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Terashima Munenori
Gaimukio

Sir

I received from your hand on the 22nd May 1874, a paper containing questions, to which, it was said on the envelope "replies are to be made in as brief delay as possible, by the Legal adviser to the Department of Foreign Affairs, for the information of H. J. M.'s Government" — This paper is not signed by any body, and bears no date.

The reason for replying to it is, that I consider your handing it to me as equivalent to a request or direction for me to reply. I therefore proceed to answer to the questions, in their numerical order

order, so far as I can do so, without making my reply unnecessarily long.

The first question has two branches

a "Can Mr Bingham's letter to General Le Gendre x x x be construed into an order not to proceed to Formosa"?

To this I reply, that the terms of the letter are clearly mandatory and imperative - Mr Bingham speaks in the tone of one who exercises authority, not in that of a man who is ^{giving} a caution, or offering advice. But the order does not forbid Gen. Le Gendre "to proceed to aboriginal Formosa". It is that he should not proceed to Formosa - any part of Formosa, aboriginal or civilized - "with an armed force".

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b "Was he (Mr Bingham) justified in issuing such an order, before Japan had placed herself in a state of war with China, and before he had ascertained whether General Le Gendre was enlisted for the Naval or Military force attached to the mission?"

I do not quite understand this question. Does it mean to ~~require~~^{enquire} was Mr Bingham justified in respect to the Government of Nippon? Or does it mean was Mr Bingham justified in respect to Gen. Le Gendre? Or finally does it mean, was he justified in respect to the Government of the United States; that is, was he authorized by the laws of the United States, or by his special instructions, to make the

order in question?

1st Was Mr Bingham justified in respect to the Government of Nippon?

In the absence of any special stipulations by treaty, and according to the General principles of international Law, it can not be doubted that His Majesty the Tenno, may go to war with China, or with any other nation, that he thinks he has good cause to make war upon. No third nation has any right to make objection, nor to interfere in the matter except in the way of friendly counsel.

In such a war His Majesty the Tenno has the unquestionable right to engage the services of any person in his dominions, whether a native subject or a foreigner. Moreover he has the right to invite foreigner

to come from their own country to serve him in war, as well as in peace.

But he has no right to recruit troops within the territory of a foreign power, which chooses to remain neutral. A good illustration of the opinion of the United States on this subject is to found in their conduct towards Mr. Crampton, the Minister of Great Britain and the three British Consuls at New York, Philadelphia, and Cincinnati, who were all dismissed because they had, in the United States, procured persons to go to Nova Scotia and Canada to enlist in a Foreign Legion, which Great Britain was raising to serve in the Crimean war of 1854 and 1855. But it is not criminal in the United States for a person to leave the country, for

the purpose of enlisting in a foreign war, nor even to transport other persons, who, of their own will, choose to go abroad for that purpose. The only duty which the United States suppose themselves to owe to foreign powers, is to prevent the gathering of expeditions within their territory, or jurisdiction, which are intended to make war upon states, tribes, or peoples with whom the United States are at peace. The principle is very plain: when the Government of the United States is at peace with any nation, or people it does not intend to allow citizens of the United States, so long as they are within the control of the United States, to go to war or to aid in a war, against a friendly people.

But while the General International

Law is what I have stated, we must look to see how that law has been modified by the special treaties between the United States and the Empire of Nippon.

The 10th article of the treaty, signed on the 29th day of July 1858 (19th sixth month, fifth year Ansei M'ma) provides that the Japanese Government "shall have the right to engage in the United States, scientific, naval and military men, artisans of all kinds and mariners to enter into its service" x x x and further "all persons engaged for its service may freely depart from the United States"

Now, if the Treaty stopped with these words, I should find no difficulty in saying that naval and

military men are to be engaged for
naval and military objects.

Their business is to make war,
on land or at sea.

