The one instance that may be an exception [335] is *Cook v. United States*,[336] in which a divided Court held that a 1924 treaty with Great Britain that allowed the inspection of British vessels for contraband liquor and seizure if any was found had superseded the authority conferred by a section of the Tariff Act of 1922 [337] The difficulty with this case is that the Tariff Act provision had been reenacted in 1930,[338] so that a simple application of the rule that the later enactment governs should have caused a different result. It may be suspected that the low estate to which Prohibition had fallen and a desire to avoid a diplomatic controversy should the seizure at issue have been upheld influenced the Court's decision.

When Is a Treaty Self-Executing.—Several references have been made above to a distinction between treaties as self-executing and as merely executory, in which case they are enforceable only after the enactment of "legislation to carry them into effect." [339] But what is it about a treaty that makes it the law of the land and gives a private litigant the right to rely on it in a court of law? As early as 1801, the Supreme Court took notice of a treaty, and, finding it applicable to the situation before it, gave judgment for the petitioner based on it.[340] In *Foster v. Neilson*,[341] Chief Justice Marshall explained that a treaty is to be regarded "as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision." A treaty will not be self-executing, however, "when the terms of the [treaty] stipulation import a contract—when either of the parties engages to perform a particular act. . . ." When this is the case, "the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the court." [342]

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[335] Other cases, which are cited in some sources, appear distinguishable. United States v. Schooner Peggy, 5 U.S. (1 Cr.) 103 (1801), applied a treaty entered into subsequent to enactment of a statute abrogating all treaties then in effect between the United States and France, so that it is inaccurate to refer to the treaty as superseding a prior statute. In United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188 (1876), the treaty with an Indian tribe in which the tribe ceded certain territory, later included in a state, provided that a federal law restricting the sale of liquor on the reservation would continue in effect in the territory ceded; the Court found the stipulation an appropriate subject for settlement by treaty and the provision binding. *See also* Charlton v. Kelly, 229 U.S. 447 (1913).

[336] 288 U.S. 102 (1933).

[337] 42 Stat. 858, 979, § 581.

[338] 46 Stat. 590, 747, § 581.

[339] Medellin v. Texas, 128 S. Ct. 1346, 1356 (2008), quoting Whitney v. Robertson, 124 U.S. 190, 194 (1888).

[340] United States v. Schooner Peggy, 5 U.S. (1 Cr.) 103 (1801).

[341] 27 U.S. (2 Pet.) 253 (1829).

[342] 27 U.S. (2 Pet.) at 314. Generally, qualifications may have been inserted in treaties out of a belief in their constitutional necessity or because of some policy reason. In regard to the former, it has always apparently been the practice to insert