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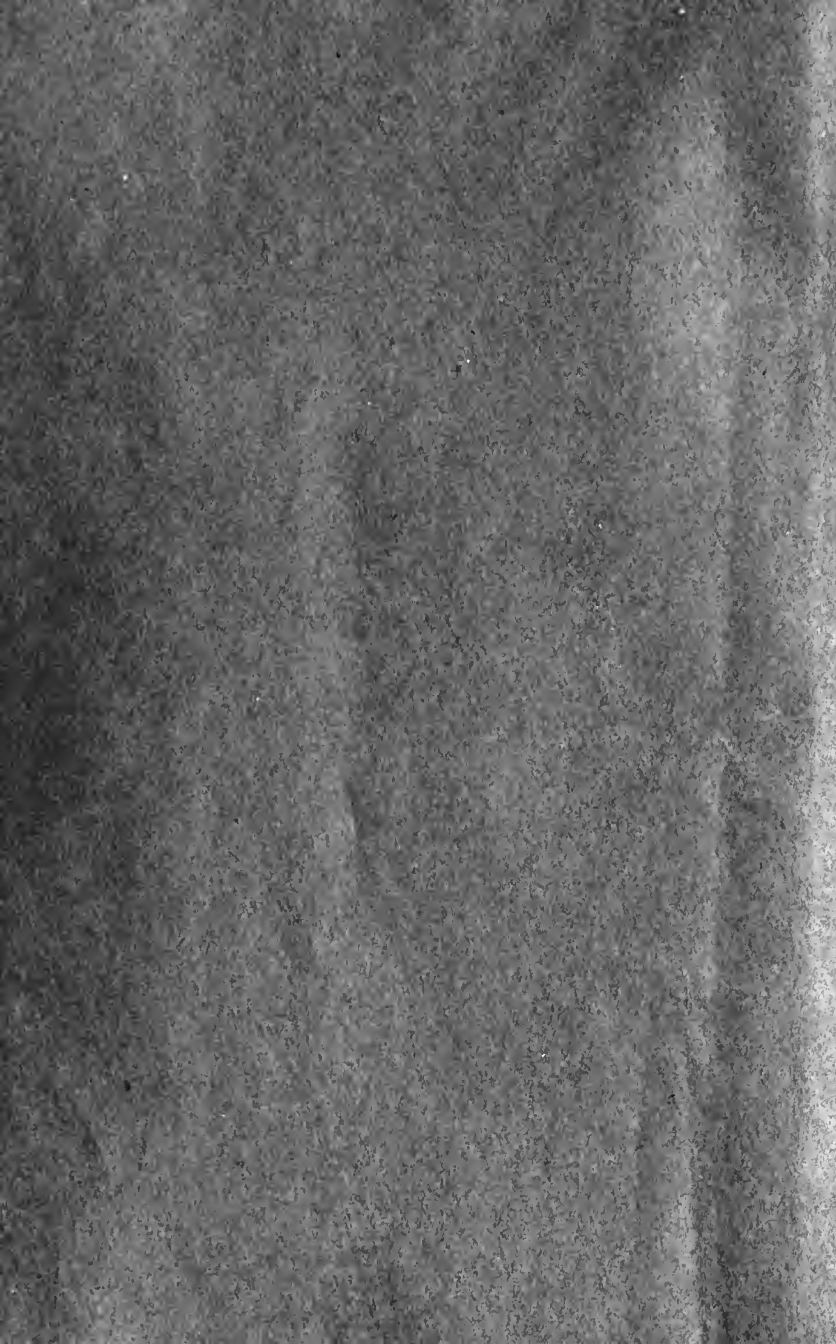

INTERNATIONAL LAW.

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COMMENTARIES

UPON

INTERNATIONAL LAW.

BY

SIR ROBERT PHILLIMORE, D.C.L.

MEMBER OF HER MAJESTY'S MOST HONOURABLE PRIVY COUNCIL, AND
JUDGE OF THE HIGH COURT OF ADMIRALTY.

Δίκα πολίων
Ασφαλὲς βάθρον, καὶ ὁμό-
τροπος Εἰράνα, ταμίαι
'Ανδράσι πλούτου, χρύσεαι
Παῖδες εὐβούλου Θέμιτος.' PIND. *Olymp.* xiii. 7.

'Justice is the common concern of mankind.'—BURKE, vol. v. p. 275, *Thoughts on the French Revolution.*

'Rectè a viris doctis inter desiderata relatum est, jus Naturæ et Gentium, traditum secundum disciplinam Christianorum.'—LEIBNITZ, xxxii. *De Notionibus Juris et Justitiæ*, p. 120.

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PREFACE

TO

THE SECOND EDITION.

Erratum.

P. vi. line 12, *for* external *read* eternal

Phillimore's International Law.

These events have not induced me to change the opinions which I had expressed in this volume as to the cardinal principles of International Law. On the contrary, I venture to think that they furnish a strong corroboration of them.

The "violence, oppression, and sword-law," which at this moment prevail in part of Europe, ought not

(*a*) The fourth volume, on Private International Law, was published in 1861.

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PREFACE

TO

THE SECOND EDITION.

I. THE FIRST EDITION of this volume, which was published in 1854, has been for some time out of print. The third volume, which closed the Commentaries on Public International Law, was published in 1857 (*a*). In the preface to that volume a summary of the historical events which in the interval of these three years (1854 to 1857) had affected International Law was given. I propose to place that summary in the present preface, adding to it a brief notice of historical events of the like character which have happened during the second interval of thirteen years (1857–1870).

These events have not induced me to change the opinions which I had expressed in this volume as to the cardinal principles of International Law. On the contrary, I venture to think that they furnish a strong corroboration of them.

The "violence, oppression, and sword-law," which at this moment prevail in part of Europe, ought not

(*a*) The fourth volume, on Private International Law, was published in 1861.

to shake conviction in the truth of these principles, while on the other hand they are confirmed by the consideration of events which, unconnected with the present war, have happened during the interval mentioned.

There always have been, and always will be, a class of persons who deride the notion of International Law, who delight in scoffing at the jurisprudence which supports it, and who hold in supreme contempt the position that a moral principle lies at its root.

The proposition that, in their mutual intercourse, States are bound to recognize the external obligations of justice apart from considerations of immediate expediency, they deem stupid and ridiculous pedantry. They point triumphantly to the instances in which the law has been broken (*b*), in which might has been substituted for right, and ask if Providence is not always on the side of the strongest battalions.

But in truth these objections are as old as they are shallow; they leave untouched the fact that there is, after all, a law to which States, in peace and war, appeal for the justification of their acts; that there are writers whose exposition of that law has been stamped as impartial and just by the great family of States, that they are only slighted by those upon whose crimes they have by anticipation passed sentence; that Municipal as well as International Law is often evaded and trampled down, but exists nevertheless, and that States cannot, without danger as well as disgrace, depart in practice from doctrines

(*b*) "Sed nimirum historiæ non tantum quæ juste, sed et quæ inique, iracunde, impotenter facta sunt memorant."—*Grotius, De J. B.* l. 2 c. xviii. s. vii.

which they have professed in theory to be the guide of their relations with the commonwealth of Christendom.

The axiom "populus jura naturæ gentiumque "violans suæ quoque tranquillitatis in posterum "rescindit munimenta" remains as true to-day as when it was written by its great author two centuries ago. The precedents of crime no more disprove the existence of International than of Civil Law (*c*).

II. In the chapter on INTERVENTION (*d*) the doctrine of what is known as the *Balance of Power* is considered.

The preservation of this balance is placed under the head of Self-defence, and upon this ground the intervention of a third State, in the adjustment of the relations between other States, must be principally justified. The doctrine has of late years been attacked and ridiculed. It certainly is liable to great abuse, but fairly explained means no more than the right of timely prevention of a probable danger.

As a matter of fact it has been directly recognized as a principle to be maintained by the great European Powers in recent conventions of great importance.

It will be seen, to pass by other instances, that the principle occupies an important place in the Protocol of 1831, which preceded the establishment of the independent kingdom of Belgium, and in the Treaty of Stockholm in 1855 (*e*). Whatever may be the value

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(*c*) See, also, concluding remarks of the third volume.

(*d*) See Pt. iv. ch. i. of this volume.

(*e*) "The Queen of England, the Emperor of the French, and the King of Sweden and Norway, being anxious to avert any complication *which might disturb the existing balance of power in* Europe, have resolved to come to an understanding with a view to secure the integrity of the united kingdoms of Sweden and Norway, and have named as their

of this principle, so recently and so solemnly recognized, it has never been more rudely "disturbed" than by the aggressions of Austria and Prussia upon Denmark in 1865, and of Prussia alone, in 1866, upon her weaker neighbours. It is indeed a melancholy repetition of history. We see in these acts of violence the same lust for aggrandisement, the same contempt for the weakness of the State whose territory is coveted, which animated the partitioners of Poland (*f*) and the rulers of Revolutionary and Imperial France.

Nevertheless, though right be thus dethroned by might for a season, justice, "the common concern of " mankind," is the only true policy of all States, and the precedents of wrong sooner or later recoil on the wrongdoer. It is some satisfaction to an English writer that England neither directly nor indirectly gave countenance to these acts of violence. In 1864, Earl Russell expressed the opinion of the Government and people of England as follows :—

" Her Majesty's Government would have preferred " a total silence instead of the task of commenting on " the conditions of peace. Challenged, however, by

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Plenipotentiaries to conclude a Treaty for that purpose," &c.—*Ann. Reg.* 1856, p. 323.

(*f*) " The principle of maintaining a balance of power, which for two centuries had distinguished Europe above other societies of nations, was now, for the first time, sacrificed; three great military Powers, instead of preventing each other's aggrandisement, conspired to share the spoils of a neighbour. The feebleness and turbulence of Poland furnished them with a strong temptation and with some pretext, and the Governments of France and England, the first influenced by the weakness of the Court, and the second influenced by the division of the people, betrayed their duty to Europe, and suffered the crime to be consummated. From that moment the security of all nations was destroyed."—*Life of Sir J. Mackintosh*, vol. ii. p. 158.

"M. de Bismarck's invitation to admit the moderation "and forbearance of the great German Governments, "Her Majesty's Government feel bound not to dis-"guise their own sentiments upon these matters. "Her Majesty's Government have indeed, from time "to time, as events took place, repeatedly declared "their opinion that the aggression of Austria and "Prussia upon Denmark was unjust, and that the "war, as waged by Germany against Denmark, had "not for its groundwork either that justice or that "necessity which are the only bases on which war "ought to be undertaken.

"Considering the war, therefore, to have been wholly "unnecessary on the part of Germany, they deeply "lament that the advantages acquired by successful "hostilities should have been used by Austria and "Prussia to dismember the Danish Monarchy, which "it was the object of the Treaty of 1852 to preserve "entire" (*g*).

It is worthy of consideration whether a State which can and does not intervene for the protection of another unjustly attacked does really provide for its own safety or secure that peace which it so justly prizes; whether there are not cases in which both national honour and national interests are best consulted by recognizing the international obligations of succouring an oppressed member of the commonwealth of civilized States; whether the conduct of a State may not be selfish, as well as that of an individual, and be attended with the like consequences. I may apply, with a slight alteration, the language of

(*g*) *Ann. Reg.* 1864, p. 237.

our present Prime Minister as to the rights of individual men to property and religious freedom, to the aggregates of men or States, and say, "The rights of "each *State* are the rights of his neighbour: he that "defends one is the defender of all; and he that "trespasses on one assails all" (*h*). It may safely be affirmed that in the present war (1870) France was the aggressor, that the immediate reason which she assigned for beginning it was neither true nor adequate. The choice by the Spaniards of a Hohenzollern, by whomsoever suggested, for the throne of Spain was not an act which disturbed the balance of power, and neither threatened the general liberties of Europe nor endangered the safety of France. But is it not most probable, or indeed morally certain, that if France had not refused to cooperate with England and assist Denmark in her noble war of self-defence in 1865, or had aided the minor States whom Prussia absorbed in 1866, the present war, which bids fair to be at least as disgraceful to Christendom as any in which Christian States have ever been engaged, would not have taken place? Let those who deride the notion that a State has International duties weigh well the following words of M. Prevost-Paradol, uttered but two years ago:—

"Le démembrement du Danemark, toléré par "nous, malgré les offres formelles de concours que "nous faisait alors l'Angleterre pour empêcher une "iniquité si dangereuse, les encouragements que la "Prusse a reçus de nous dans ses desseins déclarés "contre l'Autriche, le secours qu'avec notre aveu,

(*h*) Letter to the Bishop of Aberdeen in 1852, p. 14. "The rights of each *man*."

" sinon par notre ordre, lui a prêté l'Italie, sont des
" faits qui n'ont plus désormais qu'un intérêt histo-
" rique, sur lesquels il serait sans intérêt de revenir,
" et qu'on peut abandonner au jugement sévère de
" l'équitable postérité " (*i*).

III. The evils which result from this state of things are not transient; they tend to render permanently insecure the mutual relations of independent States.

Much of the energy, freedom, and vigour which have animated, as well as the arts and sciences which have embellished and enriched Christendom may be traced to the free competition and emulation arising from the existence of States of no considerable territorial grandeur, but members of a commonwealth which proclaimed that " Russia and Geneva had " equal rights " (*k*).

The prevailing notion, unhappily not confined to Europe, that a State must seek territorial aggrandisement as a condition of her welfare and security is a vulgar relapse into barbarous times, and fraught with future misery to the world (*l*). Hence the great evil of enormous standing armies, perpetual menaces to the liberties of mankind; hence the miserable palliations of wrong and robbery under the specious titles of " rectification of frontiers " and the like.

Hence the contempt for the feelings and wishes of the inhabitants of territories, incorporated like brute animals, by brute (*m*) force, into the "rectified" State.

(*i*) *La France nouvelle*, par *M. Prevost-Paradol*, ch. iii. p. 373.

(*k*) Pt. ii. ch. i. of this volume.

(*l*) *Mackintosh, Memoirs*, vol. ii. p. 214.

(*m*) " La force matérielle, la force brutale, la guerre, puisqu'il faut l'appeler par son nom." Chambre des Députés, 31 janvier 1848.—*Guizot, Hist. parl. de la France*, t. v. p. 555.

"D'un premier mal naîtraient une foule de maux. "Reconnaissons donc que l'injustice est un mauvais "fondement, sur lequel le monde politique ne saurait "bâtir que pour sa ruine" (*n*).

This mode of annihilating the liberties of free men did not, speaking only of modern times, it must be admitted, begin with these later German wars. It was the radical vice and the dissolving element of the conventions which closed the European wars against France, 1814–15.

The transference of provinces and kingdoms from one potentate to another, without the consent of the transferred inhabitants, was strongly condemned at the time by the wisest statesmen and jurists of the British Parliament (*o*). Subsequent events have proved the wisdom as well as the justice of this condemnation.

IV. The rights of the people thus denied in Germany have been recognized in another part of the European Continent in a very remarkable manner. The kingdom of Italy, created during the interval of which we are speaking, has been founded upon the basis of consulting the will of the inhabitants; and while these pages are being written the remaining dominions of the Pope and Rome herself are, according to the suffrage of their inhabitants, being united to this kingdom.

V. The means of ascertaining the wish of the people are open to considerable doubt and difficulty. The invention of the *plébiscite* is capable of being

(*n*) *Mémoire raisonné* by Talleyrand, in 1814, against the dismemberment of Saxony.

(*o*) Ch. xiv. of this volume.

used as an engine of despotism as well as of freedom. If Italy has acquired province after province, and city after city, by this instrument, by the same she has lost and France has acquired Nice and Savoy—an acquisition from which she has derived no real benefit, and incurred much odium, and which she made (*p*) in opposition to the warning and wishes of her ally Great Britain. I may be allowed to put in contrast with this mistaken policy the cession, by England, in 1863, with the consent of the Great Powers, of the Ionian Islands to Greece—an act in which real homage was paid to the principle of consulting the wishes and feelings of the subjects of acquired territory.

In a civil war (*q*) the stronger party will not allow the wish of the weaker party to be so ascertained, nor, if ascertained, pay attention to it, and the intervention of a third Power for the purpose of securing and giving effect to this expression of opinion, such as the Prince of Orange in the English, the King of France in the American, or the King of Sardinia in the Italian revolution, cannot take place without the existence of a war between this third Power and the other belligerent in the civil contest.

I suppose it would not be denied that, in the recent American civil war, the Southern States would have

(*p*) Lord Russell to Lord Cowley, July 5, 1859: "Her Majesty's Government have learned with extreme concern that the question of annexing Savoy to France has been in agitation. . . . . If Savoy should be annexed to France, it will be generally supposed that the left bank of the Rhine, and the 'natural limits,' will be the next object; and thus the Emperor will become an object of suspicion to Europe, and kindle the hostility of which his uncle was the victim."—*Ann. Reg.* 1860, p. 243.

(*q*) Pt. iv. ch. i. of this volume.

separated themselves from the Northern if the expression of the wishes of the inhabitants, by a vote of universal suffrage or a *plébiscite*, could have enabled them to effect this disunion, even when the civil war first broke out, and the Government of Washington declared its steadfast intention of not interfering with the status of slavery in the Southern States.