But the Treaty goes farther.
It says " Provided that no articles
that are contraband of war shall be
exported, nor any persons engaged
to act in a naval or military capacity
while Japan shall be at war with any
power in amity with the United States "

By this proviso, the Government
of Dai Nippon has voluntarily re-
nounced the right, which it otherwise
would have had, to engage citizens
of the United States to act in a
naval or military capacity " while
Japan shall be at war with any power
in amity with the United States "

I think this proviso does not

prohibit Japan from employing persons to act in a naval or military capacity, who had been engaged before Japan was at war. It would violate the spirit of the proviso, though not its strict letter, to engage Americans, in the United States, for the purpose of their acting in a war, for which Japan should be making preparations.

Persons acting in a naval or military capacity, in the service ^{of Orléans}, although, by reason of their birth or nationalization, they may be citizens of the United States, are not, in my judgment, subject to the jurisdiction, nor entitled to the protection, of the United States.

Subjects of many nations have served the United States in war, and American citizens have served in several wars, without any blame to themselves or to

their sovereigns. If persons, who retain the character of citizens of the United States, and are in the service of Japan may not without blame to themselves, or to Japan serve Japan in a war begun after their entering the service it ^{is} not by reason of General international law ^{or} of the treaty of 1858, nor, as I think of the American Neutrality Law (next mentioned) but of a law of 1860, to be hereafter considered.

The act of Congress passed April 20, 1818, ^{is} commonly called the Neutrality Law. Its first section provides that if any citizen of the United States shall within the territory or jurisdiction thereof, accept a commission to serve a foreign Prince, State, Colony, district or people in war by land or sea, against any

Prince, State, Colony, district or people, with whom the United States are at peace, the person so offending shall be deemed guilty of a high misdemeanour, and shall be fined not more than two thousand dollars and shall be imprisoned not exceeding three years." The second section provides that "if any citizen of the United States shall within the territory or jurisdiction thereof, enlist or enter himself x x x x in the service of any foreign Prince, State, Colony, district or people as a soldier or as a marine or seaman on board of any vessel of war, letter of marque or privateer, every person so offending shall be deemed guilty of a high misdemeanour, and shall be fined not exceeding one thousand dollars and be imprisoned not exceeding three years"

These provisions are very general,
I can not suppose that the lawmakers
in 1818 contemplated any such state
of things as exists in regard to American
citizens who reside in Nippon. Such
persons, so long as they continue to be
American Citizens, are by the treaty
"within the jurisdiction" of the United
States.

But while they are personally
within the jurisdiction of the United
States they commit no offence against
the law of 1818, unless the prohibited
acts are done within the jurisdiction
of the United States.

An American Citizen who,
in France or in Germany, had
enlisted in the armies of either of
those powers during the great war
of 1840, would have committed no

offence against the law of 1818.

How is it, if within the Empire of Nippon, he enlists in the service of Nippon, or of any other power to make war upon a people with whom the United States are at peace?

I do not think that this is an offence under the law of 1818. If Nippon, or if the open ports of Nippon, are places within the jurisdiction "of the United States," then they are also within the jurisdiction of about fourteen other Treaty powers. This is absurd. Persons may be under two or more jurisdictions; but territory can only be subject to one. I think therefore that the lawmakers of 1818 must have intended by the words "within the jurisdiction" to comprehend the ships of the United States upon the high

seas, or the territory occupied by its land or naval forces when acting outside of the United States. They did not intend to include any foreign country, although the United States might, by reason of exceptional treaties, exercise jurisdiction over the persons of their citizens residing in such countries.

On the 22nd June 1860, Congress passed an act to carry into effect the provisions of treaties which gave judicial powers to certain American Consuls.

The 24th section of that act relates to the Ministers of the United States in China, Japan, Siam and Turkey.

It provides: "it shall be competent for each of the said Ministers to issue all manner of writs to prevent the citizens of the United States from enlisting in the military or naval service

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of either of the said countries to make war upon any foreign power with whom the United States are at peace, or in the service of one portion of the people against any other portion of the same people, and he may carry out this power by a resort to such force as may at the time be within his reach, belonging to the United States."

It will be observed that this law looks to prevention, not to punishment. It was probably enacted because the act of 1818 was not thought to apply to American citizens in China and Japan, and because some American adventurers, notably Ward and Burgevine, had taken an active part in the hostilities between the Chinese Government and the Tai Ping rebels. Burgevine had been given his aid in turn to

both sides.

