accompanied by the proviso that one belligerent should be obliged to grant no longer period than that granted by his opponent. Such a plan is both reasonable and practicable.

It is reasonable that one belligerent should not be under obligation to accord to his opponent more favorable treatment than that accorded to him by his opponent. It is practicable because the belligerent granting a given period to his opponent may under the reciprocity principle shorten the period to that accorded by his opponent.

Further to support this position may be adduced the practice of the present war in Europe. The German declaration of war against France of August 3, 1914, contained a provision for reciprocity in regard to treatment of merchant vessels, which France immediately met. The British Orders in Council of August 4, 1914, contained a similar plan for German vessels, but this was not carried into effect rather because of misunderstanding of telegrams, than because of lack of willingness on the part of Great Britain and Germany. The principle of days of grace was adopted as regards Austria-Hungary when Great Britain was informed that Austria-Hungary would treat British ships in a manner "not less favorable" than that proposed by Great Britain for Austro-Hungarian vessels. France likewise accorded reciprocal treatment to Austro-Hungarian merchant vessels.

It would seem proper that the United States should continue to support as reasonable and practicable a plan to which in actual test of war the great states have resorted, and that the principle of reciprocity in the grant of days of grace for innocent merchant vessels of one belligerent in the ports of the other at the outbreak of war should prevail.

GEORGE GRAFTON WILSON.

ARMED MERCHANT SHIPS

The question has been much discussed whether merchant ships of the enemy carrying arms for defensive purposes are to be considered as losing their mercantile character by this fact and are to be denied the privileges accorded by international law to enemy merchant vessels. The question has also been discussed since the outbreak of the great war whether the Declaration of Paris of 1856 forbidding privateering should in spirit, if not in the letter, prevent enemy merchant vessels from carrying arms, even for defensive purposes. The question has also arisen and has been the subject of diplomatic negotiations, with resultant tension,

whether neutrals can properly ship their goods upon such armed merchant vessels without properly subjecting them to the fate of the vessel carrying them; and, finally, whether neutral persons traveling upon such vessels are to be held as voluntarily subjecting themselves to the risk incurred by such vessels and, by assuming the risk, depriving themselves of the claim to protection of their governments, or, indeed, whether their governments have the right under such circumstances to protect their subjects or citizens in the premises.

It will clear the field of discussion, at least so far as the United States is concerned, to state that this government is not a party to the Declaration of Paris, that it is therefore not bound by its provisions, and that the United States is free to recognize the right to indulge in privateering should it desire to do so.

In the next place, it should be said, at least according to the practice of the United States, that an American citizen can not renounce the right of the government to protect him in an appropriate case, of which the government is the judge, because a citizen of the United States as such does not represent the United States, and a renunciation of a right can only be made by an official agent of the government acting within the scope of his agency. A familiar illustration from municipal law will make this distinction clear: A person injured by a tort may, if he choose, waive the civil injury; but if the tort be at one and the same time a crime, the injured person can not waive this, because he is not the agent of the public, and the appropriate agent of the public must determine whether or not prosecution shall take place.

With these two questions out of the way, the others may be taken up and considered.

It may be admitted that it is difficult to determine whether a gun is carried for a defensive or for an offensive purpose, but the circumstances of the individual case may be appealed to, as the armament required for one purpose differs from that necessary for the other. The view has been expressed that the duty of a merchant ship is not to resist if attacked, and that by defending itself it loses the character of a merchant ship and becomes a privateer, in the sense that it carries on hostile operations without becoming a public vessel: and as privateering is forbidden by the Declaration of Paris, which binds the contracting parties, the vessel in question has no legitimate standing in international law. It is not a private vessel converted to a public purpose, commissioned by the government and manned by officers of the navy; and, on the other

hand, it is not a merchant vessel plying its peaceful calling without taking part in hostilities. On September 19, 1914, the Department of State issued a circular which recognized that, "A merchant vessel of belligerent nationality may carry an armament and ammunition for the sole purpose of defense without acquiring the character of a ship of war," and prescribed certain rules for determining the offensive or defensive character of the armament in each case.[1]

The Department of State has the authority of Chief Justice Marshall in the case of *The Nereide* (9 Cranch, p. 388), decided by the Supreme Court of the United States in 1815, to the effect that a neutral may lawfully employ an armed belligerent vessel to transport his goods, and such goods do not lose their neutral character, by the armament, nor by the resistance made by such vessel, provided the neutral do not aid in such armament or resistance. The same question arose later and the judgment of the court in the case of *The Nereide* was affirmed in the case of *The Atalanta* (3 Wheaton, p. 409), decided in 1818.

