward citizens of the United States, and also toward indemnifying those who may be shown to be entitled to indemnity."

President Grant, annual message, Dec. 1, 1873. (Richardson's Messages and Papers of the Presidents, VII. 241.) See *infra*, p. 946.

A copy of the protocol of Nov. 29 accompanied the message.

The Attorney-General, in an opinion mentioned in President Grant's special message of January 5, 1874, *infra*, found that the American citizen in whose name as owner the *Virginianus* was registered made, as required by law, an oath that there was "no subject or citizen of any foreign prince or state, directly or indirectly, by way of trust, confidence, or otherwise, interested in such ship or vessel, or in the profits or issues thereof"; that this oath was false, as the vessel was then the property of certain Cuban residents of New York, who furnished the funds for her purchase; that the American citizen who commanded the vessel when she left New York was cognizant of the facts; that various other persons on board testified to the same effect, stating that one of the Cuban owners navigated and controlled the vessel and treated it in all respects as if it were his property; that there were no sureties on the bond given by the ostensible owner and commander, though the law required it; that there was no insurance on the vessel, and that, when it left New York, the principal Cubans who took passage did not embark at the wharf, but went on board by a tug after the vessel had left New York. The Attorney-General therefore held that the registration was "a fraud upon the navigation laws of the United States"; but he added:

"Assuming the question to be what appears to conform to the intent of the protocol, whether or not the *Virginianus*, at the time of her capture, had a right, as against the United States, to carry the American flag, I am of the opinion that she had no such right, because she had not been registered according to law; but I am also

of the opinion that she was as much exempt from interference on the high seas by another power, on that ground, as though she had been lawfully registered. Spain no doubt has a right to capture a vessel with an American register and carrying the American flag, found in her own waters, assisting, or endeavoring to assist the insurrection in Cuba, but she has no right to capture such a vessel on the high seas upon an apprehension that, in violation of the neutrality or navigation laws of the United States, she was on her way to assist said rebellion. Spain may defend her territory and people from the hostile attack of what is, or appears to be, an American vessel, but she has no jurisdiction whatever over the question as to whether or not such vessel is on the high seas in violation of any law of the United States. Spain cannot rightfully raise that question as to the *Virginianus*, but the United States may, and, as I understand the protocol, they have agreed to do it; and, governed by that agreement, and without admitting that Spain would otherwise have any interest in the question, I decide that the *Virginianus* at the time of her capture was without right and improperly carrying the American flag."

Williams, At. Gen., Dec. 17, 1873, 14 Op. 340; For. Rel. 1874, 1113; H. Ex. Doc. 30, 43 Cong. 1 sess. 208.

"By direction of the President, I have the honor to inclose herewith a copy of this opinion and decision of the Attorney-General.

"The President directs me further to say that the conditions having thus been reached, on which, according to the protocol of the 29th of November last, the salute to the flag of the United States is to be spontaneously dispensed with, he desires that you will give the necessary orders and instruct the proper officers to notify the authorities of Santiago de Cuba of that fact, in time to carry out the intent and spirit of the agreement between the two Governments."

Mr. Fish, Sec. of State, to Mr. Robeson, Sec. of Navy, Dec. 17, 1873,
H. Ex. Doc. 30, 43 Cong. 1 sess. 210; For. Rel. 1874, 1115/1116.

"Spain having admitted (as could not be seriously questioned) that a regularly documented vessel of the United States is subject on the high seas in time of peace only to the police jurisdiction of the power from which it receives its papers, it seemed to the President that the United States should not refuse to concede to her the right to adduce proof to show that the *Virginianus* was not rightfully carrying our flag. When the question of national honor was adjusted, it also seemed that there was a peculiar propriety in our consenting to an arbitration on a question of pecuniary damages."

Mr. Fish, Sec. of State, to Mr. Adeé, chargé at Madrid, Dec. 31, 1873,
H. Ex. Doc. 30, 43 Cong. 1 sess. 69, 70; For. Rel. 1874, 976.

"On the 26th day of September, 1870, the *Virginius* was registered in the custom-house at New York as the property of a citizen of the United States, he having first made oath, as required by law, that he was 'the true and only owner of the said vessel, and that there was no subject or citizen of any foreign prince or state, directly or indirectly, by way of trust, confidence, or otherwise, interested therein.'