VI. The application of the doctrine of INTERVENTION to Turkey (*r*) has produced events of great importance during the interval mentioned.

Turkey has been formally, and in a manner to place the question beyond all doubt, admitted, by the Treaty of Paris, into the family of States which are bound, not only, as all States are, by the principles of PUBLIC INTERNATIONAL LAW, but by those usages and customs which constitute what may be considered the Positive Law of Christian Communities. The object of the Treaty of Paris is to secure, "through effectual and reciprocal guarantees, the "independence and integrity of the Ottoman Em-"pire" (*s*). This result is the subject of a *common Guarantee* (*t*). The Plenipotentiaries declare that "the Sublime Porte is admitted to participate in the "advantages of the Public Law and system (*concert*) "of Europe" (*u*). This proposition must receive, as to PRIVATE INTERNATIONAL LAW, some obvious limitation from the very nature of Mohammedanism: though it be true that this religion is professed by a

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(*r*) Pt. ii. ch. i. of this volume.

(*s*) Preamble.

(*t*) Article vii.

(*u*) Art. vii. of the *Treaty of Paris*, 30 March, 1856.

comparatively small number of the subjects of European Turkey; but the proposition holds good as to PUBLIC INTERNATIONAL LAW; and the fact which it affirms marks an important epoch in the History of the Progress of International Jurisprudence. For if Turkey has acquired the Rights, she has also subjected herself to the Duties of a civilized Community. How long this new condition of things, so utterly at variance with the former traditions and habits of Christendom, may endure, is a speculation without the province of this work. It is to be remarked, however, even in this place, that this condition is the more complicated because the same Treaty which recognizes this quasi-Christian *status* (x) of the Turkish Empire, contains the following most singular provision, which might almost seem intended at once to recognize and to prohibit the Right of INTERVENTION by the Powers of Christendom on behalf of their co-religionists:—

"His Imperial Majesty the Sultan having, in his "constant solicitude for the welfare of his subjects, "issued a firman which, while ameliorating their "condition without distinction of religion or of race, "records his generous intentions towards the Chris-"tian population of his Empire, and wishing to give "a further proof of his sentiments in that respect, "has resolved to communicate to the Contracting "Parties the said firman, emanating spontaneously "from his Sovereign Will.

"The Contracting Powers recognize the high value "of this communication. It is clearly understood

(x) The Sultan has even received from the Queen of England the essentially Christian Order of the Garter.

"that it cannot, in any case, give to the said Powers "the right to interfere, either collectively or sepa- "rately, in the relations of His Majesty the Sultan "with his subjects, nor in the internal administration "of his Empire" (*y*).

It remains to be seen whether this firman be put into *bona fide* execution, or whether M. Guizot be right in (*z*) his opinion that European intervention in Turkey is at once inevitable and of no avail. The immiscible characters of Christian and Turk are still attested by the exemption of the former from the civil and criminal jurisdiction of Turkish tribunals.

The *Principalities of Moldavia and Wallachia and of Servia* are placed under the *Suzeraineté* of the Porte, and the *Guarantee* of the Protecting Powers, but

(*y*) Article ix.

(*z*) "Il y a, dans les relations de l'Europe chrétienne avec l'empire ottoman, un vice incurable : nous ne pouvons pas ne pas demander aux Turcs ce que nous leur demandons pour leurs sujets chrétiens, et ils ne peuvent pas, même quand ils se résignent à nous le promettre, faire ce que nous leur demandons. L'intervention européenne en Turquie est à la fois inévitable et vaine. Pour que les gouvernements et les peuples agissent efficacement les uns sur les autres par les conseils, les exemples, les rapports, et les engagements diplomatiques, il faut qu'il y ait, entre eux, un certain degré d'analogie et de sympathie dans les mœurs, les idées, les sentiments, dans les grands traits et les grands courants de la civilisation et de la vie sociale. Il n'y a rien de semblable entre les chrétiens européens et les Turcs ; ils peuvent, par nécessité, par politique, vivre en paix à côté les uns des autres ; ils restent toujours étrangers les uns aux autres ; en cessant de se combattre, ils n'en viennent pas à se comprendre. Les Turcs n'ont été en Europe que des conquérants destructeurs et stériles, incapables de s'assimiler les populations tombées sous leur joug, et également incapables de se laisser pénétrer et transformer par elles ou par leurs voisins.

"Combien de temps durera encore le spectacle de cette incompatibilité radicale qui ruine et dépeuple de si belles contrées, et condamne à tant de misères tant de millions d'hommes ? Nul ne peut le prévoir ; mais la scène ne changera pas tant qu'elle sera occupée par les mêmes acteurs."—*Guizot*, *Mémoire de mon Temps*, t. vi. ch. xxxvii. pp. 257–8

without "any *separate* right of interfering in their "internal affairs" (*a*).

VII. With respect to INTERVENTION in the internal affairs of an independent State (*b*), *Greece* during the Russian war (1856) afforded an instance in which this exceptional right, the offspring of necessity, has been exercised both by France and England, as it should seem upon two grounds:—(1) That the sending of foreign troops to Greece was necessitated by the unneutral conduct of the Government of that country towards Russia, the enemy of France and England; (2) and also that this course was justified by the open, notorious, and admitted insecurity of life and property to French and English subjects commorant or resident in Greece. It should also be added, that Greece does not appear to have formally protested against, or seriously objected to—probably on account of the undeniable inefficiency of her own internal police—the temporary introduction of these foreign troops into her territory (*c*).

(*a*) Articles xxii.–xxviii.

(*b*) Pt. ii. ch. ii. of this volume.

(*c*) "It cannot be denied," Count Walewski says, "that Greece is in an abnormal state. The anarchy to which that country was a prey, has compelled France and England to send troops to the Piræus at a time when their armies, nevertheless, did not want occupation. The Congress knows in what state Greece was; neither is it ignorant that that in which it now is, is far from being satisfactory. Would it not therefore be advantageous that the Powers represented in the Congress should manifest the wish to see the three protecting Courts take into serious consideration the deplorable situation of the kingdom which they have created, and devise means to make provision for it?

"Count Walewski does not doubt that the Earl of Clarendon will join with him in declaring that the two Governments await with impatience the time when they shall be at liberty to terminate an occupation to which nevertheless they are unable without the most serious inconvenience to put an end, so long as real modifications shall not be introduced into the state of things in Greece."—*Extract from 22nd Protocol to Treaty of Paris* (1856).

VIII. The INTERVENTION of different Foreign Powers at different periods in the affairs of Rome, on the ground of preserving the anomalous position of the Pope as a temporal prince, appears at last to be at an end. The whole question of the International position of the Pope is considered in the second volume of this work (*d*).

IX. There is a kind of INTERVENTION which is touched upon in this volume—though dealt with at greater length in the later volume, which relates to International Duties and Rights in time of War—

(*d*) The following passages are to be found in the Twenty-second Protocol to the Treaty of Paris, 1856:—"The first Plenipotentiary of France then observes that the Pontifical States are equally in an abnormal state; that the necessity for not leaving the country to anarchy, had decided France as well as Austria to comply with the demand of the Holy See by causing Rome to be occupied by her troops, while the Austrian troops occupied the Legations.

"He states that France had a twofold motive for complying without hesitation with the demand of the Holy See, as a Catholic Power and as an European Power. The title of eldest son of the Church which is the boast of the Sovereign of France makes it a duty for the Emperor to afford aid and support to the Sovereign Pontiff; the tranquillity of the Roman States and that of the whole of Italy affects too closely the maintenance of social order in Europe for France not to have an overbearing interest in securing it by all the means in her power. But, on the other hand, it is impossible to overlook the abnormal condition of a Power which, in order to maintain itself, requires to be supported by foreign troops.

"Count Walewski does not hesitate to declare, and he trusts that Count Buol will join in the declaration, that not only is France ready to withdraw her troops, but that she earnestly desires to recall them so soon as that can be done without inconvenience as regard the internal tranquillity of the country and the authority of the Pontifical Government, in the prosperity of which the Emperor, his august Sovereign, takes the most lively interest.

"The first Plenipotentiary of France represents how desirable it is for the balance of power in Europe that the Roman Government should be consolidated in sufficient strength for the French and Austrian troops to be able, without inconvenience, to evacuate the Pontifical States."—*Ann. Reg.* 1860, p. 215.

See also last page of this volume.

the indirect and direct Intervention of subjects of a neutral State in a war.

During the recent civil war in the United States of North America, in which England observed a strict neutrality, the principles of International Law, which England had for a long period of time upholden and enforced when belligerent, were put to a severe trial. Several grave questions of International Law were raised and discussed during this great civil war. Among them were thefollowing :—(1.) The RECOGNITION of revolted States as *de facto* Governments by a neutral Power. All the neutral States recognized the Southern Confederacy as a *de facto* Government, so far as belligerent rights and neutral obligations were concerned. But they did not accredit diplomatic agents to this *de facto* Government. It would have been perfectly competent to them to have done so without any breach of neutral duty (*e*), and indeed if any precedent for such a step had been wanting, it would have been found in the conduct of the United States, who had always exercised their right, both of recognizing without delay as *de facto* Governments the Colonies in America which had revolted from European kingdoms, and of sending diplomatic representatives to them. President Grant, in his mes-

(*e*) More especially as the greatest conflict of opinion prevailed amongst the highest American authorities on the vital point of the liberty of a State to separate herself from the Union.

1860. President Buchanan asserts that Congress has no power to coerce a State which wishes to withdraw from the Union.—*Ann. Reg.* p. 283.

1865. President Johnson: "It is not one of the rights of any State Government to renounce its own place in the Union."—*Ann. Reg.* p. 293.

1867. President Johnson: "Candour compels me to declare, there is no Union as our fathers understood the term."—*Ann. Reg.* p. 291.

sage to Congress, 1869, said: "The people and Go-
"vernment of the United States entertain the same
"warm feelings and sympathies for the people of
"Cuba, in their pending struggle, that they mani-
"fested throughout the previous struggles between
"Spain and her former colonies in behalf of the
"latter. But the contest has at no time assumed
"the conditions which amount to a war in the sense
"of International Law, or which would show the
"existence of a *de facto* political organization of
"the insurgents, sufficient to justify a recognition of
"belligerency.

"The principle is maintained, however, that this
"nation is its own judge when to accord the rights
"of belligerency, either to a people struggling to
"free themselves from a Government they believe to
"be oppressive, or to independent nations at war
"with each other" (*f*).

(2.) The INVIOLABILITY OF AN ENVOY on board a neutral ship on the high seas (*g*). This is a subject which, whatever doubt might once have existed respecting it, must now be considered as settled in the affirmative by the consent of all civilized nations. (3.) As to BLOCKADE and CONTRABAND, the rights of the belligerent and the obligations of a neutral with respect to them were fully enforced, though the blockade was on a most gigantic scale, pressed most severely upon neutral commerce, and inflicted especial distress upon the manufacturing population of England.

X. (4.) There remains one question of the

(*f*) *Ann. Reg.* 1869, pp. 305, 306.

(*g*) See vol. ii. pt. vi. ch. ii. as to Ambassadors generally.

gravest importance, namely, the RESPONSIBILITY OF A STATE FOR (*h*) THE ACTS OF HER CITIZENS, involving the duty of a neutral to prevent armaments and ships of war issuing from her shores for the service of a belligerent, though such armaments were furnished and ships were equipped, built, and sent without the knowledge, and contrary to the orders, of her Government.

The question to what extent the State is responsible for the private acts of its subjects (*civitasne deliquerit an cives?*) is one of the most important and interesting parts of the law which governs the relations of independent States. The subject is discussed in these volumes, but the following propositions may be recapitulated here.

It is a maxim of general law, that so far as foreign States are concerned, the will of the subject must be considered as bound up in that of his Sovereign.

It is also a maxim that each State has a right to expect from another the observance of international obligations, without regard to what may be the municipal means which it possesses for enforcing this observance.

The act of an individual citizen, or of a small number of citizens, is not to be imputed without clear proof to the Government of which they are subjects.

A Government may by *knowledge* and *sufferance*, as well as by direct *permission*, become responsible for the acts of subjects whom it does not prevent from the commission of an injury to a foreign State.

A Government is presumed to be able to restrain the subject within its territory from contravening

(*h*) Pt. iv. ch. i. of this volume.

the obligations of neutrality to which the State is bound.

The principal matters which have at various times and in various forms given rise to complaints on the part of belligerents with respect to the conduct of the neutral States are (I pass over, in this brief notice, the question as to loans of money):—

(1.) The furnishing from a neutral territory arms, ammunition, and the various articles which are, according to the circumstances, to be considered as contraband.

(2.) The enlistment of soldiers or sailors in a neutral territory to be employed in the service of a belligerent.

(3.) The furnishing ships of war to a belligerent. It is important to remember, in the consideration of these matters, not only what the *reason of the thing* might suggest, but what the *usage of States* has sanctioned.

Having regard to the reason of the thing, it may seem very difficult to draw any distinction between the duty of a neutral Government with respect to the enlistment within the territory of military forces on behalf of a belligerent, and the permission to supply within the territory munitions of war to a belligerent. To furnish cannon may be often as great an assistance as to furnish men to the belligerent. "Verum "est dictum," says Grotius, "in hostium esse partibus "qui ad bellum necessaria hosti administrat;" and in the *Mémoire justificatif* (*i*) it will be seen that

(*i*) *Mémoire justificatif pour servir de réponse à l'exposé des motifs de la conduite du roi de France relativement à l'Angleterre* (*Miscellaneous Works of Edward Gibbon*, ed. 1854, vol. v. p. 1), written by Gibbon, by desire of

England *then* considered that the permission accorded by the French Government for the export of munitions of war from French ports to the revolted American colonies (*la licence effrénée d'un commerce illégitime*) was alleged as one justifying cause of the war which England had then declared against France. France and some other States have provided (*j*), by their municipal or constitutional law, that no munitions of war shall be fabricated without the "*autori-*" "*sation*" of the Minister of War, and that their exportation may be forbidden generally, or for a particular period or destination.

But with respect to the established modern usage of nations, undoubtedly a clear and decided practical distinction between these things is very generally, though not universally, made, and thus while *foreign enlistment* is strenuously prohibited as inconsistent with neutrality by the United States, the *sale of contraband goods* at home, and the *carriage* of them subject to the liability of seizure, are as strenuously insisted upon as being consistent with neutrality. "There is nothing" (says the high authority of Mr. Justice Story), "in our laws, or in the laws of "nations, that forbids our citizens from sending "armed vessels, as well as munitions of war, to "foreign ports for sale. It is a commercial adven- "ture which no nation is bound to prohibit, and "which only exposes the persons engaged in it to "the penalty of confiscation" (*k*). England, how-

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Lord Chancellor Thurlow, and Lord Weymouth, Secretary of State in 1778. *Ib.* vol. i. p. 234.

(*j*) See pt. iv. ch. i. of this volume.

(*k*) *The Santissima Trinidad, Wheaton's Rep.* vii. p. 340.

ever, is by her existing law enabled to prevent the exportation of munitions of war and provisions (*l*). But the enforcement of this law has always been considered a question of domestic policy. It forms a portion of her Custom House statute; and corresponds with a similar clause enabling the Crown to restrict the importation of the same articles.

During the last war with Russia, Her Majesty, being a belligerent, issued a proclamation, prohibiting the exportation of munitions of war, under the authority of this statute.

This statute was not put in force during the late American civil war, nor during the subsequent war between Spain and Chili, nor the present war between France and Prussia.

The Crown has generally been content to issue a proclamation announcing its neutrality, calling upon all subjects to abstain from affording aid to any belligerent, and warning them that if they carry contraband or break blockade, they will receive no protection. This appears to be the course pursued by France, Sweden, Spain, and Prussia.

The latter State did not exert any authority to prevent her subjects from dealing in contraband during the Crimean war, in which she was neutral; but is known to have liberally supplied belligerent Russia with ammunition and arms. Indeed, Prussia has gone farther than most States in not restraining commerce in this matter, having a Treaty with the United States of America, which provides that in the case of one of the contracting parties being engaged in war with any other Power, no arms,

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(*l*) See the section at length, Appendix vii., p. 562.

ammunition, or military stores of any kind carried by the other party shall be deemed contraband, so as to induce confiscation or condemnation, and a loss of property to individuals (*m*), though liable to detention or "reasonable compensation" to the owners.

(*m*) Treaty of Amity and Commerce between the King of Prussia and the United States of America, signed at Berlin, July 11, 1799 (see *Ann. Reg.* 1800, p. 290):—

"*Art.* 12. Experience having proved, that the principle adopted in the twelfth article of the Treaty of 1785, according to which free ships make free goods, has not been sufficiently respected during the two last wars, and especially in that which still continues, the two contracting parties propose, after the return of a general peace, to agree either separately between themselves, or jointly with other Powers alike interested, to concert with the great maritime Powers of Europe such arrangements and such permanent principles as may serve to consolidate the liberty and the safety of the neutral navigation and commerce in future wars. And if in the interval, either of the contracting parties should be engaged in war, in which the other should remain neutral, the ships of war and privateers of the belligerent Power shall conduct themselves towards the merchant-vessels of the neutral Power as favourably as the course of the war then existing may permit, observing the principles and rules of the law of nations, generally acknowledged.