I think the terms of this act
justified Mr. Bingham - as between
himself and Gen. Le Gendre - in issuing
just such an order as he did, without
waiting until "Japan had placed ^{her} ~~himself~~
self in a state of war with China."

The object of the law seems clearly
to be to arm the Minister with power
to arrest an American citizen before
he has enlisted.

To make an arrest after enlist-
ment might involve direct collision
between the force of the United States
and that of Nippon. Of course, the
Minister is found to satisfy himself
of the intent of his countryman to
enlist before he employs force to
prevent it.

If the intent did not exist,

or if the proof of it is insufficient, the citizen who is actually subjected to restraint or detention, can obtain a remedy against the Minister, in the Courts of his own Country.

If he wishes to do so, he will disregard a mere order and compel the Minister to resort to acts.

Mr Bingham has taken the responsibility of deciding, upon such information, as he obtained, that Gen. Le Genre, by proceeding "in the service of Japan to Formosa, with an armed force" would bring himself within the description of persons, enlisting to make war, upon a foreign power.

I do not believe that the word enlisting is used in such a technical sense that it is restricted to persons who formally sign an enlistment paper, or

take the naval or military oath of allegiance and obedience to superior officers. I suppose it includes all persons who in any way connect themselves with an expedition, designed to make war. A doctor or a cook, who actually attends such an expedition, with a knowledge of its objects and for the purpose of aiding their accomplishment, has in the sense of the law, enlisted, just as much as a combatant officer or private in the ranks.

Upon this principle two American citizens were in 1866 convicted of having made war upon Great Britain because they attended a Fenian (Frishter's) expedition from the United States into Canada, though one acted only as a Priest the other as a newspaper Reporter. Neither of them struck

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a blow, and there was no evidence that either of them sympathized with the objects of the expedition - except the fact that they were in company with it - or that one intended to do any more than to perform religious services, the other more than to write an account of the events as they might occur. Particulars of this case can be found in the Diplomatic Correspondence of the U. S. for 1867 & 1868 vol. 1. page 193. The Priest and the Reporter were sentenced to death, but the sentence was committed to imprisonment for twenty years I suppose they are still in prison.

I think that all the Americans who, in any capacity, were attached to an armed force proceeding to Formosa, are to be considered as enlisted and as

making war, if the expedition or any part of it makes war. But it must be against some power with whom the United States are at peace. Aboriginal tribes in Formosa, occupying part of an island inhabited largely by a civilized people, like the Chinese, can not be regarded as powers. They are, presumptively, subjects whether quiet or turbulent, of the recognized empire which has taken and held possession of the civilized portion of the island. They are, I imagine, in respect to China, to be regarded not as foreign States, if States at all; but as domestic, dependent tribes, or communities, administering some rude system of Government, each in its little domain, but all under the protection of China, and subject to such Chinese jurisdiction as China may find it necessary or convenient to exert.

Indian tribes in the United States are in the same anomalous condition. Their relation resembles, as says Mr Wheaton, (Part 1 chap. 2 § 14,) that of a ward to his guardian. The principal employment of the American Army is to endeavour to make them obedient wards. There is almost constant war between some of the Indian tribes, and the military forces of the United States; yet nobody imagines that the Indians are not ~~as~~ the subjects of the United States and within the jurisdiction of the United States. No ^{one} ever thought that the United States would regard an invasion of any Indian tribe, by a foreign nation as any else than an act of war upon the United States.

^{From} ~~The~~ respect ^{to} this principle ~~that~~ bordering nations from the incursions of whose savage

subjects the United States frequently suffer, are nevertheless exempt from invasion by American troops in pursuit of those savages. Thus, on the northern boundary, Indians pursued by American troops often cross the frontier line and take refuge in Canada in wild regions where there are no British troops. The American Government has asked permission to pursue them into Canada; but as the permission has been refused, the troops stop at the Canadian line. So on the boundary between Mexico and the United States, which for a long distance is the narrow and winding river, Rio Grande, Mexican Indians make frequent incursions and carry off the cattle of American settlers. When pursued they retire across the Rio Grande and Mexico

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decline to ^{permit} American troops to cross the river, and Mexico herself is unable to maintain sufficient forces in that remote part of her territory to restrain the Indians, the latter go unpunished.