"Having complied with the requisites of the statute in that behalf, she cleared in the usual way for the port of Curaçao, and on or about the 4th day of October, 1870, sailed for that port. It is not disputed that she made the voyage according to her clearance, nor that, from that day to this, she has not returned within the territorial jurisdiction of the United States. It is also understood that she preserved her American papers, and that when within foreign ports she made the practice of putting forth a claim to American nationality, which was recognized by the authorities at such ports.

"When, therefore, she left the port of Kingston, in October last, under the flag of the United States, she would appear to have had, as against all powers except the United States, the right to fly that flag, and to claim its protection, as enjoyed by all regularly documented vessels registered as part of our commercial marine.

"No state of war existed, conferring upon a maritime power the right to molest and detain upon the high seas a documented vessel; and it can not be pretended that the *Virginius* had placed herself without the pale of all law by acts of piracy against the human race.

"If her papers were irregular or fraudulent, the offense was one against the laws of the United States, justiciable only in their tribunals.

"When, therefore, it became known that the *Virginius* had been captured on the high seas by a Spanish man-of-war; that the American flag had been hauled down by the captors; that the vessel had been carried to a Spanish port; and that Spanish tribunals were taking jurisdiction over the persons of those found on her, and exercising that jurisdiction upon American citizens, not only in violation of the rules of international law, but in contravention of the provisions of the treaty of 1795, I directed a demand to be made upon Spain for the restoration of the vessel, and for the return of the survivors to the protection of the United States, for a salute to the flag, and for the punishment of the offending parties.

"The principles upon which these demands rested could not be seriously questioned, but it was suggested by the Spanish Government that there were grave doubts whether the *Virginius* was entitled to the character given her by her papers; and that therefore it might be proper for the United States, after the surrender of the vessel and the survivors, to dispense with the salute to the flag, should such fact be established to their satisfaction.

"This seemed to be reasonable and just. I therefore assented to it, on the assurance that Spain would then declare that no insult to the flag of the United States had been intended.

"I also authorized an agreement to be made that, should it be shown to the satisfaction of this Government that the *Virginius* was improperly bearing the flag, proceedings should be instituted in our courts for the punishment of the offense committed against the United States. On her part Spain undertook to proceed against those who had offended the sovereignty of the United States, or who had violated their treaty rights.

"The surrender of the vessel and the survivors to the jurisdiction of the tribunals of the United States was an admission of the principles upon which our demands had been founded. I therefore had no hesitation in agreeing to the arrangement finally made between the two Governments—an arrangement which was moderate and just, and calculated to cement the good relations which have so long existed between Spain and the United States.

"Under this agreement the *Virginius*, with the American flag flying, was delivered to the Navy of the United States at Bahia Honda, in the island of Cuba, on the 16th ultimo. She was in an unseaworthy condition. In the passage to New York she encountered one of the most tempestuous of our winter storms. At the risk of their lives the officers and crew placed in charge of her attempted to keep her afloat. Their efforts were unavailing and she sank off Cape Fear. The prisoners who survived the massacres were surrendered at Santiago de Cuba on the 18th ultimo, and reached the port of New York in safety.

"The evidence submitted on the part of Spain to establish the fact that the *Virginius* at the time of her capture was improperly bearing the flag of the United States is transmitted herewith, together with the opinion of the Attorney-General thereon, and a copy of the note of the Spanish minister, expressing, on behalf of his Government, a disclaimer of an intent of indignity to the flag of the United States."

President Grant, special message, Jan. 5, 1874, H. Ex. Doc. 30, 43 Cong. 1 sess. 1.

As to the character and previous career of the *Virginius* see H. Ex. Doc. 30, 43 Cong. 1 sess. 85-145.

For the report of a United States naval board of inquiry on the sinking of the *Virginius*, see For. Rel. 1875, II. 1148.