"*Art.* 13. And in the same case of one of the contracting parties being engaged in war with any other Power, to prevent all the difficulties and misunderstandings that usually arise respecting merchandise and contraband, such as arms, ammunition, and military stores of every kind, no such articles carried in the vessels, or by the subjects or citizens of either party, to the enemies of the other, shall be deemed contraband, so as to induce confiscation or condemnation, and a loss of property to individuals. Nevertheless, it shall be lawful to stop such vessels and articles, and to detain them for such length of time as the captors may think necessary to prevent the inconvenience or damage that might ensue from their proceeding, paying, however, a reasonable compensation for the loss such arrest shall occasion to the proprietors; and it shall further be allowed to use in the service of the captors the whole or any part of the military stores so detained, paying the owners the full value of the same, to be ascertained by the current price at the place of its destination. But in a case supposed of a vessel stopped for articles of contraband, if the master of the vessel stopped will deliver out the goods supposed to be of contraband nature, he shall be admitted to do it, and the vessel shall not, in that case, be carried into any port, nor farther detained, but shall be allowed to proceed on her voyage.

"All cannons, mortars, fire-arms, pistols, bombs, grenades, bullets, balls, muskets, flints, matches, powder, saltpetre, sulphur, cuirasses, pikes, swords, belts, cartouch-boxes, saddles (!), and bridles (!!), *beyond the*

With respect to the furnishing ships of war to a belligerent, as with respect to the supplies of ammunition, there have been before and since the time of Grotius two schools of opinion: "Nam et "olim," he says, "et nuper de ea re acriter certatum "scimus, cum alii belli rigorem, alii commerciorum "libertatem defenderent" (*n*).

According to the exposition of International Law on this subject by the United States, *bona fide* commercial dealings in contraband (*o*) of war are not restrained, and an American subject may build and arm a vessel and supply her with stores, and, Mr. Dana says, "may without violating our law send out "such a vessel, so equipped, under the flag and "papers of his own country, with no more force of "crew than is suitable for navigation, with no right "to resist search or seizure, and to take the chances "of capture as contraband merchandise, of blockade, "and of a market in a belligerent port. In such "case the extent and character of the equipments is "as immaterial as in the other class of cases. The "intent is all. The act is open to great suspicion "and abuse, and the line may often be scarcely "traceable; yet the principle is clear enough. Is "the intent one to prepare an article of contraband

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quantity necessary for the use of the ship, or beyond that which every man serving on board the vessel, or passenger, ought to have; and in general whatever is comprised under the denomination of arms and military stores of what description soever, shall be deemed objects of contraband." By a Treaty of Commerce, May 1, 1828, between the same States, these provisions, with regard to the carriage of contraband, were carefully revised and re-inserted in that Treaty (Art. XII.).—*Martens, Nouv. Rec. de Traités*, xv. p. 615.

(*n*) *De J. B. et P.* l. 3, c. i. § v.

(*o*) See vol. iii. pt. x. ch. i.

" merchandise, to be sent to the market of a belli-
" gerent, subject to the chances of capture and of
" the market? Or, on the other hand, is it to fit out
" a vessel which shall leave our port to cruize, im-
" mediately or ultimately, against the commerce of a
" friendly nation? The latter we are bound to pre-
" vent. The former the belligerent is bound to
" prevent" (*p*).

XI. The question whether the powers given by the statute 59 Geo. III., c. 69 (July 3, 1819), to our Government, and by that of the preceding but almost contemporaneous statute of Congress (April 20, 1818) to the Government of the United States, are in excess or are in fulfilment of the International obligations of the neutral, receives a different solution from two schools of opinion as distinct upon this point of which I have spoken as upon that of contraband. If the former school was correct in its opinion, then the English Government was already more than sufficiently armed with authority for the discharge of the International duty incident to a neutral. If the latter school was correct in its opinion, then there was, to say the least, a doubt whether the statute, as at present interpreted by English judges, did confer on our Government the requisite authority (*q*).

In considering this subject it is to be remembered that International Law is not stationary, and that precedents of history, taken from a period when the mutual relations of States were less clearly defined

(*p*) *Wheaton's International Law*, ed. *Dana*, pt. iv. p. 563, end of note 215.

(*q*) See *Report of Neutrality Laws Commission*, 1868.

than at present, cannot be considered as decisive on the point at issue. Precedents may be found in the time of Queen Elizabeth, and later, in which large bodies of English subjects were enlisted under the authority of the Government in this country, and, displaying the English or Scotch standard, took a part in the civil war of a foreign State without open war being declared between that foreign State and England. But for more than a century, at least, such a state of things has been considered as inconsistent with the duties of a neutral State.

And although the only alteration suggested by the United States has been in favour of a relaxation of the stringency of the provision of their Municipal Act (*r*), I rejoice that the English Government has, by the statute of this year, strengthened the hands of the Executive and given greater force and prominence to the maxim, that with respect to the external relations of the State, the will of the subject is bound up in that of his Government.

At all events, those who are interested in the progress of International justice may look with satisfaction upon the general state of feeling and usage throughout the civilized world upon the much-vexed question of Foreign Enlistment. There is no International subject perhaps in which, during the last thirty years, so decided an improvement has taken place. The axiom that to enlist foreign subjects without the consent of their Governments is a grave

(*r*) In 1866 this Neutrality Bill provided that "the neutrality laws shall not be so construed as to prohibit the sale of vessels, ships, or steamers, or materials, or munitions of war, the growth or product of this country, to the Government or citizens of any country not at war with the United States."—*Ann. Reg.* 1866, p. 277.

breach of the Right of States, is now, it may be reasonably hoped, firmly incorporated into the code of International Law (*s*).

The dispute which unhappily arose between England and the United States, in consequence of the escape of the ship *Alabama* from British territory and her subsequent employment as a ship of war by the Southern Confederates, is, I deeply regret to say, still open (*t*).

I will only say in this place that no English jurist could object to have that dispute decided upon the principles of law laid down—harmoniously, I think, on the whole—by the tribunals of the United States and England, and by reference to the public Acts and documents of both countries.

It is a satisfactory reflection that the general recognition of the established rules of International Law, by neutrals as well as belligerents, during this civil war prevented the extension of the calamity to other States. In 1863, President Lincoln said: "We "remain in peace and friendship with foreign Powers. "The efforts of disloyal citizens of the United States "to involve us in foreign wars to aid an inexcusable "insurrection have been unavailing. Her Britannic "Majesty's Government, as was justly expected, "have exercised their authority to prevent the "departure of new hostile expeditions from British "ports. The Emperor of France has, by a like pro-

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(*s*) The two English and American statutes, and the judgment of the Privy Council on the former of the English statutes, are printed in the Appendix to this volume.

(*t*) See despatch of Mr. Fish, and the answer of Earl Clarendon, *Ann. Reg.* 1869, p. 295.

"ceeding, promptly vindicated the neutrality which "he proclaimed at the beginning of the contest. "Questions of great intricacy and importance have "arisen out of the blockade and other belligerent "operations, between the Government and several of "the maritime Powers, but they have been discussed, "and as far as was possible accommodated, in a spirit "of frankness, justice, and natural good-will. It is "especially gratifying that our prize courts, by the "impartiality of their adjudication, have commanded "the respect and confidence of maritime Powers" (*u*).

In 1862, President Lincoln, in his message to Congress, observed:—"The Treaty with Great "Britain for the suppression of the African slave "trade has been put into operation with a good "prospect of complete success. It is an occasion of "special pleasure to acknowledge that the execution "of it on the part of Her Majesty's Government has "been marked by a jealous respect for the authority "of the United States and the rights of their moral "and loyal citizens" (*x*).

XII. The *Black Sea* has been neutralized; its waters and its ports are opened (*y*) to the mercantile marine of every nation, but are formally and in perpetuity interdicted to the flag of war, either of the Powers possessing its coasts, or of any other Power (*z*). Russia and Turkey are allowed to keep light vessels for the service of the coasts, and each of the contracting Powers has the right to station at

(*u*) *Ann. Reg.* 1863, p. 335.
(*x*) *Ann. Reg.* 1862, p. 239.
(*y*) Pt. iii. ch. viii. of this volume.
(*z*) Article XI. of the Treaty of Paris, 1856.

all times two light vessels at the mouth of the Danube(*a*).

XIII. The temporary opening of the great *River St. Lawrence* (*b*) appeared to have justified the opinion expressed in the former edition of this volume, respecting the expediency of allowing to the whole world the benefit of this great channel of traffic. By Art. IV. of the Treaty between England and the United States, signed at Washington (June 5, 1854), "It is agreed that the citizens and inhabitants of "the United States shall have the right to navigate "the River St. Lawrence and the canals in Canada "used as the means of communicating between the "Great Lakes and the Atlantic Ocean, with their "vessels, boats, and crafts, as fully and freely as the "subjects of Her Britannic Majesty, subject only to "the same tolls and other assessments as now are or "may hereafter be exacted of Her Majesty's said "subjects; it being understood, however, that the "British Government retains the right of suspending "this privilege on giving due notice thereof to the "Government of the United States."

By Article V. it was provided that "the Treaty "shall remain in force for ten years from the date at "which it may come into operation; and further, "until the expiration of twelve months after either "of the high contracting parties shall give notice to "the other of its wish to terminate the same; each "of the high contracting parties being at liberty to "give such notice to the other at the end of the said "term of ten years or at any time afterwards."

While this right to navigate the St. Lawrence was

(*a*) Articles XIV., XIX.

(*b*) Pt. iii. ch. v. of this volume.

granted to citizens of the United States, British subjects had a corresponding right to navigate Lake Michigan. England might suspend the right granted to the United States upon notice, in which event she lost her right to navigate Lake Michigan, and the United States might further suspend the operation, so far as Canada was affected thereby, of Article III. of the Treaty, admitting certain articles the growth and produce of British provinces into the United States duty free. It is much to be regretted that this Reciprocity Treaty was terminated, after ten years, by a notice given by the President, in pursuance of a resolution of Congress of January 18, 1865 (*c*). The difficulties (*d*) arising out of the *Clayton-Bulwer Treaty* and the relations of England to the Bay Islands and the territory of the Mosquito Indians and the Republics of Nicaragua and Costa Rica, have been happily removed. By the Protocol of October 9, 1868, the thorny question of NATURALIZATION has been happily settled between England and the United States.

XIV. The free navigation of the *Danube*, secured by the recent Treaty of Paris (*e*), places this magnificent stream under the same Public Law of Europe to which other European rivers flowing through the territories of different States have been subjected by the Treaty of Vienna (*f*).

The doctrine of GUARANTEE (*g*) has received addi-

(*c*) *Dana's Wheaton*, notes 110 and 118, pp. 262, 287.

(*d*) Pt. iii. c. ix. of this volume. See, too, President Grant's message to Congress, *Ann. Reg.* 1869, p. 307.

(*e*) Articles XV., XIX.

(*f*) Pt. iii. ch. v.

(*g*) Pt. iv. ch. i. of this volume.

tional recognition and confirmation from the practice of the European States.

The case of Turkey has been already mentioned. The liberties of that important member of the Scandinavian Society of States, Sweden, were formally guaranteed by England and France during the recent war with Russia. The succession to the throne of Denmark has also become the subject of European *guarantee*, and the independence of Belgium guaranteed at the time of her constitution as a separate State has been sustained by Treaties between England and Prussia, and England and France, during the present war.

XV. The important International questions relative to the *Sound Dues* levied by Denmark were finally adjusted in 1857 (*h*).

With respect to *Slavery* (*i*), it is too much to say that the terrible and desolating civil war in the United States is not to be regretted, if the abolition of domestic *Slavery* could not otherwise be obtained, but it is impossible to estimate too highly the boon to mankind which this unintended (*k*) fruit of the great internal contest produced. It tends, I hope, to strengthen the opinion which, in spite of high autho-

(*h*) Pt. iii. ch. vii. of this volume.

(*i*) Pt. iii. ch. xvii. *ib.*

(*k*) 1859. President Buchanan congratulates Congress that the Supreme Court has decided that a man may take his slave as his property into the *common* territory.—*Ann. Reg.* p. 270.

1860. Northern States have no more right to interfere with the institution of slavery in the Southern States, than with similar institutions in Russia or Brazil.—*Ann. Reg.* p. 277.

1861. President Lincoln: "I have no purpose, directly or indirectly, to interfere with the institution of slavery in the State where it exists."

1862. All slaves declared free.—*Ann. Reg.* p. 242, and *Ann. Reg.* for 1863, p. 303.

rity to the contrary, I ventured to state (*l*), that, in the language of Grotius, "placuit gentibus" that this crime against the human race shall no longer be sheltered by International Law. "For myself," (said President Lincoln in 1864), "I have no doubt "of the power and duty of the Executive, under the "law of nations, to exclude *enemies of the human race* "from an asylum in the United States. If Con-"gress should think that proceedings in such cases "lack the authority of law, or ought to be further "regulated by it, I recommend that provision be "made for effectually preventing foreign slave-traders "from acquiring domicile and facilities for their "criminal occupation in our country" (*m*).

The same President had observed in his annual Address for 1863: "The supplemental Treaty be-"tween the United States and Great Britain for the "suppression of African slave trade, made on the "17th day of February last, has been duly ratified "and carried into execution. It is believed that, so "far as American ports and American citizens are "concerned, *that inhuman and odious traffic* has been "brought to an end" (*n*).

XVI. The causes of the War between England and China in 1856 underwent a full and elaborate discussion in both Houses of Parliament. The House of Lords approved, the House of Commons condemned, the war. The portions of this memorable debate which will chiefly interest the International Lawyer are those which relate to the criteria by which the

(*l*) Chapter xvii.
(*m*) *Ann. Reg.* 1864, p. 289.
(*n*) *Ib.* 1863, p. 335.

national character of a merchant vessel is to be ascertained, and to the distinction between *Reprisals* and *War*.

XVII. *The Annexation of the Kingdom of Oude* to the British dominions depends for its justification upon the right application of the doctrines laid down in this volume respecting the Rights of Acquisition (*o*) and of Intervention (*p*), partly also on the Law of Treaties discussed in the second volume (*q*).

XVIII. The Convention (proposed 14th of October, 1854, confirmed 18th of October, 1855) of Nagaski, between England and Japan, is not an unimportant extension of International relations to a part of the globe from which they have been hitherto practically excluded. By that Convention, certain ports are opened for certain purposes to British ships, and the jurisdiction of British authorities over British subjects in Japanese ports is retained: and *ships of war*, in the necessary performance of their duties, have a general right to enter all the ports of Japan; but, unless compelled by necessity, they, like the merchant ships, are confined to certain ports named in the Convention (*r*).

XIX. The CONDUCT, and still more the CONCLUSION, of the last war with Russia must always be memorable to the historian or the writer on International Law.

(*o*) Pt. iii. ch. xii.

(*p*) Pt. iv. ch. i.

(*q*) See remarks as to International Law between Christian and Heathen civilized States, pp. 22–6. The instrument of Annexation is printed in the Appendix.

(*r*) Correspondence respecting the late negotiations with Japan, laid before Parliament, 1856.

In the *former*, Great Britain waived (*s*), in the *latter* she abandoned, one of the most certain and highly valued Belligerent Rights, namely, the right of confiscating enemies' goods found on board neutral vessels (*t*).

The mode of abandoning this right was little less remarkable than the abandonment itself. The abandonment of that Right was not formally incorporated in the provisions of a Treaty, but was stated in a *Declaration* accompanying the *Treaty*, with the objects of which, however, it had no natural connection.

This anomalous Declaration, whatever may be its binding effect, was signed by most of the European States, but not by the State the most interested, and, next to Great Britain, the best acquainted with the subject—the United States of North America. On the contrary, but a few months afterwards (*u*) this State formally declined—as it was perfectly competent to her to do—to sanction the general principle of abandoning *Privateering*,—that is, of carrying on war by the aid of the individual exertions of the Subject as well as of the Government,—unless, indeed, the same Powers would agree to a Treaty securing the free navigation of the sea to *all* merchant vessels whatsoever.

This is not the place in which the expediency of the abandonment of this great maritime Right of the Belligerent can be fully discussed; but it may be observed, that a defence which has been put forth, namely, that nations are defeated by fleets and armies,

(*s*) Vol. iii. pt. ix. ch. x.
(*t*) *Ibid.*
(*u*) August 1856.

and not by attacks upon their commerce, does not appear to be either very well founded in history or well supported by reason.

It is obvious that the food and the means which procure the food of your enemy are as valuable to him, to say the least, as his weapons or his ships. It is no less obvious that wars are always shortened, and frequently ended, by the privations of the Subjects of the Belligerent, whether by interruption of commerce, or by the blockade, or the siege. These privations of the Subjects, the inquiries which they sharpen, and the demands which they beget, are the natural correctives of the ambition and passion of Rulers.