It should be said that Mr. Justice Story delivered a vigorous dissenting opinion in the case of *The Nereide*, but, apparently regarding the question as settled by the holding in that case, he did not dissent in the case of *The Atalanta*.

It should also be said that, while there do not appear to be many adjudged cases, the practice of Great Britain, as stated by Sir William Scott in the case of *The Fanny* (1 Dodson, p. 443), decided in 1814, is opposed to *The Nereide* and accords with the dissenting opinion of Justice Story in that case. The distinction between *The Nereide* and *The Fanny*, and the questions involved in these decisions is thus pointed out by Chancellor Kent, in his Commentaries:

> In the case of *The Nereide*, the Supreme Court of the United States carried the principle of immunity of neutral property on board an enemy's vessel to the extent of allowing it to be laden on board an *armed* belligerent cruiser; and it was held that the goods did not lose their neutral character, not even in consequence of resistance made by the armed vessel, provided the neutral did not aid in such armament or resistance, notwithstanding he had chartered the whole vessel, and was on board at the time of the resistance. The act of arming was the act of the belligerent party, and the neutral goods did not contribute to the armament, further than the freight, which would be paid if the vessel was unarmed, and neither the goods nor the neutral owner were chargeable for the hostile acts of the belligerent vessel, if the neutral took no part in the resistance. A contemporary decision of an opposite character,

[1] The text of the circular is printed in the Special Supplement to the JOURNAL for July, 1915, p. 234.

on the same point, was made by the English High Court of Admiralty in the case of the *Fanny;* and it was there observed that a neutral subject was at liberty to put his goods on board the merchant vessel of a belligerent; but if he placed them on board an armed belligerent ship, he showed an intention to resist visitation and search, by means of the association, and, so far as he does this, he was presumed to adhere to the enemy, and to withdraw himself from his protection of neutrality. If a neutral chooses to take the protection of a hostile force, instead of his own neutral character, he must take (it was observed) the inconvenience with the convenience, and his property would, upon just and sound principles, be liable to condemnation along with the belligerent vessel.

The question decided in the case of the *Nereide* is a very important one in prize law, and of infinite importance in its practical results; and it is to be regretted that the decisions of two courts of the highest character, on such a point, should have been in direct contradiction to each other. The same point afterwards arose, and was again argued, and the former decision repeated in the case of the *Atalanta.* It was observed, in this latter case, that the rule with us was correct in principle, and the most liberal and honorable to the jurisprudence of this country. The question may, therefore, be considered here as at rest, and as having received the most authoritative decision that can be rendered by any judicial tribunal on this side of the Atlantic. (12th ed., Vol. 1, pp. 132–3.)

As far as the United States is concerned, the *Nereide* is the measured judgment of the Supreme Court, not overruled or departed from, but solemnly affirmed on a reconsideration of the question involved. The law seems to be clear, as far as the Supreme Court of the United States can make or expound the law.

JAMES BROWN SCOTT.

THE CONSEQUENCES OF THE SEVERANCE OF DIPLOMATIC RELATIONS

There seems to be some confusion in the public mind as to the consequences of a break in the diplomatic relations between two states.

When a certain diplomatic agent is unacceptable for a personal reason, his recall may be asked or he may even be sent out of a country, but the presumption is that a successor will be appointed. Suppose this not to take place, it is still no proof of strained relations, because the individual and not the state sending him is at fault.

It is quite otherwise when state A commits an unfriendly act which state B desires to resent. Their diplomatic relations may cease, *e. g.*, through B's recall of its agent to A, not because the agent conducting them is *persona non grata*, but because governmental intercourse implies an amicable understanding which no longer exists. The recall of a minister is a mark of displeasure aimed at the state. But even so,