"This Department has received despatches from the consuls of the United States at Puerto Cabello and Curaçao, relative to a regularly documented steamer of the United States, named the 'Virginius' or 'Virgin,' whose proceedings in that quarter do not appear to be of an exclusively commercial character. That vessel is reported to have even been charged with piracy in the courts of Curaçao, although from the particulars of the charge contained in the des-

patches adverted to, it is not deemed likely that it will be sustained. Still, under the circumstances, I am directed by the President to inform you that it is thought to be advisable, especially in view of the continuance of the civil war in Venezuela, and the supposed connection of the 'Virginius' or 'Virgin' with one of the parties to that war, that a vessel of the North Atlantic Squadron should visit Curaçao and ports of Venezuela. It is believed that the mere presence of such a vessel would tend to prevent injuries upon the persons and property of citizens of the United States as well as irregularities by the steamer adverted to." (Mr. Fish, Sec. of State, to Mr. Robeson, Sec. of Navy, Dec. 17, 1870, 87 MS. Dom. Let. 294.)

"In March last an arrangement was made, through Mr. Cushing, our minister in Madrid, with the Spanish Government, for the payment by the latter to the United States of the sum of \$80,000 in coin, for the purpose of the relief of the families or persons of the ship's company and certain passengers of the *Virginius*. This sum was to have been paid in three installments at two months each. It is due to the Spanish Government that I should state that the payments were fully and spontaneously anticipated by that Government, and that the whole amount was paid within but a few days more than two months from the date of the agreement, a copy of which is herewith transmitted. In pursuance of the terms of the adjustment I have directed the distribution of the amount among the parties entitled thereto, including the ship's company and such of the passengers as were American citizens. Payments are made accordingly, on the application by the parties entitled thereto."

President Grant, seventh annual message, Dec. 7, 1875. (Richardson's Messages and Papers of the Presidents, VII. 336.)

As to the amount and distribution of the indemnity, see President's message, Nov. 15, 1877, H. Ex. Doc. 15, 45 Cong. 1 sess.

For further correspondence, see President's message, March 29, 1878, H. Ex. Doc. 72, 45 Cong. 2 sess.

For a confidential circular, April 24, 1874, enclosing correspondence with the Spanish minister at Washington, see MS. Inst. Arg. Rep. XVI. 66.

As to the question of a claim by Spain for the loss of the steamer, see Mr. Fish, Sec. of State, to Mr. Cushing, min. to Spain, tel., March 1, 1875, MS. Inst. Spain, XVII. 197.

"In 1870, the *Virginius*, a vessel registered as the property of an American citizen, but in fact belonging to certain Cuban insurgent leaders, set sail from New York as an American ship, and after making sundry voyages for insurgent objects, found herself at Kingston in the first-mentioned year [1873]. There she took on board some men intended to be landed in Cuba, and after also shipping a quantity of fresh hands, who were ignorant of the true destination of the vessel, set sail ostensibly for Limon Bay in Costa Rica. While on her way to Cuba, but upon the open sea, she was chased by

and surrendered to the Spanish vessel, the *Tornado*. She was taken into Santiago de Cuba, and the greater part of those on board, including several British subjects shipped in Jamaica, were shot by order of the general commanding the place. When the *Virginius* was captured she was undoubtedly engaged in an illegal expedition, but she had committed no act of piracy, she was sailing under the flag of the United States and with American papers, she offered no resistance, and was in fact unfitted both for offence and defence by the character of her equipment. Although therefore the Spanish authorities had ample reason for watching her, for seizing her if she entered the Cuban territorial waters, and possibly even for precautionary seizure upon the high seas, no excuse existed for regarding the vessel and crew as piratical at the moment of capture. Had they even been seized while in the act of landing the passengers the business in which they would have been engaged would not have amounted to piracy. The element of violence would have been wanting. Invasion is in itself an act of violence. But an invasion does not take place when a hundred men land in a country without means of seriously defending themselves, and when their only immediate object is to join their fellow-rebels quietly and without observation. The British Government demanded and obtained compensation for the families of the British subjects who were executed. In their correspondence with the Government of Spain they did not complain of the seizure of the vessel, or of the detention of the passengers and crew, but argued that after this had been effected 'no pretence of imminent necessity of self-defence could be alleged, and it was the duty of the Spanish authorities to prosecute the offenders in proper form of law, and to have instituted regular proceedings on a definite charge before the execution of the prisoners;' maintaining further that had this been done it would have been found that 'there was no charge either known to the law of nations or to any municipal law, under which persons in the situation of the British crew of the *Virginius* could have been justifiably condemned to death.'"

Hall, International Law, 4th ed. 278-279. See infra, pp. 967, 980.