It is, moreover, surely plain, that the Neutral who is the carrier of the commerce of the Belligerent, enables him to convert his commercial into his military marine, and greatly to increase and strengthen the latter.

Nor is it a light objection that a state of things is produced, in which the Governments of States are at war while their Subjects are at peace. Lately, indeed, it has been suggested, that the commerce of Belligerents should continue to be carried on in War as in Peace ; that being the condition on which the United States of North America offer to abandon the right of *Privateering*. Let it, however, be remembered, that to redress a present injury, to take security against a future transgression, are the only legitimate causes of war ; and that in such cases, "toto certatum "est corpore regni." The continuance of commercial intercourse between the subjects of the offended and the offending nation is, as a matter of *Public* Law,

utterly destructive of the first notion of allegiance on the part of subjects to their respective sovereigns: and as a matter of International Law, the proposition that the will of the subject is, so far as other States are concerned, bound up in the will of his Government, is a proposition of the most vital importance to the due administration of International Law, and to the peace of the world. After all, it remains a very serious question whether the tendency of these exemptions is not to prolong hostilities, to protract the horrors of war: are they not, in truth, devices for making war perpetual rather than real mitigations of its attendant calamities?

"If we were to go to war with the United States "of North America it would not much matter, we "could carry on our trade all the same," was the language of a merchant to the author when this fundamental change in the principles of Public and International Law was proposed. Such a remark bore true testimony to the fact that, by this fundamental change, one great check imposed upon the hasty beginning of this terrible scourge is removed; and the same observation applies, with at least equal force, to its continuance. How many wars have been, in fact, ended by the sufferings which their duration inflicted upon the subjects of the Belligerents? or rather, who, looking back into history, can fix a probable period of termination to many wars kindled by the passions of Nations or of their Governors, if the commerce of the Belligerents had remained unaffected? or if the famous, but perhaps legendary, precedent of the two Dutch admirals—who, commanding antagonistic fleets, sold powder to each other,

and, commercially, contributed to their own destruction—had been generally followed ?

XX. In the performance of a melancholy duty, I am obliged to close this chronicle of events by the admission that the suggestion contained in the last Protocol to the Treaty of Paris, 1856, that Christian States should not go to war without previously attempting to adjust their dispute by arbitration, has remained a dead letter, except perhaps in the case of Luxemburg. Neither of the Belligerents, in the present horrible war, would listen to the suggestion of such an arbitration.

XXI. The writer of these pages is anxious to acknowledge the service which he has derived from the works of his own countrymen and from those of the United States of North America and the Continent of Europe in the compilation of this volume. To the works of Ward, of Manning, of Wheaton, and Story, he is under great obligations. To various writers on the European Continent, and especially to the learned Pfeiffer, his acknowledgments are also due. He also desires to draw attention to the Spanish works of Abreu and Pando, particularly of the latter. "Die Geschichte und Literatur der "Staatswissenschaften," by R. von Mohl, Erlangen, 1855; an excellent essay by Mr. Hurd, an American jurist, on "Topics of Jurisprudence connected with "Conditions of Freedom and Bondage;" a sketch by M. van Hogendorp, a Dutch jurist, of the Dutch School of Jurisprudence founded by Grotius; some pamphlets on Maritime International Law by Professor Würm of Hamburg; "Fünf Briefe über die "Fluss-Schifffahrt" u. s. w., Leipzig, 1858; new

editions of Wheaton's "Elements of International "Law," by Mr. Lawrence and Mr. Dana, with ample notes; a new edition by M. Demangeat of the "Droit "international privé," by M. Fælix; Mancini, "Della "Nazionalità," Torino, 1851; "The Law of Nations," by Dr. Twiss, 1863; an "Historical Account of the "Neutrality of Great Britain during the American "Cvil War," by M. Bernard, Chichele Professor of International Law at Oxford, 1870, a work worthy of its very learned and accomplished author,—must be hailed as accessions to the library of the International Jurist.

DEDICATION OF FIRST EDITION.

TO

CHARLES JOHN VISCOUNT CANNING

IN AFFECTIONATE

ACKNOWLEDGMENT OF HIS LONG FRIENDSHIP,

AND IN SINCERE VENERATION FOR THE ILLUSTRIOUS NAME

WHICH HE WORTHILY BEARS,

THESE PAGES ARE INSCRIBED.

PREFACE

TO

THE FIRST EDITION.

THE NECESSITY of mutual intercourse is laid in the nature of States, as it is of Individuals, by God, who willed the State and created the Individual. The intercourse of Nations, therefore, gives rise to International Rights and Duties, and these require an International Law for their regulation and their enforcement.

That law is not enacted by the will of any common Superior upon earth, but it is enacted by the will of God; and it is expressed in the consent, tacit or declared, of Independent Nations (*a*).

The law which governs the external affairs equally with that which governs the internal affairs of States, receives accession from custom and usage, binding the subjects of them as to things which, previous to the introduction of such custom and usage, might have been in their nature indifferent (*b*).

Custom and usage, moreover, outwardly express

(*a*) *Grot. Proleg.* ss. 19-25. "Omni autem in re consensio omnium gentium lex naturæ putanda est:" *Cic. Tusc.* i. 13.

(*b*) "Omne jus aut necessitas fecit, aut consensus constituit, aut formavit consuetudo."—*Dig. de Leg.* 40.

the consent of nations to things which are *naturally*, that is by the law of God, binding upon them. But it is to be remembered that in this latter case, usage is the effect and not the cause of the Law (*c*).

International Jurisprudence has received since the civilization of mankind, and especially since the introduction of Christianity, continual culture and improvement; and it has slowly acquired, in great measure and on many subjects, the certainty and precision of positive law.

There can be few nobler objects of contemplation and study than to trace the gradual progress of this jurisprudence—the steps by which it has arisen from a few simple rules of natural law transferred from individuals to States, to the goodly and elaborate fabric which it now presents. The history of this progress has been written by Ompteda, Miruss, and Wheaton (*d*) in a manner which leaves the German, the English, and the French readers but little to desire. The subject receives some further notice in the body of this work, but the space within which this preface is necessarily confined, does not allow me to enter into details, which have received a very able exposition from the authors to whom I have referred; and I must content myself with inviting the attention of my readers to the principal epochs of this interesting and instructive portion of the moral and intellectual history of mankind.

I propose to cast a very rapid glance over the

(*c*) "Veruntamen hic etiam usus est effectus juris, non ipsum jus, quia hoc jus non ex usu, sed usus ex jure est."—*Suarez, De Lege a terra et naturali, ac Jure Gentium*, l. i. c. xix. 8. *Cic. de Off.* l. 3, 5.

(*d*) By this author, both in English and French.

principal Jurists, whose labours have contributed to raise the edifice of International Law, and to conclude this preface with some observations on a subject, not altogether, it may be hoped, devoid of interest to all students of jurisprudence and history, but certainly not unworthy the attention of English readers—namely, the growth and cultivation of the science of International Law in this country.

BEFORE THE CHRISTIAN ÆRA.

It is hardly necessary to say, that the peculiar dispensation under which the Jewish nation was placed, and the rigidly prescribed mode of their dealings with foreign nations, render vain any attempt to trace in the history of that people the vestiges of International Jurisprudence (*e*).

The Egyptians held the persons of ambassadors sacred upon strictly religious grounds, and it appears to have been not unreasonably supposed that the Egyptian priests compiled a written *jus feciale*, which Pythagoras transplanted into Greece. Neither the source nor the nature of International Law can be said to have been unknown to the Greeks.

It was indeed a maxim of their wisest statesmen (*f*) that no State could subsist without acknowledging the rights of its neighbours, and the remarkable institution of the Amphictyonic League approached to the reality of an international tribunal, so far as the

(*e*) *Michaelis, Mosäisches Recht,* Th. ii. *Israelitisches Staatsrecht.*
See the treatment of David's ambassador by the King of the Ammonites.—2 *Samuel,* c. x.

(*f*) *Wachsmuth, Jus Gentium quale obtinuit apud Græcos* (Berol. 1822).
Vide post, pt. i. ch. ii.

great republic of the different States of Greece was concerned; but the stranger with whom there was no alliance was an enemy, and all Treaties of peace, like those formerly made between the Turks and Europeans, were for a limited period.

The *Collegium* and the *Jus Feciale* of the Romans are the most remarkable instances of regard for International justice ever exhibited by any nation, and the wonder is increased by the reflection, that this *Collegium* was the institution of a nascent State, which, in its very infancy, laid down the observance of right towards other nations, as a cardinal principle of its public policy.—The institution of the *recuperatores* also bears testimony to the same political integrity; how much, indeed, the practice of Rome in her maturity and decline was at variance with that principle of her early days, is well known.

But making, as history compels us to do, this admission, it must be remembered that if the *Jus inter Gentes* (*g*), strictly speaking, was violated by the practice of conquering Rome, yet the *Jus Gentium* was in reality established by her compilation of Jurisprudence; for in this stood transcribed eternally, if the word were applicable to a mortal work, those maxims of written Reason, those principles of Natural Law, which not only guide a State in its conduct towards Individual Foreigners, and are the root of *Comity*, or *Private International Law*, but which guide a State in its conduct towards other States, and

(*g*) The expression of *Lucan* as to the violation of the Laws of Embassy by the Egyptians is very remarkable; I do not remember to have seen it noticed:

> "Sed neque *jus mundi* valuit, neque fœdera sancta
> Gentibus."—*Pharsal.* x. 471–2.

which constitute the most considerable foundation of Public International Justice.

THE CHRISTIAN ÆRA BEFORE GROTIUS.

We enter next upon the Christian æra. Great and inestimable has been the effect of the doctrines of Revelation upon the Jurisprudence of Nations, though long retarded by the evil passions both of mankind generally and of the governors of men; yet the language, and the teaching, the system of a *representation* of different nations, the very forms of the assembling of the Councils of the Church, the notion of a common International Tribunal, the authority of the Pope during ages steeped in intellectual ignorance and moral grossness, contributed to preserve some idea of the Duties and Rights of Nations.

During the earlier part of the Middle Ages the Pope discharged the functions of International Judge and Arbitrator in the conventions of Christendom. The practice might have been imperfect, but the theory was sublime. The Right of the Pope to discharge these noble functions was almost unquestioned before the time of Boniface VIII., A.D. 1302. A great change was effected by the introduction and prevalence of the doctrine, that a distinction was to be taken between *temporal subjection ratione feudi*, and *subjection in temporal matters ratione peccati* (*h*). In Ecclesiastical Law the distinction was of little avail, and easily evaded, for in the Middle Ages the acts of an absolute irresponsible prince were easily brought within the category of sin (*ratione peccati*).

(*h*) *De Marca, De Concord. Sacerd. et Imper.* iv. c. xvi. 5.

But in International Law, the distinction was of the utmost importance, for it was now competent to Princes to tell their subjects, that there were circumstances under which the Papal Interdict was unlawful, and therefore invalid. The Pope lost his character of International Judge, and retained but for a season, and with difficulty, the character of International Arbitrator. That, too, had disappeared before the epoch of the Reformation, though up to that period all the foreign or international affairs of a State were considered and treated as matters appertaining solely to the prince, and with which the people had no concern.

It must be remembered that, even in the year 1493, Ferdinand and Isabella were confirmed in their possessions and discoveries in the New World by the Bull of the Pope, issued, as former Bulls had been, in virtue of his general territorial supremacy over the whole world; and that as late as the year 1701 the Pope complained, in his Consistory, that Austria had recognized the Ruler of Prussia under his new title of *King*, "not considering that it was the exclusive privilege of the Holy See to make kings" (*i*).

The Crusades introduced the principle of Intervention, both upon the general ground of religious sympathy, and upon the particular ground of reverence for those holy places which had been the scenes of our Lord's life and death—principles which, after the lapse of five centuries, are, while I write these pages, again most powerfully affecting the destinies of Europe. Though the Greek Empire, for many cen-

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(*i*) *Lamberty, Mémoires*, t. i. 353, cited *Günther*, ii. 445.

turies before its destruction, occupied no position which affects the history of International Jurisprudence, yet the conquest of Constantinople by the Turks operated very injuriously upon the *jus commune* of Christendom ; because thereby an important portion of Christendom has been, up to a very recent period, exempted from its influence. Events, however, which are now happening, the great internal changes in the habits and laws of that extraordinary people, and their increasing connection with the Christian States, are evidently preparing the way for a general diffusion of International justice among nations of different religious creeds. During the Middle Ages, the most remarkable features of International Jurisprudence are the maritime codes of commercial towns, the institution of the Consulate, the laws and customs of Embassies.

ÆRA OF GROTIUS.

It is strange that the admirable and luminous treatise of *Suarez* (*k*), *De Legibus et Deo Legislatore*, is not referred to by *Grotius* in his great work, because it appears from his other writings that he was acquainted (as indeed he could not but have been) with the works of this profound jurist. *Suarez* certainly cannot be claimed as a fruit of the Reformation, but at that epoch, from whatever cause, a new æra of International Jurisprudence opens upon us. Streaks of light from various countries, our own included, preceded the dawn of International Jurispru-

(*k*) Born 1548, died 1617.

dence which appeared in the *Mare Liberum* of *Grotius*, published in 1609; but its full meridian shone forth in his great work, *De Jure Belli et Pacis*, which was published in 1624.

It is scarcely too much to say, that no uninspired work has more largely contributed to the welfare of the Commonwealth of States. It is a monument which can only perish with the civilized intercourse of nations, of which it has laid down the master principles with a master's hand. Grotius first awakened the conscience of Governments to the Christian sense of International duty (*l*).

His work has been blamed for a want of systematic arrangement, and because the examples which illustrate the principles of law are taken chiefly from classical times and classical literature; but these defects were, in truth, necessarily incident to the particular period at which he wrote. His work was defended from these charges by himself during his lifetime (*m*), and since his death has received a vindication from the pen of Sir James Mackintosh, which will not easily be surpassed (*n*).

I would fain linger on the merits of this famous master-builder of International Jurisprudence, this great legislator of the community of States, but I am admonished by diminishing space to proceed.

(*l*) "*Christianis placuit*," "*Christianis in universum placuit*," "*hoc perfecit reverentia Christianæ legis*," &c.—*Vide post*, p. 39.

(*m*) In one of his latest letters to his brother, Grotius says of some one who had attacked his work: "Non probat quod, in illis libris De Jure Belli ac Pacis, utor Paganorum dictis: verùm non ita ut utor, ut illa sequi satis esse Christianis arbitror, sed ut erubescent Christiani si minùs præstent."—*H. Grot. Epistolæ*, Ep. 546, p. 920 (ed. Amstelod. 1687); and see *Proleg.* to *De Jure B. et P.*

(*n*) *Lecture on the Law of Nature and Nations.*

FROM THE PEACE OF WESTPHALIA, 1648, TO THE TREATY OF UTRECHT, 1713.

International Jurisprudence received considerable cultivation, a natural result from the increased intercourse between European nations, both in Europe and in their colonies.

Puffendorf, in 1672, published his once admired, and still celebrated work, *De Jure Naturæ et Gentium*: it had the merit of stating boldly that Natural Law was binding upon nations as well as upon individuals. It would indeed be hardly fair to say that Grotius had altogether omitted Natural Law from the sources of International Jurisprudence; but certainly Puffendorf is entitled to the merit of having supplied, by greater precision of statement, a philosophical defect upon this subject in the work of his predecessor. In other respects, however, the disparaging opinion of Leibnitz upon the work of Puffendorf has been generally confirmed; it is, in truth, very inferior to the treatise of Grotius.

Leibnitz, whose *Codex Juris Gentium Diplomaticus* was published in 1693, manifested in his preface, and in other passages scattered about his works, a profound and just acquaintance with the principles of the science which we are considering, and left posterity for ever to regret that the fuller prosecution of it was swallowed up in the variety and vastness of his other studies.

THE INTERVAL BETWEEN THE TREATY OF UTRECHT, 1713, AND OF PARIS, 1763.

In 1740–43, *Wolff*, a disciple of Leibnitz, published the fruit of his enormous labours in nine quarto volumes, *Jus Naturæ Methodi Scientificè Pertractatum*, &c. An abridgment of his work, dealing separately with the question of *Jus Gentium*, subsequently appeared. He prided himself on accurately distinguishing the Natural from the Voluntary, Consuetudinary, and Conventional Law of Nations. His work had two great defects—the application of technical and mathematical terms to moral subjects, and the assumption of the false hypothesis that there existed *de facto* a great republic of which all nations were members. The latter error, however, does not in reality affect the force of his general position, and exists, perhaps, more in the pedantry of the language than in the spirit of the argument which he derives from it. The work of Wolff, with all its merits—and it had many—would probably have been both unread and unknown to modern readers, but for his abridger *Vattel*, who, departing in some points from his original, has melted down his ponderous quartos into the concise, readable, practical, sensible, but superficial work, which still retains its popularity. I must, however reluctantly, pass by *Montesquieu*.