I understand that the Chinese Government has made the following statement of its relation to the aboriginal tribes of Formosa, I gave ^{the} translation as made by Mr Williams American Charge d'affaires, from the original Chinese, communicated to Mr Wade, the Minister of Great Britain.

x x x "When the Japanese Minister, Soyeshima, was in Peking last year, he never consulted with the members of the Foreign Office in relation to taking troops to Formosa, and landing them on the east side of that island, to chastise the

aborigines; nor ~~we~~ have ^{we} received any
despatch, giving the reason why Japan
is mastering her forces. But all abo-
riginal tribes which like these unsubdued
people, are included within the territory
of China are within her jurisdiction.

Although we do not attempt to
interfere with their peculiar usages, or
bring them under the strict restraint of
our laws, still the regions they occupy
all form apart of the Middle Kingdom."

This being the point of view
in which China regards the aborigines
and their territory, I think it clear
that she has the right to consider the
landing of a military expedition upon
Formosa, without her previous consent,
as a hostile act. "A military force"-
says Mr Wildman, vol. 1, pages 65, 66-
can never gain immunities other than

those which war gives, by entering a foreign territory against the will of its sovereign"
 x x x It is for reasons like these that the general license to foreigners to enter the dominions of a friendly power is never understood to extend to a military force; and an army marching into the dominions of another sovereign may justly be considered as committing an act of hostility."

Gen. Halleck (International Law, page 96) after having stated it to be "An established principle that every sovereign state has the right to protect the inviolability of its own territory, and that any invasion is an act of hostility, which may be repelled by force" proceeds to ask: shall the state which is suffering from the piratical incursions, organized in and emanating from a neighbouring state,

do nothing in self defence and for self preservation? x x x Not at all. If the neighbouring state, from the want either of the will or of the ability, neglects to prevent such excursions, or to suppress such organizations, the threatened state may cross the frontier, and attack or destroy the threatened danger. But the act is one of hostility. and she performs it in the exercise of her belligerent right, not in the exercise of a Pacific right of self defence." Other authorities to the same effect might be cited.

The act of 1860, as it seems to me justified Mr. Bingham in respect to his government, and in respect to all persons who recognize its validity and consider themselves amenable to its provisions.

I do not think that the obligations

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of neutrality required the United States to restrain their citizens in Japan from entering the service of Japan in any capacity. If there be anything unjustifiable in their unnecessarily enacting such a law, the fault is with the Government of the United States, not with Mr. Bingham.

I do not think that the Government of Japan, was bound either by International law, or by treaty, to enforce the law of 1860, or to suffer it to be enforced, against any American citizen, in the service and within the jurisdiction of Japan, before it went to war. It was under no obligation to respect the protest of Mr. Bingham. He might, if he had thought proper, have directed the Commander of an American naval vessel to forcibly take American citizens out of an American ship, on the high sea, in which they were

proceeding to make war on a nation
in amity with the United States.

In that case the question would have
been one between the two Governments.

But he could not have taken them from
a Japanese vessel because that would
have been an act of war.

2.

Much that has been already said
is applicable in answer to the second and
to the succeeding questions. I do not
quite understand how an imposing mili-
tary force can be displayed without the
display conveying a tolerably distinct
intimation that it is to be used. Armies
do not go into a foreign country for
holiday parade. It is conceded in the
question that active warfare was a
possible phase of the expedition. I
can not see that a Commissioner who

lands with an army at his back which he may put into active warfare, when he thinks fit, is any less a belligerent than the soldier who carries a musket. The soldier may never discharge his musket; but nobody is bound to wait till he has done so, before he may be regarded as an enemy. So of the Commissioner, and of Gen. Le. Gendre as the Commissioner's assistant — Moreover Gen. Le. Gendre's character is to be judged by the statement that "under his immediate order were St. Com. Capel, and Lieut. Wapson," and that St. Com. Capel was "to reconnoitre the East Coast of the island in order to find a suitable landing for the mission on or in the immediate vicinity of the Bontan territory," and that he was attended by fifty mariners "to protect him in case of any attack by the Bontans,

who we had so many reasons to believe,
would at first be hostile" - In other words,
Lt. Com. Capel was "under the immediate
orders of Gen. Le Genere" prepared to resist
an anticipated attack from the Bontans.