Bynkershoek ranks next to his illustrious fellow-countryman Grotius, whom he delighted to call ὁ μέγας, and for whom, though not unfrequently dissenting from his opinions, he entertained the reverence which one great jurist naturally feels for another. The *Quæstiones Juris Publici* appeared in 1737;—

this work, and the two treatises, by the same author, *De Dominio Maris* and *De Foro Legatorum*, are among the most valuable authorities which this science can claim.

THE INTERVAL BETWEEN THE TREATY OF PARIS, 1763, AND THE FRENCH REVOLUTION, 1789.

Italy furnishes us with *Lampredi* and *Galliani*; Germany with *Moser* and *Martens*. The latter has obtained, not undeservedly, a place among the classics of International Law. But this interval is chiefly memorable in its effect upon this science, for the event of the independence of the North American Republics, accompanied by the distinct recognition of the authority and principle of Christian International Law in another quarter of the globe, and by a cultivation of that law which has already produced no less eminent professors of it than a *Story*, a *Kent*, and a *Wheaton*.

FROM THE FRENCH REVOLUTION, 1789, TO THE PRESENT TIME.

Germany has furnished many writers upon International Law. Two appear to me worthy of especial notice—*Klüber*, whose work, in spite of leaning to the doctrines of the Holy Alliance, is of great value; and *Heffters*, who is still enjoying the reputation which he has acquired.

England, to pass by for the moment the achievements of her distinct International profession, has made no mean contributions to the cultivation of International Jurisprudence, in the writings of

Bentham, *Ward*, *Mackintosh*, *Mr. Manning*, *Mr. Reddie*, *Mr. Wildman*, and *Mr. Bowyer*.

Private International Law (*jus gentium*) has greatly flourished, thanks to the transfusion of Hertius, Huberus, Rodenburghius, Voet, and other Latin authors, into the well-arranged and carefully-reasoned works of *Story*, *Wächter*, *Savigny*, and *Fœlix*; of the first and the last of these authors we have but lately deplored the death.

It will be seen that I have been compelled to omit the mention of many authors, whom I have consulted, whose names will be found below in the catalogue of authorities, and to whom I owe a debt of much gratitude.

HISTORY OF INTERNATIONAL JURISPRUDENCE IN ENGLAND.

It remains only to invite attention to a subject which, however little known, is not without interest to the historian, the jurist, and the statesman, namely, the existence in England of a distinct Bar for the cultivation of International Jurisprudence (*o*).

It cannot be denied that the Common Law of England has hitherto been, to a certain extent, like the territory in which it prevails, of an *insulated* and peculiar character. It must be acknowledged that it has borrowed less than any other State in Christendom from the jurisprudence of ancient and modern Rome. The fountains of wisdom, experience, and written reason, at which the European continent in former

(*o*) The following sketch, with slight alterations, has appeared in a letter from the author to Mr. Gladstone, published in 1848.

and America in later times have so largely drunk, were passed by in England with a hasty and scanty draught. The Gothic conquerors of continental Europe fell by degrees and from a variety of causes under the dominion of the laws of the vanquished. "Capta ferum victorem cepit" was eminently true of the restoration of the Civil Law during the middle ages in every country, but our own; and yet, for more than three centuries, England had been governed by the Civil Law. It is a very remarkable fact, that, from the reign of Claudius to that of Honorius (a period of about 360 years), her judgment-seats had been filled by some of the most eminent of those lawyers (*p*) whose opinions were afterwards incorporated into the Justinian compilations. But all germs of such jurisprudence would have perished with every other trace of civility under the rude incursions of Saxons and Danes, had not the tribunals of the clergy afforded them shelter from the storm (*q*). Occasionally, too, some maxims of the Roman Law, admitted either from their intrinsic merit, or through the influence of the clergy, enriched the then meagre system of English law. The Norman invasion was attended with a memorable change in the constitution as it then existed. The Bishop and the Sheriff had heretofore sat together in the Court of Justice, administering with equal jurisdiction the law upon temporal and spiritual offences; by the charter of William the Conqueror, the Eccle-

(*p*) *Papinian, Paulus, and Ulpian. Vide Duck, De Usu ac Autor. Juris Romani*, l. ii. c. 8, pars secunda, s. 7.

(*q*) *Blackstone*, vol. iv. 410; *Preface by Dr. Burn, to his Ecclesiastical Law; Millar's Historical View of the English Government*, vol. iii.; *Burke's Fragment of the History of England.*

siastical was separated from the Civil Court. This division has continued (with the exception of a temporary reunion in the reign of Henry I.) till the present period; the Ecclesiastical tribunal deciding, according to the rules and practice of the Civil and Canon Law, generally, on all matters relating to the Church, to the spiritual discipline of the laity, and, among other questions of a mixed nature, upon two of the most important kind, namely, the contract of marriage and the disposition of personal property after death (*r*). It is not necessary to dwell on the original reasons for assigning these mixed subjects to the jurisdiction of the Spiritual Courts. It was an arrangement at the time almost universally prevalent in Christendom.

The Ecclesiastical Courts, however, were not the only tribunals in which the Roman law was administered. In the High Court of Admiralty (*s*) (established about the time of Edward I.) and in the Courts of the Lord High Constable and the Earl Marshal (the Courts of Honour and Chivalry), the mode of proceeding was regulated by the same code.

The Courts of Equity also borrowed largely, and for a long time almost exclusively, from the same jurisprudence. Almost every Lord High Chancellor from Beckett to Wolsey—that is, from the Conquest to the Reformation—was an ecclesiastic; and it was a matter of course, that, like every eminent ecclesiastic of those days, he should be well skilled in the Civil

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(*r*) *Burn's Preface*, xvii. *Lyndwood's Provinciale*, pp. 96-7, 261, 316 (ed. 1679, Oxford).

(*s*) *Blackstone*, vol. iii. p. 68; *Millar's English Government*, vol. xi. p. 338.

and Canon Law. Indeed, it was chiefly because they were deeply versed in this jurisprudence, though partly, no doubt, because their general attainments were far superior to those of the lay nobility, that the dignitaries of the Church were usually (*t*) employed in the foreign negotiations of this period (*u*). Nor can it be denied by the most zealous admirer of our municipal law that, during the period which elapsed from the reign of Stephen to Edward I., the Judges of Westminster Hall had frequent recourse to the Justinian Code; for in truth the writings of Fleta contain many literal transcripts of passages taken from the Digest and the Institutes (*x*).

Lastly, in the Courts of the two Universities the same system prevailed. Universities, which are not the least remarkable institutions of Christendom, had indeed originally been founded for the express purpose of teaching this science, and even in this country, where the feudal law so largely prevailed, had succeeded in kindling into a flame the precious spark which the schools of the cloisters and the

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(*t*) *Hurd's Dialogues, Moral and Political*, vol. ii. p. 183; *Duck De Usu, &c., Juris Civilis*, p. 364.

(*u*) By the Statutes of York Cathedral express provision is made for the absence of the Dean when employed beyond seas in the service of the State. The Bishop of Bristol, who was also Lord Privy Seal, was one of the negotiators of the Treaty of Utrecht; the last instance, I believe, of the kind.

(*x*) *Millar*, p. 325; *Preface to Halifax's Civil Law; Mackintosh's Law of Nature and Nations*, p. 52; *Lord Holt*, 12 *Mod. Rep.* p. 482: "Inasmuch as the laws of all nations are doubtless raised out of the ruins of the Civil Law, as all Governments are sprung out of the ruins of the Roman Empire, it must be owned that the principles of our law are borrowed out of the Civil Law, therefore grounded upon the same reason in many things."

learning of the clergy had preserved from total extinction (*y*).

I pass now to the epoch of the Reformation. On the Continent, where the Civil Law was the basis of all municipal codes, the study of this science was scarcely, if at all, affected by this memorable event. In England it was otherwise. The professors of the Civil and the Canon Law belonged chiefly to the Ecclesiastical Courts, and were associated in the minds of the people partly with the exactions (*z*) of Empson and Dudley in the preceding reign, and partly with the authority of the Pope. Severe blows were dealt at the former, which were aimed solely at the latter system.

"The books of Civil and Canon Law were set " aside to be devoured with worms as savouring too " much of Popery," says the learned Ayliffe in his history of the University of Oxford during the Visitation of 1547 (*a*). And Wood (*b*), after stating " That as for other parts of learning at Oxford, a " fair progress was made in them," observes, " The " Civil and Canon Laws were almost extinct, and " few or none there were that took degrees in them, " occasioned merely by the decay of the Church and " power of the Bishops."

(*y*) See *Lyndwood's Life, Biog. Brit. Dedication; Ridley's View of Civil and Ecclesiastical Law*, p. 118; *Zouche's Preface to his Treatise on the Punishment of Ambassadors, &c.*, to Henry, Marquis of Dorchester; *et vide infra.*

(*z*) Empson and Dudley justified their extortions by citations from the Civil Law. See *Hurd's Dialogues, Moral and Political*, vol. ii. p. 211, though they contain a very superficial and very imperfect sketch of the fortunes of the Civil Law in England.

(*a*) *Ayliffe's Oxford*, vol. i. p. 188.

(*b*) *Wood's Hist. and Antiquities of the University of Oxford*, vol. ii. b. i. s. lxxix. (ed. Gutch).

In 1536, Thomas Cromwell, Chancellor of the University of Cambridge, Secretary of State, and Vice-gerent of the King in Spirituals, was appointed (by the King's seal used for causes ecclesiastical) Visitor of that University; by the same instrument, he promulgated, in the name of the King, certain injunctions, of which the fifth was—

"That as the whole realm, as well clergy as laity, "had renounced the Pope's right and acknowledged "the King to be the supreme head of the Church, no "one should thereafter publicly read the Canon "Law, nor should any degree in that Law be con-"ferred" (*c*).

About the same time, or rather earlier, similar injunctions were issued to the University of Oxford: these are preserved in the State Paper Office, and the corresponding injunction to the one just mentioned is as follows:—

"Quare volumus ut deinceps nulla lectio legatur "palam et publicè per Academiam vestram totam in "jure Canonico sive Pontificio, nec aliquis cujus con-"ditionis homo gradum aliquem in studio illius juris "Pontificii suscipiat, aut in eodem in posterum pro-"moveatur quovis modo." These injunctions (for there never was, as is commonly believed, any statutable provision on the subject) underwent some modification from the regulations of Edward VI. In 1535, Henry VIII. appointed certain Visitors, the chief of whom were Richard Layton and John London, LL.D., to visit the University of Oxford; these

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(*c*) *Strype's Ecclesiastical Memorials*, vol. i. c. xxix. App. No. lvii. lviii.; *Cooper's Annals of the University and Town of Cambridge*, p. 375.

Visitors joined a Civil to the Canon Law Lecture in every Hall and Inn.

In 1549, a Visitation of the University of Cambridge took place under the auspices of the Protector Somerset. Bishop Ridley was appointed to be one of the Visitors, and one of the professed objects of this Visitation, according to Bishop Burnet (*d*), was to " convert some fellowships appointed for encourag-" ing the study in Divinity to the study of the Civil " Law; in particular, Clare Hall was to be suppressed." Bishop Ridley found his task very difficult and odious, and wrote to the Protector that, to diminish the number of divines went against his conscience. Somerset replied: " We should be loth anything " should be done by the King's Majesty's Visitors " otherwise than right and conscience might allow " and approve; and visitation is to direct things for " the better, not the worse; to ease consciences, not " to clog them;" and further, " my Lord of Canter-" bury hath declared unto us, that this maketh partly " a conscience unto you that Divines should be di-" minished; that can be no cause; for first, the same " was met before in the late King's time to unite the " two Colleges together, as we are sure ye have heard, " and Sir Edward North can tell, and for that cause " all such as were students of the Law, out of the " newly-erected Cathedral Church, were disappointed " of their livings, only reserved to have been in that " *Civil* College. The King's Hall being in a manner " all Lawyers, Canonists were turned and joined to " Michael House, and made a College of Divines,

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(*d*) *Burnet*, vol. ii. pt. ii. p. 222.

"wherewith the number of Divines was much aug-
"mented, Civilians diminished. Now at this present
"also, if in all other Colleges where Lawyers be by
"the Statutes or the King's injunctions, ye do con-
"vert them or the more part of them to Divines, ye
"shall rather have more Divines upon this change
"than ye had before. The King's College should
"have six Lawyers; Jesus College some; the Queen's
"College and others, two apiece; and, as we are in-
"formed by the late King's injunctions, *every College*
"*in Cambridge one at the least.* All these together
"do make a greater in number than the Fellows of
"Clare Hall be, and they now made Divines, and
"the statutes in that reformed Divinity shall not be
"diminished in number, but increased, as appeareth,
"although these two Colleges be so united. *And we*
"*are sure ye are not ignorant how necessary a study that*
"*study of Civil Law is to all Treaties with Foreign*
"*Princes and Strangers, and how few there be at this*
"*present to the King's Majesty's service therein,*" &c.

Queen Elizabeth, among the Statutes which she promulgated for the University of Cambridge, and which have been recently published by Dr. Lamb, enacted one, *De Temporibus Lectionum et Libris prælegendis* (c. iv.), in which it is ordered, "Theologicus "prælector tantum sacras literas doceat et profiteatur. "*Jurisconsultus* Pandectas, Codicem, vel Ecclesiastica "regni Jura quæ nos edituri sumus et non alia præ- "leget." Since the reigns of Stephen and Henry II., when Vacarius first read lectures at Oxford on the Civil Law, the Universities have made it their legitimate boast that the study of the Roman Law found its shelter and encouragement within their *pomœria.*

The history of almost every college will show that the promotion of this study was an object which its founder had at heart. The statutes promulgated after the Reformation, during the royal visitations of the Tudors, as has already been shown, most carefully provided for the furtherance of the same end. The statutes of Edward VI. define more closely the knowledge requisite for a Doctor of Civil Law, and set forth the usefulness of such knowledge to the Church and State, as follows: "Doctor Legum—
"Doctor mox a doctoratu dabit operam legibus
"Angliæ, ut non sit imperitus earum legum quas
"habet sua patria, et *differentiam exteri patriique*
"*juris* noscat, et in solemnibus comitialibus quæs-
"tionibus unus qui id maximè certissimèque sciat
"facere ad finem quæstionum *quid in illis jus civile,*
"*quid ecclesiasticum, quid regni Angliæ jus* teneat,
"defineat, determinetque" (*e*).

In truth, the Universities were doubly interested in the preservation of this study; first, because the statutes, both those of the University and of the College, must, in cases of doubt, which not unfrequently arise, receive their interpretation from the Canon and Civil Law; the founders of Colleges (Chicheley and Wykeham for example) were often deeply versed in both branches of jurisprudence, and in cases tried before the Visitors of Colleges, many of the arguments have been drawn from these sources; but, secondly, inasmuch as the degrees conferred at

(*e*) These statutes are copied from Dr. Lamb's book, but they are, *mutatis mutandis*, the same as those given to Oxford, save that Oxford has some *post-statuta*, which Cambridge has not.—*Twyne's Collect.* vol. iv. p. 144, in *Turr. Schol. Oxon.: Lamb's Documents from MS. Library*, C. C. C. C., p. 127; see also a similar statute of Elizabeth's, 323.

the Universities were the necessary passport to the College of Advocates at Doctors' Commons.

Of the five professorships (*f*) which Henry VIII. founded on the spoils of the Church, one was instituted and endowed at each University for teaching the Civil Law. At Oxford, the lay prebend of Shipton was attached to the Professorship, and in Charles II.'s reign this endowment was expressly recognized and confirmed as an exception to the general law laid down in the Statute of Uniformity. The foundation of these Professorships in some measure counterbalanced the injury which the Civil Law received from the discredit into which the Canon Law had fallen (*g*). But this was not, I think, the sole or the principal circumstance which kept alive at this time the knowledge of this jurisprudence.

About this period a great and important change had begun to take place in the relations of the European communities towards each other, which rendered the preservation of the study of the civil law of great, and indeed indispensable, necessity to these islands. During the reign of the Tudors, the English had been compelled, by a multitude of concurring causes (far too many for enumeration in these pages), to abandon their hopes of permanent conquests in France; nevertheless, at this very period, Great Britain began to assume that attitude with respect to foreign Powers which, from the days of Lord Burleigh to Mr. Can-

(*f*) Divinity, Hebrew, Greek, Civil Law, Medicine, founded 1540, confirmed 1546. John Story appears to have been the first Professor at Oxford appointed with a fixed salary.—*Wood, Hist. & Ant. of Oxford*, vol. ii. pt. ii. pp. 840, 859 (ed. Gutch).

(*g*) Luther openly burnt at Wittenburg the books of the Canon Law.—*Robertson's Charles V.* b. ii.

ning, it has been the constant endeavour of her wisest and greatest statesmen to enable her to maintain. She became an integral part, in spite of her "salt-"water girdle" (*h*), of the European system, and daily more and more connected her interest with that of the commonwealth of Christendom. Every fresh war and revolution on the Continent, every political and religious movement, rendered that interest indissoluble.

The closer the bond of international intercourse became, the more urgent became the necessity for some International Law, to whose decisions all members of the commonwealth of Christendom might submit. The rapid advance of civilization, bringing with it an increased appreciation of the blessings of peace, and a desire to mitigate even the necessary miseries of war, contributed to make this necessity more sensibly felt. A race of men sprang up, in this and in other countries, whose noble profession it became to apply the laws of natural justice to nations, and to enforce the sanction of individual morality upon communities. But the application of these laws and sanctions to independent States, and still more any approach towards securing obedience to them, was no easy achievement. No one nation, it was obvious, had any right to expect another to submit to the private regulations of her municipal code; and yet, according to the just and luminous observation of Sir James Mackintosh, "In proportion as they "approached to the condition of provinces of the "same empire, it became almost as essential that

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(*h*) *Cymbeline,* act. iii. sc. 1.

"Europe should have a precise and comprehensive "code of the law of nations, as that each country "should have a system of municipal law" (*i*).

It was, as has been said, soon after the era of the Reformation that the science of International Law began to flourish on the Continent; and it has been said that this epoch was on the whole unfriendly to its study in this island. It remains to show by what means any vestiges of it have been preserved; and how a profession, whose duty it was to be "lawyers "beyond seas" (*k*), has been maintained in these islands, where honour and emolument have ever, with few exceptions, attended the knowledge and practice of a distinct and isolated system of municipal law.

Long before the Reformation there existed an ancient society of Professors and Advocates, not a corporate body, but voluntarily associated for the practice of the Civil and Canon Law. In 1587, Dr. Henry Hervey, Master of Trinity Hall in the University of Cambridge, purchased from the Dean and Chapter of St. Paul's, for the purpose of providing a fixed place of habitation for this society, an old tenement, called Mountjoy House, on the site of which the College of Advocates at Doctors' Commons now stands. In this sequestered place the study and practice of laws proscribed from Westminster Hall took root and flourished.

The Tudors, who, with all their faults, were unquestionably the most accomplished and lettered race which as yet has occupied the English throne, always looked with a favourable eye upon civilians, employed

(*i*) *Lecture on the Law of Nature and Nations*, p. 13.

(*k*) *Ayliffe's Parergon Juris Canonici, Introduction.*

them in high offices of state, and set especial value on their services in all negotiations with foreign countries. Few, if any, matters of embassy or treaty were concluded without the advice and sanction of some person versed in the Civil Law. The enmity of Henry VIII. to the Canon, as has been observed, materially injured the profession of the Civil Law; but this was a result neither contemplated nor desired by that monarch. He founded, as has been said, a Professorship of Civil Law at both Universities, and in many respects befriended the maintenance and culture of this science. In 1587, Albericus Gentilis (*l*), an illustrious foreigner, was appointed to the Professorship of Civil Law at Oxford; his work, *De Jure Belli*, was in truth the forerunner of Grotius. According to the emphatic language of the learned Fulbeck, he it was "who by his great industrie hath "quickened the dead body of the civil law written by "ancient civilians, and hath in his learned labours "expressed the judgment of a great State, with the "soundnesse of a deep phylosopher, and the skill of a "cunning civilian. Learning in him hath showed "all her force, and he is therefore admirable because "he is absolute" (*m*).

During the earlier period of the Tudor sway ecclesiastics, many of them of high renown, were advocates of the civil law, but towards the close of Elizabeth's reign the profession became, and has ever since been, composed entirely of lay members (*n*). During

(*l*) He came from the University of Perugia, died 1609.—*Wood's Hist. and Antiq. of Oxford*, vol. ii. pt. ii. p. 858 (ed. Gutch).

(*m*) *A Direction or Preparative to the Study of the Law*, f. 266 (Lond. 1620, 8vo.). *Irving's Introd. to the Civil Law*, s. 97.

(*n*) An unsuccessful attempt was made in Highmore's case (8 *East's*

this reign a nice question of International Law was raised in the case of the Bishop of Ross, ambassador to Mary Queen of Scots, and Elizabeth submitted to Drurye, Lewes, Dale, Aubrey, and Johnes, advocates in Doctors' Commons, that most difficult and important question as to the propriety and lawfulness of punishing an ambassador for exciting rebellion in the kingdom to which he was sent. Civilians were also consulted as to the power of trying (*o*) the unhappy Mary herself; and Mr. Hallam seizes on the facts, with his usual sagacity, to demonstrate that the science of International Law was even at this period cultivated by a distinct class of lawyers in this kingdom. James I., who, besides his classical attainments, imbibed a strong regard for the Civil Law from his native country, protected its advocates to the utmost that his feeble aid would extend (*p*). To this monarch Sir Thomas Ridley dedicated his *View of the Civil and Ecclesiastical Law*, a work of very considerable merit and of great learning; it had for its object to demonstrate the pettiness and unreasonableness of the jealousy with which the common lawyers had then begun to regard the civilians, and the law which they administered at Doctors' Commons—and it appears to have been by no means

Reports, 213) to obtain a mandamus from the archbishop commanding the Dean of the Arches to admit Dr. Highmore a member of the College of Advocates. This was in 1807.

(*o*) *Constitutional History*, vol. i. pp. 218, 219; *Strype*, 360–362.

(*p*) Cowell, who was Professor of Civil Law at Cambridge, had acquired a profound knowledge of this law, and had in consequence been chosen Master of Trinity Hall (an office at this moment filled by the learned Judge of the Arches), published a dictionary of law, in imitation of *Calvin's Lexicon Juridicum*, a work of much learning, but containing extravagant dicta about the king's prerogative. James shielded him from the wrath of Coke

unattended with success; for it was perhaps a consequence of this able work that, about the year 1604, each of the two Universities was empowered by royal Charters to choose two members to represent them in Parliament, and by the same Charters they were admonished to select such as "were skilful in the "Imperial Laws" (*q*).

The reign of the First Charles produced two civilians of great eminence, whose reputation, especially that of the latter, was as great on the Continent as in these islands—Arthur Duck and Richard Zouche. The former steadily adhered to the fortunes of his unhappy sovereign; and his work, *De Usu ac Authoritate Juris Civilis*, has never ceased to maintain its deserved authority. Zouche, who held several high appointments, submitted to the authority of the Parliament (*r*). In 1653, the famous case of the Portuguese ambassador happened: Don Pantaleon de Sa, having deliberately murdered an English subject in London, took refuge in the house of his brother, the Portuguese ambassador. That high functionary insisted on the exemption of his brother from punishment on account of the inviolable character which the law of nations impressed upon the dwelling of an ambassador. Cromwell, however, caused him to be tried before a commission composed of Sir H. Blunt, Zouche, Clerk, and Turner, Advocates of Civil Law, and others; before whom he was convicted of murder and riot, and for these offences was executed at

(*q*) *Vide infra*, pp. 49, 50.

(*r*) Zouche had received a patent from King James, assigning to him a stipend of 40*l*. per annum, and all emoluments and privileges enjoyed by "Albericus Gentilis, Frauncis James, and John Budden." A copy of this patent is to be found in *Rymer's Fœdera*.

Tyburn. On this occasion Zouche wrote a very able and learned treatise, entitled *A Dissertation concerning the Punishment of Ambassadors who transgress the Laws of the Countries where they reside*, &c. This civilian was also the author of several other treatises on public law, the most celebrated of which was entitled *Juris inter Gentes Quæstiones*, a book which is to this day of high authority and constant reference by all jurists both in Europe and America.

During the reign of Charles II. various causes conspired to extend and strengthen the influence of the Civilians. The restoration of the orders and discipline of the Church—the rapid growth of commerce and its consequences, augmentation of *personal* property and increase of shipping—the creation of a navy board (*s*), and widely spreading relations with foreign States—the two Dutch wars, and the personal merits of the great Civilian of the day, Sir Leoline Jenkins—all contributed to produce this result.

" If," says Sir Robert Wiseman, Advocate-General, writing in 1680, " we look no farther back than " twenty years ago, we shall remember the Civil " Law did so far spread itself up and down this " nation, that there was not any one county which " had not some part of the government thereof " managed and exercised by one or more of that pro- " fession, besides the great employment and practice " it had in the Courts in London. So that it being " thus incorporated, and, as I may say, naturalized " by ourselves into this Commonwealth, it ought not

(*s*) *Vide Pepys' Memoirs, passim.*

"to be reputed or looked upon by us a stranger any "longer" (*t*).

I come now to the last period, that which elapsed between the Revolution of 1680 and the present time. During this interval the profession of the Civil Law has been sustained by a succession of advocates and judges, who may challenge comparison with their brethren of Westminster Hall, and who have done good service to the State, both in her domestic tribunals, in her courts of the law of nations, and in her pacific intercourse with foreign nations. Nobody acquainted with the history of our country since the Revolution can be wholly ignorant of Sir Leoline Jenkins, Sir George Lee, Sir G. Hay (*u*), Sir William Wynne, Dr. Lawrence, and Lord Stowell.

The biography of Sir Leoline Jenkins contains a history of the foreign affairs of this kingdom from the breaking out of the first Dutch war (1664) to the Peace of Nimeguen (1676-7), which he negotiated in concert with his illustrious colleague Sir W. Temple. He filled various high offices, those of Member of Parliament, Judge of the High Court of Admiralty, Judge of the Prerogative Court of Canterbury, Principal of Jesus College, Oxford, Ambassador, Secretary of State.

Throughout the works (*v*) of this great jurist are scattered tracts upon various questions of Public and

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(*t*) The extract is taken from a treatise called *The Law of Laws, or the Excellency of the Civil Law.*

(*u*) *Vide Walpole's History of Last Ten Years of George II.*, vol. ii., for an account of Dr. Hay's eloquence.

(*v*) I believe the Colleges of Jesus and All Souls contain MSS. yet unpublished of Sir L. Jenkins, which, it is to be hoped, will one day see the light.

International Law, rich in deep learning and sound reasoning, and consequently forming a mine from which all subsequent jurists have extracted materials of great value. His acquaintance with the Civil Law was deep and accurate, as he had opportunities of evincing upon several occasions; and he often lamented, we learn from his biographer, that the Civil Law "was so little favoured in England, where all "other sciences met with a suitable encourage-"ment" (*x*).

"His learned decisions," I quote from the same source (*y*), "rendered his name famous in most parts "of Europe (there being at this time almost a general "war, and some of all nations frequently suitors to "this Court), and his answers or reports of all "matters referred to him, whether from the Lords "Commissioners of Prizes, Privy Council, or other "great officers of the kingdom, were so solid and "judicious as to give universal satisfaction, and often "gained the applause of those who dissented from "him, *because they showed not only the soundness of* "*his judgment in the particular matters of his profes-*"*sion, but a great compass of knowledge in the general* "*affairs of Europe and in the ancient as well as*

(*x*) *Life of Sir L. Jenkins*, p. xi. preface.

(*y*) *Ib.* p. xiii. and vol. ii. p. 741. He advised the Duke of York as to his title to the Seigneury of Aubigné, on the death of the Duke of Richmond, vol. ii. p. 704. He advised upon the claim of the Crown of England to the dominion of the narrow seas and the homage due to her flag; upon the Electoral Prince Palatine's settlement; on the effect of a settlement of property made by Maurice Prince of Orange; as to the succession to the personal estate of the Queen Mother of France, and on many other cases of great importance and delicacy, in which the knowledge of a civilian and publicist was required. See vol. ii. pp. 663, 673, 674, 709, &c.; see also *Temple's Memoirs*.

" *modern practice of other nations.* Upon any ques-
" tions or disputes arising beyond sea between His
" Majesty's subjects and those of other Princes, they
" often had recourse to Dr. Jenkins. Even those
" who presided in the seats of foreign Judicatures in
" some cases applied to him to know how the like
" points had been ruled in the Admiralty here, and
" his sentences were often exemplified and obtained as
" precedents there, &c." " For his opinion, whether
" in the Civil, Canon, or Laws of Nations, generally
" passed as an uncontrovertible authority, being
" always thoroughly considered and judiciously
" founded" (*z*).

The Law which governs the disposition of the personal estates of intestates, commonly called the Statute of Distributions (*a*), was framed by Sir L. Jenkins, principally upon the model of the 118th Novel of Justinian.

It was also by the influence of this distinguished member of their body, that after the Fire of London the Advocates of Civil Law obtained a share of certain immunities enjoyed by other branches of the Bar. The Rescript of Charles II. on the subject begins, " Charles R. The Society of the Doctors at
" Civil Law, Judges and Advocates of our Court
" now settled at Doctors' Commons, in London, hav-
" ing to their great charges rebuilt the same, &c. &c.
" And *we knowing the usefulness of that profession for*
" *the service of us and our kingdom in many affairs*,
" found just cause to assert their exemption from
" payment of taxes, burdens, and impositions in the

(*z*) P. xviii.
(*a*) 22 & 23 Car. II. c. 10.

"same manner as the Societies of the Serjeants' Inn "are and have used to be."

The death of Jenkins happened soon after the accession of James II. After the abdication of that Monarch the Civilians were consulted upon a very nice question of International Law, to which reference is made at length in this work (*b*). In the reign of Anne, Sir John Cooke, a distinguished Civilian, and Dean of the Arches, was one of the Commissioners for the Treaty of the Union with Scotland; and everybody acquainted with the Treaty of Utrecht is aware that the Civilians were continually consulted by the Crown upon the framing of the different Articles contained in it. Thus, the Queen, in her instructions to Lord Bolingbroke, "whom we have appointed to go to France," speaking of the exchange or alienation of Sicily by the House of Savoy, observes, "As for the second "point which you are to adjust, as far forth as is "possible, we have directed what has been prepared "by the Civilians upon this subject to be put into "your hand" (*c*). The reigns of the first two Georges produced Sir George Paul, Sir Henry Penrice, and the two Bettesworths, Judges of great learning and ability; but I pass on to the date of 1729, when Sir George Lee first entered upon his career of distinction. This able Civilian was an active enemy of Sir Robert Walpole; he was also Treasurer to Frederick Prince of Wales, and deservedly venerated for the learning, accuracy, and clearness of his decisions in the Prerogative and Arches Courts, in both

(*b*) *Vide post*, pp. 299, 428.

(*c*) *Bolingbrokes's Correspondence*, vol. i. p. 4, note.

of which tribunals he presided as Judge. But he enjoys also no inconsiderable European fame; for he was the principal composer of a State Paper (*d*) on a great question of International Law—the Answer to the Memorial of the King of Prussia, presented to the Duke of Newcastle by Mr. Mitchell, and, to borrow the words of his biographer (*e*), "it has universally "been received and acknowledged throughout Europe "as a correct and masterly exposition of the nature "and extent of the jurisdiction exercised over the "ships and cargoes of Neutral Powers by Courts of "the Law of Nations, established within the Terri-"tories of belligerent States. Montesquieu charac-"terizes is as *réponse sans réplique*, and Vattel terms "it *un excellent morceau du droit des gens*." To that memorial indeed another name was affixed, the name of one who was not indeed a member of the College of Advocates, but who was destined to be among the few luminaries of Jurisprudence in our island, and able to vie with those which have shone upon the Continent —of one whose boast it was that he had early and late studied the Civil Law, and who built upon this avowed basis, and on his knowledge of the writers on Public Law, that goodly fabric of Commercial Jurisprudence which has since indeed received addition and ornament, but which owed its existence to a mind saturated with the principles of the Roman Law. This great man was then Mr. Murray, afterwards Lord Mansfield. For comprehensive grasp of mind, for

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(*d*) It is printed in the *Collectanea Juridica*.

(*e*) See *Dr. Phillimore's Preface to Sir G. Lee's Reports*, p. xvi. See also an elaborate panegyric by *Dr. Harris*, in the Preface to his translation of the *Institutes of Justinian*.

knowledge of general principles of law, and of their particular application in various countries, this illustrious magistrate was second only to one, with the mentioned of whom I shall presently close my brief notice of distinguished Civilians (*f*).

But, to be historically correct, I should first advert to a circumstance of great importance in its relation to the history of the Advocates of Civil Law. Sir G. Lee died in 1756; in 1768 George III. granted to this Society a formal charter, by which it became a legally recognized body corporate. The charter recites, that the members of the College at Doctors' Commons had devoted themselves to the study of the Civil and Canon Law, and were either advocates or judges in the Ecclesiastical and Admiralty Courts, and that they had for "centuries past formed a "*voluntary* society," &c., and prayed the King to be pleased, by letters patent under the great seal, "to "incorporate them and their successors by the name, "style, and title of the College of Doctors of Law, "exercent in our Ecclesiastical and Admiralty Courts." The charter goes on to say: "We having taken "the said petition into our royal consideration, and "being willing to give all fitting encouragement to "the said study," &c., and then proceeds to constitute, with every imaginable formality of expression, the College a legal corporate society, with visitors and power of making bye-laws, &c. I return to the mention of that Civilian whose reputation as a jurist overtopped even the great name of Lord Mansfield. In 1779 Dr. Scott enrolled his name among the

(*f*) Want of space compels me reluctantly to omit all mention of such judges as Sir E. Simpson and Sir G. Hay.

advocates of Doctors' Commons; he is now better known by his well-deserved title, Lord Stowell, of whom it may be indeed emphatically said that he left

> "Clarum et venerabile nomen
> *Gentibus.*"

And the remainder of the line is scarcely less his due—

> "Et multum nostræ quod profuit urbi."