I think this a military or naval employ-
ment hostile to the Bontans, and hostile
to China if, as I suppose, China claims
jurisdiction over the Bontans and their
territory.

I do not see that the former orders
of an American Admiral to Lt. Com.
Capel, are at all pertinent to this question.
Those orders do not contemplate any collision
with the Bontans.

What kind of service was to be
performed by Lt. Wapson is not stated.

He was, it is to be inferred, to aid the
expedition in some way, and therefore
comes under whatever ^{rule} ~~one~~ is applicable

to other members of it.

3.

The sending of the mission to
Aboriginal Formosa, taken in the sense
attached it in the Memorandum com-
municated to Mr. Bingham, may I
think, be construed, if China so elects, and
it has been undertaken without her per-
mission, not so much a declaration ^{of war} as a
war without declaration.

It is asked "wherein is the differ-
ence between the present action of Japan,
and the course taken by the British in
1864, as described, in the American Dip-
lomatic Correspondence for 1864, Mr. Allen
to Mr. Seward x x (Dip. Corr. 1864-68
vol. 1 page 499) and by the Americans in
1864 as recorded in the Report of the
Secretary of the Navy, 1864 x x"?

The first difference consists in

this: that the action of the British was not the action of the British Government, but that of a Consul, and the Commander of a Naval Steamer, officers whose conduct was not ordered by their Government and might have been disavowed by it, if China had remonstrated. — The second difference is, that the attempt of the British officers appears to have been to rescue, by ransom, if necessary, such of the crew of an American shipwrecked vessel as they might find alive. They did not appear to have intended to employ force against the savages but did so in self defence when the savages fired upon them from the bushes, without notice,

The unsuccessful attack by Admiral Bell upon the Formosan savages appears by his report to have been made on the 13th June 1864. That it was made without

the authority of his Government appears from the fact that on the 20th of June 1864 Mr Seward, the American Secretary of State, sent the instruction to Mr Burlingame, Minister in China, which is printed at page 498 of Vol. 1. *U.S. App. Corr.* for 1864-68. Mr Burlingame was instructed to "report whether the Chinese Government is established or acknowledged in any or in what degree, in the region where the atrocious transaction took place. If clearly so, then to demand investigation and punishment, with such indemnities as are possible."

If no organized Government exists you will suggest what form of proceeding should be adopted with a view to obtain redress and prevent such transactions in future."

I see no evidence that Admiral Bell had ascertained from the Chinese

authorities "that the inhabitants of Aboriginal Formosa were not subject to their laws." What the Secretary of the Navy says is, that on the arrival of Commander Febiger at Tai Wan Fu, three principal authorities of the island "claimed to be unable to bring to justice the perpetrators of the crime, who belonged to a horde of savages that were not obedient to their laws." There is a plain distinction between the duty of obedience and the actual fulfillment of that duty.

H.

It does not follow that "if the invasion of Aboriginal Formosa, by Admiral Bell, could have been construed into an act of war against China, it would not have been attempted without the sanction of Congress" - It is not uncommon for Admirals, distant from home, to violate the law - Mr Seward's instruction

to Mr Burlingame, No 213, Aug. 23. 1864 (Nip. Corr. 1864-68 vol. 1 page 507) which is cited in the question as showing that Admiral Bell's conduct received the approval of the President, shows nothing of the kind. Mr Seward quotes from Admiral Bell's report as follows:

"I am satisfied that the barbarities of those savages can not be permanently stopped until the Government at Peking be induced, by the action of the American and other foreign Ministers, to occupy all the villages and bays on the East Coast and on the South, and thus drive the Aborigines back to the interior of the island" - After reciting this, Mr Seward continues:

"The President desires that you (Mr Burlingame) will confer with the representatives of the western powers at Peking, and in cooperation with them, if it shall be

practicable, earnestly urge upon the Emperor's Government, the policy suggested by Admiral Bell" — What the President approved was not Admiral Bell's unauthorized and inglorious skirmish but his suggestion that the Government of China should be asked to drive the Aborigines into the interior. — This is a proof, so far as it goes, that the Government looked upon Aboriginal Formosa as being within the jurisdiction of China.