The history of Lord Stowell is familiar to the present generation. His great natural endowments—his long residence at the University—the admirable use he made of the opportunities which such residence affords for storing the mind with all kinds of knowledge—his vast and varied intellectual attainments—the mature age at which they were brought into the fray of active life—the keen insight into human nature—the judicial character of his wise, patient, and deliberative mind—the marvellous power of lucid arrangement, educing order and harmony from the most perplexed and discordant matter—the clear and beautiful robe of felicitous language and inimitable style which clothed all these high attributes—the awful crisis and convulsion of the civilized world which called for the exercise of these powers in the judgment-seat of International Law at the very time when he was elevated to it—the renown of his decisions over both hemispheres (*g*)—the great age to which he enjoyed the full possession of his faculties—all this is matter of too recent history to require a more detailed enumeration. "Testes vero jam omnes oræ atque

(*g*) *Vide passim the American Reports.*

"omnes exteræ gentes ac nationes: denique maria "omnia tum universa, tum in singulis oris, omnes "sinus atque portus" (*h*). With this justly venerated name I close my catalogue of English Civilians, omitting, not without regret, all mention of Dr. Strahan, the translator of *Domat*; of Dr. Harris, a Civilian of great eminence, the translator of *The Institutes*; of that learned and able Judge, Sir William Wynne; and of Dr. Lawrence, the well-known friend of Burke. To the latter, indeed, ample justice has been done by Lord Brougham in his *Characters of British Statesmen* (*i*).

I have endeavoured to give a sketch of the fortunes of International Law in this country, and to illustrate them by some comments on the most distinguished disciples of that jurisprudence. My sketch has been necessarily meagre and imperfect; it would otherwise have transgressed the limits of my Preface; and I have been compelled, especially during the latter period, to pass by in silence many English Civilians who would have deserved commemoration in a larger work.

CONCLUSION.

In conclusion, the Author trusts that, in any judgment which may be passed upon this work, it will be recollected that it is an endeavour, upon a larger scale than has hitherto been attempted in England, to reduce, in some measure at least, to a system, the principles and precedents of International Law; and that this is a task which the very nature of the ma-

(*h*) *Cicero, pro Lege Manilia.*
(*i*) See also *Horner's Memoirs*, vol. i.

terials renders extremely hard: inasmuch as it is very difficult so to arrange them as to avoid on the one hand a vague unsatisfactory generality, and on the other an appearance of precise mathematical accuracy, of which the subject is not susceptible.

The Author is anxious to express a sincere hope that others of his fellow countrymen, profiting by what may be useful, avoiding what may be erroneous, supplying what may be defective in his labours, may by them be stimulated to undertake and execute a better treatise upon the same subject.

It is by such gradual additions and painful accumulations that the edifice of this noble science may one day be completed, and the Code of International Jurisprudence acquire in all its branches the certainty and precision of Municipal Law. Such a result would be greatly instrumental in procuring the general recognition and ultimate supremacy of Right in the intercourse of nations, and, with the blessing of God, in hastening the arrival of that period when the aspiration of the Philosopher and the vision of the Prophet shall be accomplished. "Nec erit alia lex "Romæ alia Athenis; alia nunc, alia posthac, sed et "omnes gentes et omni tempore una lex et sempiterna "et immutabilis continebit." (*Cicero*, *De Re Publica*, l. 3, c. 22.) "Nation shall not lift up sword against "nation, neither shall they learn War any more." (*Isaiah*, c. ii. v. 4.)

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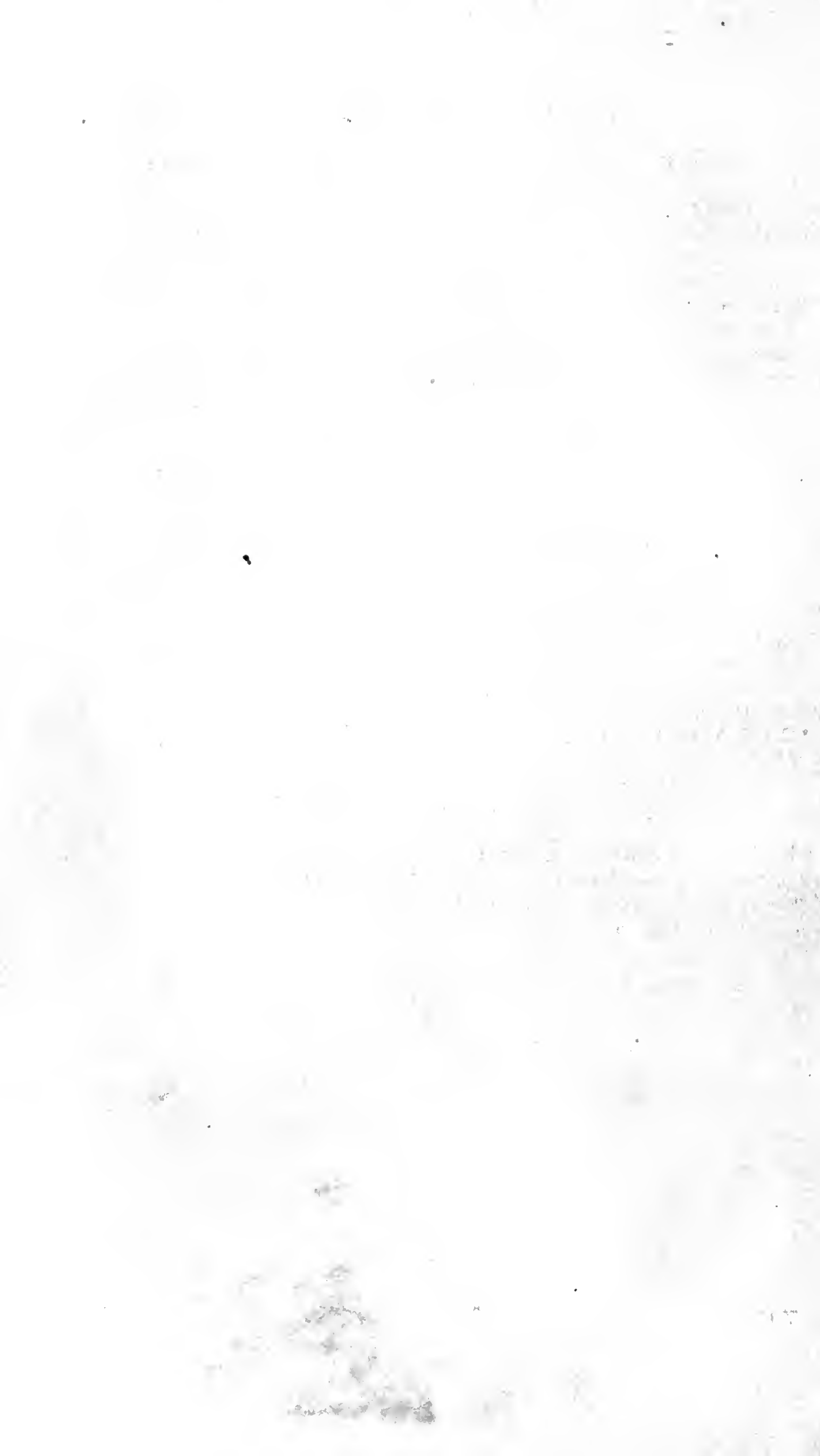

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COMMENTARIES

UPON

INTERNATIONAL LAW.

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INTERNATIONAL LAW.

CHAPTER I.

INTRODUCTION.

I. The great community, the universal commonwealth of the world, comprehends a variety of individual members, manifesting their independent national existence through the medium of an organized government, and called by the name of States (*a*).

II. States in their corporate capacity, like the individuals which compose them, are (subject to certain limitations) free moral agents, capable of rights, and liable to obligations (*b*).

(*a*) "Communitas, quæ genus humanum aut populos complures inter se colligat"—"jura magnæ universitatis."—*Grotius, de Jure Belli et Pacis, Proleg.* 17, 23.

"Sociétés, qui forment les nations—membres principaux de ce grand corps qui renferme tous les hommes."—*D'Aguesseau,* l. 444; *Institution du Droit public,* v., vi.

"Comme donc le genre humain compose une société universelle divisée en diverses nations, qui ont leurs gouverneurs séparés," &c.—*Domat, Traité des Lois,* ch. 11, s. 39.

(*b*) *Dig.* lib. v. tit. i. 76: "(De inoff. testamento) *pòpulum* eundem hoc tempore putari, qui abhinc centum annis fuisset, cum ex illis nemo nunc viveret."

Dig. lib. vii. tit. i. 56: "(De usufructu) an ususfructûs nomine actio *municipibus* dari debeat, quæsitum est, periculum enim esse videbatur ne perpetuus fieret quia neque morte nec facilè capitis diminutione periturus est . . . . sed tamen placuit dandam esse actionem: unde sequens dubitatio est quousque tuendi sunt municipes? et placuit centum annis tuendos esse municipes, *quia is finis vitæ longævi hominis est.*"

III. States, considered in their corporate character, are not improperly said to have internal and external relations (*c*).

IV. The internal relations of States are those which subsist between governments and their subjects in all matters relating to the public order of the State: the laws and principles which govern these internal relations form the subject of public jurisprudence, and the science of the publicist—*jus gentis publicum* (*d*).

V. The internal relations of a State may, generally speaking, be varied or modified without the consent of other States—*aliis inconsultis* (*e*).

VI. But in the great community of the world, in the society of societies, States are placed in relations with each

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The expression *municipes* is identical with *municipium.—Savigny, R. R.* ii. 249.

Dig. lib. xlvi. tit. i. 22: "(De fidejuss.) hæreditas *persônæ vice fungitur* sicuti *municipium*, et curia, et societas."

Dig. lib. iii. tit. 4: "Quod cujuscunque universitatis nomine vel contra rem agatur."—Lib. i. s. 1, 2.

Cod. lib. ii. t. 29: "De jure reipublicæ: 30, de administratione rerumpublicarum; 31, de vendendis rebus civitatis; 32, de debitoribus civitatum."

Hobbes, with his usual perspicuity: "Quia civitates semel institutæ induunt proprietates hominum personales."—*De Civ.* c. 14, ss. 4, 5.

Puffendorff adopted this view.—*Ib.* 3, 13.

Wolff, Præf.: "Enimvero cum gentes sint personæ morales ac ideo nonnisi subjecta certorum jurium et obligationum."

"Puis donc qu'une nation *doit* à sa manière à une autre nation ce qu'un homme *doit* à un autre homme," &c.—*Vattel, Droit des Gens*, liv. ii. ch. 1, s. 3; "Celle qui a tort pèche contre sa *conscience*."—*Ib. Prélim.* s. 21.

(*c*) *D'Aguesseau*, ib.

Blume, Deutsches Privatrecht, s. 19: "Der Staat . . . als ideale Person wird er zum lebendigen Träger des gesammten öffentlichen Rechts."

Puchta, Cursus der Institutionen, s. 25, b. 73, 4.

(*d*) "The Law which belongeth unto each nation—the Law that concerneth the fellowship of all."—*Hooker's Ecclesiastical Polity*, b. i. s. 16.

"Publicum jus est quod ad statum rei Romanæ spectat, privatum quod ad singulorum utilitatem."—*Ulpian, Dig.* i. t. i. s. 2, *De Just. et Jure.*

(*e*) "Hoc autem non est jus illud gentium propriè dictum: neque enim pertinet ad mutuam inter se societatem, sed ad cujusque populi tranquillitatem: unde et ab uno populo *aliis inconsultis* mutari potuit," &c. —*Grotius, de Jure Belli et Pacis*, lib. xi. ch. 8, s. 2.

other, as individuals are with each other in the particular society to which they belong (*f*). These are the external relations of States.

VII. As it is ordained by God that the individual man should attain to the full development of his faculties through his intercourse with other men, and that so a people should be formed (*g*), so it is divinely appointed that each individual society should reach that degree of perfection of which it is capable, through its intercourse with other societies.

To move, and live, and have its being in the great community of nations, is as much the normal condition of a single nation, as to live in a social state is the normal condition of a single man.

VIII. From the nature then of States, as from the nature of individuals, certain rights and obligations towards each other necessarily spring; these are defined and governed by certain laws (*h*).

IX. These are the laws which form the bond of justice between nations, "quæ societatis humanæ vinculum conti-"nent" (*i*), and which are the subject of international jurisprudence, and the science of the international lawyer—*jus inter gentes* (*j*).

(*f*) "Ex hoc jure gentium introducta bella, discretæ gentes, regna condita, dominia distincta."—*Dig.* lib. i. tit. i. s. 5.

Jus Gentium, however, here as elsewhere in the Roman Law, means Natural Law.—*Grot. de J. B. et P.* lib. ii. c. viii. tit. i. 26.

Savigny, R. R. b. 1, App.

Taylor's Civil Law, 128.

(*g*) *Puchta, Cursus der Institutionen*, i. s. 25, b. 73.

"That Law which is of commerce between grand Societies, the Law of Nations and of Nations Christian."—*Hooker*, ib.

(*h*) "Si nulla est communitas quæ sine jure conservari possit, quod memorabili latronum exemplo probabat Aristoteles; certè et illa quæ genus humanum aut populos complures inter se colliget, jure indiget."—*Grot. Proleg.* 23; *Vattel, Prélim.* s. 11.

(*i*) *Grot. de Jure B. et P.* l. ii. 26.

(*j*) It is to the English civilian *Zouch* that we owe the introduction of this correct phrase, the forerunner of the terms *International Law*, now in general use.—See *Von Ompteda, Litteratur der Völkerrecht*, s. 64.

D'Aguesseau afterwards adopted the phrase *jus inter gentes*.—Tom. i. 444, 521; *Instit. du Droit public*, vii. 2e partie, 1.

"The strength and virtue of that law (it has been well "said) are such that no particular nation can lawfully preju- "dice the same by any their several laws and ordinances, "more than a man by his private resolutions the law of "the whole commonwealth or State wherein he liveth; for "as civil law, being the act of the whole body politic, doth "therefore overrule each several part of the same body, so "there is no reason that any one commonwealth of itself "should to the prejudice of another annihilate that where- "upon the whole world hath agreed" (*k*).

X. To clothe with reality the abstract idea of justice, to secure by law within its own territories the maintenance of right against the aggression of the individual wrong-doer, is the primary object of a State, the great duty of each separate society.

To secure by law, throughout the world (*l*), the maintenance of right against the aggression of the national wrong-doer, is the primary object of the commonwealth of States, and the great duty of the society of societies. Obedience to the law is as necessary for the liberty of States as it is for the liberty

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(*k*) *Hooker*, ib., b. 1, s. 10.

"Dicitur ergo humana lex quia proximè ab hominibus inventa et posita est. Dico autem *proximè* quia primordialiter omnis lex humana derivatur aliquo modo à lege eterna."—*Suarez, Tractatus de Legibus et Deo legislatore*, c. 3, p. 12 (ed. Lond. 1679).

"Omnes populi qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum jure utuntur; nam quod quisque populus ipse sibi jus constituit, id ipsius proprium civitatis est: vocaturque jus civile, quasi jus proprium ipsius civitatis. Quod verò naturalis ratio inter omnes homines constituit, id apud omnes peræquè custoditur: vocaturque jus gentium, quasi quo jure omnes gentes utuntur."—*Dig.* lib. i. tit. i. s. 2.

(*l*) "Dieselbe Kraft, welche das Recht hervortreibt, bildet auch den Staat, ohne welchen das Recht nur ein unvollständiges Daseyn, eine prekäre Existenz hätte, ohne den der gemeine Wille, auf dem das Recht beruht, mehr ein Wunsch als ein wirklicher kräftiger Wille seyn würde."—*Puchta, Instit.* xi. 27.

"Dennoch ist seine erste und unabweisliche Aufgabe die Idee des Rechts in der sichtbaren Welt herrschend zu machen."—*Savigny, R. R.* b. 1, k. ii. s. 9, 25.

of individuals. Of both it may be said with equal truth, "legum idcirco omnes servi sumus ut liberi esse pos- "sumus" (*m*).

XI. It has been said that States are capable of rights, and liable to obligations; but it must be remembered that they can never be the subjects of *criminal* law (*n*). To speak of inflicting punishment upon a State, is to mistake both the principles of criminal jurisprudence and the nature of the *legal* personality of a corporation. Criminal law is concerned with a *natural* person; a being of thought, feeling, and will. A *legal* person is not, strictly speaking, a being of these attributes, though, through the medium of representation and of government, the will of certain individuals is considered as the will of the corporation; but only for certain purposes. There must be *individual* will to found the jurisdiction of criminal law. Will by *representation* cannot found that jurisdiction. Nor is this proposition inconsistent with that which ascribes to States a capacity of civil rights, and a liability to civil obligations. This capacity and liability require for their subject only a *will* competent to acquire and possess property, and the rights belonging to it. A *legal* as well as a *natural* person has this will. The greatest corporation of all, the State, has this will in a still greater degree than the minor subordinate corporations—the creatures of its own municipal law. The attribute of this limited will is consistent with the idea and object of a legal person. But the attribute of the unlimited will, requisite for the commission of a *crime*, is wholly inconsistent with this idea and object.