That China did not protect against the attack of Admiral Bell only proves that she did not feel any special indignation that strangers had assaulted her refractory subjects, and had no apprehension of ulterior purposes from a nation, which, through Mr Seward (page 498 of the volume last quoted) had declared "in no case do the United States desire to seize and hold possession

(page 507) that General Lew had issued a proclamation announcing the object of his mission - viz. the destruction of the "Kooluts for the murder of the crew of the American bark Rover". It also states that General Le Genere wanted the establishment of a fort "because of its asserting the Chinese authority where it had been so long denied". General Le Genere succeeded in obtaining the construction of a fort "a circular inclosure formed of trunks of palm trees and sand bags". In these three guns were mounted; over it the Chinese flag waves". The Chinese Government therefore asserted its authority and jurisdiction in precisely the manner which General Le Genere thought adequate.

The circumstance that the Chinese General Lew, was not a party to the conference between Gen. Le Genere and the savage chief

Tuketok does not appear to be any disclaimer, by Lew, of the jurisdiction of his Government. On the contrary if Lew had attempted to negotiate with Tuketok, upon any other than a purely military question growing out of his expedition - such as the surrender of Tuketok's warriors, or the exchange of prisoners, he would, so far as he could, have acknowledged that Tuketok and his band were a power, capable of treating on equal terms with the Government of China. Lew would not have ventured to say in behalf of China, what the American Consul with, out any visible authority, assumed to say in behalf of the United States "We are not unwilling to forget the past."

The question refers to the "Commercial Relations" of U. S. for 1869, and two other documents, which are not before ^{me}, and upon which I can therefore form no opinion.

6.

The sixth question presents Geographical and historical questions upon which I have too little knowledge to be competent to express an opinion.

7.

I think the only inference to be drawn from the protest of the American Minister is that ^{he} intended to comply with the act of Congress of 1860, and what he supposed to be the obligations of the United States to China.

8.

I am of the opinion that Japan did not violate any of the rights of the United States, or ignore any of the obligations towards that country under existing treaties, when she chartered the Steamer "New York"

The doctrine of the United States

was stated by President Pierce in his Message to Congress in December 1854, during the Crimean war "The laws of the United States do not forbid their citizens to sell to either of the belligerent powers articles contraband of war, or to take munitions of war or soldiers on board their private ships for transportation; and although in so doing the individual citizen exposes his property or person to some of the hazards of war, his acts do not involve any breach of national neutrality, nor of themselves implicate the Government. Thus during the progress of the present war in Europe, our citizens have without national responsibility therefore sold guns, powder and arms to all buyers, regardless of the destination of those articles. Our merchantmen have been and still continue to be largely employed by Great

the United States will exert their good offices, on being informed of the case, to bring about an amicable arrangement of the question." — I think it would be no excess of courtesy for Japan to detach American citizens from a mission which may have consequences calling for the mediation of the United States. It would especially embarrass the United States to apologize to China for the employment of persons who were in the American naval or military service.

11.

I am not able to say whether Mr Bingham's protest has been followed by any counterprotest, but can see no possible advantage in the issuing of such a protest. This Government can do what it thinks proper without

taking any "means of inducing Mr Bingham to reconsider his steps."

It would, in my judgment, be undignified and humiliating to take any measure, or write any paper, which would allow it to be supposed that the action of this Government depended, in the least, upon the assent of Mr Bingham, or of any other Foreign Representative.

As to the American Citizens connected with the Mission, I suppose they must have determined, before this time, whether their paramount duty is to obey the instructions of this Government or to obey the laws of the United States as interpreted to them by Mr Bingham. They will be responsible to the one Government or to the other for what they may do and for what

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they fail to do. They may find some difficulty in trying to serve two masters. They however never sought my advice and I have no disposition to volunteer it at this late day.

Respectfully submitted
E. Peshine Smith

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