The mistake respecting the liability of nations to *punish-*

(*m*) *Cic. pro Cluentio*, 53. "Der Staat ist die Anstalt zur Beherrschung des Rechtes in einem bestimmten Volke, das höchste Rechtsinstitut dieser Nation."—*Kaltenborn, Völkerrecht*, 259.

(*n*) *Savigny, R. R.*, 2, 94–96, has some excellent remarks on the analogous subject of the capacities and liabilities of corporations in a State. See *Pinheiro Ferreira's Commentaries on Vattel*, wherever the word "*punir*" occurs.

ment, which appears in Grotius and Vattel, arises from two causes: First, from an indistinct and inaccurate conception of the true character of a State; secondly, from confounding the individual rulers or ministers with that of the nation which they govern or represent. The error may be fairly illustrated by an analogy drawn from municipal law. Lunatics and minors, like corporations, have no *natural* capacity of acting; an *artificial* capacity is therefore vested in their representatives, their guardians or curators. The lunatics and minors are rendered, by the acts of these representatives, capable of *civil* rights, and liable to *civil* obligations; but the possibility of their being rendered liable to *punishment* for the vicarious commission of *crime,* is a proposition as yet unknown to any human code of municipal law. Justice and law lay down the rule: "Ut noxa tantum caput sequatur"(*o*). It does not militate with this doctrine, to maintain that a State may be injured and insulted by another; may seek redress by war, or may require the deposition of the ruler, or the exile of the representative of another State; or may deprive a State of its territory, wholly or in part. These measures may be necessary to preserve its own personality and existence, the welfare of other States, and the peace of the world, and on these grounds, but upon no other, they may be defensible. These acts, when lawful, are acts, directly or indirectly, of self-defence, not of punishment. It has happened, that corporations have been subjected to calamities which at first sight resemble punishments (*p*). Municipalities have been deprived of their legal personality, or have been stripped of

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(*o*) It is hardly necessary to say, that the awful question of God's dealing with sinful nations does not enter into this discussion.

"Nunquam curiæ a provinciarum rectoribus generali condemnatione mulctentur, cum utique hoc et æquitas suadeat et regula juris antiqui, ut *noxa tantum caput sequatur,* ne propter unius fortasse delictum alii dispendiis affligantur."—*Nov. Majoriani,* tit. 7; *Hugo, Jus Civile Antejust.* p. 1386, s. 4: cited *Savigny, R. R.* 2, 321.

(*p*) *Savigny, R. R.* 2, 318.

their honours and privileges, as regiments have been deprived of their colours. But these acts, duly considered, are acts of policy, not of justice (*q*).

We read in Roman history of the *punishment* inflicted upon the city of Capua, which had revolted from Rome, and become the ally of Hannibal. Reconquered Capua was stained with the blood of her eminent citizens, and disfranchised of all her corporate privileges (*r*). But this, and other less remarkable instances of the like kind in Roman history, did not purport to be, and were not judicial applications of criminal law; but were rather acts of state policy, intended to strike a salutary terror equally into foes and subjects (*s*).

A very different principle appears in the pages of Roman jurisprudence, in which the obligation arising from the commission of a crime—*obligatio ex delicto*—is distinguished from the obligation arising from the possession of a benefit obtained by the commission of a crime—*obligatio ex re, ex eo quod ad aliquem pervenit* (*t*). The latter, but not the former obligation may bind a corporate body.

Under what circumstances States become responsible for the guilty acts of their individual members (*u*), will be considered hereafter. But even in these cases the State is not

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(*q*) *Livy*, lib. xxvi. c. 15: "De *supplicio* Campani," &c.
C. 17: "Quod ad *supplicium*, ad expetendas *pœnas*," &c.

(*r*) C. 16: "Cæterum habitari tantum, tanquam urbem, Capuam, frequentarique placuit: corpus nullum civitatis, nec senatus, nec plebis concilium, nec magistratus esse; sine consilio publico, sine imperio, multitudinem, nullius rei inter se sociam, ad consensum inhabilem fore."

(*s*) C. 16: 'Confessio expressa hosti quanta vis in Romanis ad expetendas *pœnas* ab infidelibus sociis, et quam nihil in Annibale auxilii ad receptos in fidem tuendos esset."

(*t*) *Dig*. xliii. t. xvi. s. 4: "De vi.—Si vi me dejecerit quis nomine municipum *in municipes* mihi interdictum reddendum Pomponius ait, *si quid ad eos pervenit*."

(*u*) "Solere *pœnæ* expetendæ causa bella suscipi, et supra ostendimus et passim docent historiæ: ac plerumque hæc causa cum altera de damno reparando conjuncta est, quando idem actus et vitiosus fuit et

punishable, though liable to make compensation for the injury which it has sanctioned.

XII. Vattel describes with simplicity and truth the province of International Jurisprudence: "Le droit des Gens" (he says) "est la science du droit qui a lieu *entre* les "Nations et les États, et des obligations qui répondent à ce "droit" (*x*).

The same favourite expounder of International Law does not hesitate to class among these *obligations* binding upon the national conscience, the duty of succouring another nation unjustly invaded and oppressed. The fact that no defensive alliance formally subsists between the two nations cannot, he says, be alleged as an excuse for the neglect of this duty (*y*). The nation that renders the succour, is keeping alive that benevolent spirit of mutual assistance, the application of which she herself may one day need. To perform her duty to another is, in truth, to strengthen the founda-

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damnum reipsa intulit, ex quibus duabus qualitatibus duæ diversæ nascuntur obligationes."—*Grotius*, lib. ii. c. 20, s. 28.

"Sciendum quoque est, reges, et qui par regibus jus obtinent, jus habere *pœnas* poscendi non tantum ob injurias in se aut subditos suos commissas, sed et ob eas quæ ipsos peculiariter non tangunt, sed in quibusvis personis jus naturæ aut gentium immaniter violantibus."—*Ib.* lib. ii. c. 20, s. 40.

"Et eatenus sententiam sequimur Innocentii, et aliorum qui bello agunt, peti posse eos qui in naturam delinquunt: contra quam sentiunt Victoria, Vasquius, Azorius, Molina, alii, qui ad justitiam belli requirere videntur, ut qui suscipit aut læsus sit, in se aut republica sua, aut ut in eum qui bello impetitur jurisdictionem habeat. Ponunt enim illi *puniendi* potestatem esse effectum proprium jurisdictionis civilis, cum nos eam sentiamus venire etiam ac jure naturali, qua de re aliquid diximus libri primi initio. Et sane si illorum a quibus dissentimus admittatur sententia, jam hostis in hostem *puniendi* jus non habebit, etiam post justè susceptum bellum ex causa non *punitiva*: quod tamen jus plerique concedunt, et usus omnium gentium confirmat, non tantum postquam debellatum est, sed et manente bello; non ex ulla jurisdictione civili, sed ex illo jure naturali quod et ante institutas civitates fuit, et nunc etiam viget, quibus in locis homines vivunt, in familias non in civitates distributi."—*Ib.* lib. ii. c. 20, s. 40 (4).

C. 21: "De communicatione *pœnarum*."

(*x*) *Prélim.* s. 3.

(*y*) *Ib.* l. 2. c. xxv. ss. 1–7.

tions of her own security; and in the case of the nation, as in the case of the individual, duty and true self-love point to the same path (*z*).

The whole edifice of this science, pronounced by the still higher authority of Grotius to be the noblest part of jurisprudence (*a*), may be said to rest upon the sure foundations—first, of moral truth; and, secondly, of historical fact:—

1. The former demonstrates that independent communities are free moral agents.

2. The latter, that they are mutually recognized as such in the universal community of which they are individual members (*b*).

(*z*) "Ainsi quand un État voisin est injustement attaqué par un ennemi puissant, qui menace de l'opprimer, si vous pouvez le défendre sans vous exposer à un grand danger, il n'est pas douteux que vous ne *deviez* le faire. N'objectez point qu'il n'est pas permis à un souverain d'exposer la vie de ses soldats pour le salut d'un étranger, avec qui il n'aura contracté aucune alliance défensive. Il peut lui-même se trouver dans le cas d'avoir besoin de secours; et par conséquent mettre en vigueur cet esprit d'assistance mutuelle, c'est travailler au salut de sa propre nation."—Liv. ii. c. i. s. 4.

(*a*) *Grotius, Proleg.* 32: "In hoc opere quod partem jurisprudentiæ longè nobilissimam continet."

Aristoteles, Eth. lib. i. c. 2: Ἀγαπητὸν μὲν καὶ ἑνὶ μόνῳ καλλίον δὲ καὶ θειότερον ἔθνει καὶ πόλεσιν.

(*b*) *Domat, Traités des Lois*, c. xi. s. 30.

Kaltenborn, Kritik des Völkerrechts, s. 295.

"Possunt autem gentium præcepta ad unum principium revocari, quo quasi fundamento suo nituntur. Oportet enim esse gentes vel respublicas, quæ se invicem ut liberas et sui juris nationes agnoscunt. Hac agnitione sine qua jus gentium ne cogitari quidem potest, efficitur, ut illæ civitates *personarum* ad instar habeantur, quæ non minus quam singuli homines caput habentes, suo jure utuntur, et mutuo juris vinculo inter se junguntur. Hujus vinculi definitio atque ponderatio juris gentium argumentum est."—*Doctrina Juris Philosophica, &c., Warnkönig*, s. 145, p. 189.

CHAPTER II.

PLAN OF THE WORK.

XIII. A TREATISE on International Jurisprudence appears to admit of the following general arrangement:—

1. An inquiry into the origin and nature of the *Laws* which govern international relations (*leges*).

2. The *Subjects* of these laws. The original and immediate subjects are States considered in their corporate character.

3. The *Objects* of these laws. These objects are Things, Rights, and the Obligations which correspond to them (*Res, Jura, Obligationes*).

4. *Certain Subjects* of these laws which, though only to be accounted as such mediately and derivatively, yet, for the sake of convenience, require a separate consideration.

These Subjects of International Law are the following individuals who are said to *represent* a State:—

1. *Sovereigns.*
2. *Ambassadors.*

Also another class of public officers who are not clothed, accurately speaking, with a representative character, but who are entitled to a *quasi* diplomatic position, namely—

3. *Consuls.*

4. Lastly, the *International Status of Foreign Spiritual Powers*, especially of *the Pope,* requires a distinct consideration.

XIV. Public International Rights, like the Private Rights of an Individual, are capable of being protected and enforced by Legal Means.

These Legal Means are of two kinds, aptly expressed by jurists as being (1) *via amicabili*, and (2) *via facti*.

1. Via amicabili. { 1. Negotiation.
2. Arbitration.

2. Via facti. { 1. Reprisals.
2. Embargo.
3. War.

When war has actually begun, we enter upon the *jus belli*, which is to be considered with reference to

1. The Rights of Belligerents;
2. The Rights of Neutrals—

"Sequitur enim de jure belli: in quo et *suscipiendo*, et "*gerendo*, et *deponendo*, jus, ut plurimum valet, et fides" (*a*). "For the wars (as Lord Bacon says) are no massacres and "confusions, but they are the highest trials of right" (*b*).

Grotius points out, with his usual sound and true philosophy, the proper place, object, and functions of war in the system of International Law (*c*): "Tantum vero abest ut "admittendum sit, quod quidam fingunt, in bello omnia jura "cessare, ut nec suscipi bellum debeat nisi *ad juris consecu-* "*tionem*, nec susceptum geri nisi intra juris et fidei modum. "Benè Demosthenes bellum esse in eos dixit, qui judiciis "coerceri nequeunt; judicia enim vigent adversus eos qui "invalidiores se sentiunt: *in eos qui pares se faciunt aut pu-* "*tant, bella sumuntur; sed nimirum ut recta sint, non minori* "*religione exercenda quam judicia exerceri solent*;" and again, "*bellum pacis causa suscipitur*" (*d*).

(*a*) *Cicero de Rep.* lib. ii. c. 14; and he adds, "horumque ut publici interpretes essent lege sanximus."

(*b*) *Bacon's Works*, vol. v. p. 384 (ed. Basil Montagu).

(*c*) *Grotii Proleg.* 25, *De Jure Belli et Pacis*; though he illogically displaces the treatment of it in his great work, beginning, as indeed he admits, with the end of his subject.

(*d*) *Ib.* lib. i. c. i. s. 1.

"Le mal que nous faisons à l'agresseur n'est point notre but: nous agissons en vue de notre salut, nous usons de notre droit; et l'agresseur est seul coupable du mal qu'il s'attire."—*Vattel*, liv. ii. c. ii. s. 18.

Taylor's Civil Law, p. 131.

XV. When by use of the Legal Means of War the Righ has been obtained or secured, or the Injury redressed—*pos juris consecutionem*—the normal state of peace is re-esta blished.

A consideration of the negotiations which precede, and th consequences which follow, the Ratification of Peace wil conclude that portion of this work which relates to Publi International Law.

XVI. We have hitherto spoken of Public Internationa Law (*jus publicum inter gentes—jus pacis*), which govern the mutual relations of States with respect to their Publi Rights and Duties; but, as States are composed of Indi- viduals, and as individuals are impelled by nature an allowed by usage to visit and to dwell in States in whic they were not born, and to which they do not owe a natura allegiance, and as they must and do enter into transaction and contract obligations, civil, moral, and religious, with th inhabitants of other States, and as States must take som cognizance of these transactions and obligations, and as th municipal law of the country cannot, in many instances a least, be applied with justice to the relations subsisting be- tween the native and the foreigner—from these cause a system of Private International Law, a "*jus gentium* "*privatum*," has sprung up, which has taken deep roo among Christian, though it more or less exists among all nations.

The distinction, however, between the two branches o International Jurisprudence is extremely important. It i this:—

The *obligationes juris privati inter gentes* are not—as th *obligationes juris publici inter gentes* are—the result of lega necessity, but of social convenience, and they are called by the name of Comity—*comitas gentium*.

It is within the absolute competence of a State to refuse permission to foreigners to enter into transactions with its subjects, or to allow them to do so, being forewarned that

the municipal law of the land will be applied to them (*e*); therefore a breach of comity cannot, strictly speaking, furnish a *casus belli,* or justify a recourse to war, any more than a discourtesy or breach of a natural duty, simply as such, can furnish ground for the private action of one individual against another (*f*).

For a want of Comity towards the individual subjects of a foreign State, reciprocity of treatment by the State whose subject has been injured, is, after remonstrance has been exhausted, the only legitimate remedy; whereas the breach of a rule of Public International Law constitutes a *casus belli,* and justifies in the last resort a recourse to war.

It is proposed to treat the subject of Comity or Private International Law next in order to the subject of Public International Law.

(*e*) *Néyron, Principes du Droit des Gens européens,* l. clxxi. c. vi. s. 177.

Barbeyrac, Ad Grotium, l. ii. c. ii. s. 13.

(*f*) *Vattel,* liv. ii. c. i. s. 10.

CHAPTER III.

SOURCES OF INTERNATIONAL LAW.

XVII. It is proposed in this chapter to trace the source and ascertain the character of those laws which govern the mutual relations of independent States in their intercourse with each other.

XVIII. International Law has been said, by one profoundly conversant with this branch of jurisprudence, to be made up of a good deal of complex reasoning, and, though derived from very simple principles, altogether to comprise a very artificial system (*a*).

XIX. What are the depositories of this reasoning and these principles? What are the authorities to which reference must be made for the adjustment of disputes arising upon their construction, or their application to particular instances? What are in fact the fountains of International Jurisprudence—"dijudicationum fontes?"—to borrow the just expression of Grotius. These are questions which meet us on the threshold of this science, and which require as precise and definite an answer as the peculiar nature of the subject will permit (*b*).

XX. Grotius enumerates these sources as being "*ipsa* "*natura, leges divinæ, mores, et pacta*" (*c*).

In 1753, the British government made an answer to a memorial of the Prussian government (*d*) which was termed

(*a*) *Lord Stowell: the Hurtige Hane*, 3 *Robinson, Adm. R.* 326.

(*b*) *Arist. Eth.* lib. i. c. 2: Πεπαιδευμένου γάρ ἐστιν, ἐπὶ τοσοῦτον τἀκριβὲς ἐπιζητεῖν καθ' ἕκαστον γένος, ἐφ ὅσον ἡ τοῦ πράγματος φύσις ἐπιδέχεται, παραπλήσιον γὰρ φαίνεται, μαθηματικοῦ τε πιθανολογοῦντος ἀποδέχεσθαι, καὶ ῥητορικὸν ἀποδείξεις ἀπαιτεῖν.

(*c*) *Prolegom.*: "By the Law of Nature and Nations and by the Law Divine, which is the perfection of the other two."—*Lord Bacon, Of an Holy War.*

(*d*) *Cabinet of Scarce and Celebrated Tracts*, 1 vol. (Edinburgh).

by Montesquieu *réponse sans réplique* (*e*), and which has been generally recognized as one of the ablest expositions of international law ever embodied in a state paper. In this memorable document, "The Law of Nations" is said to be "founded upon justice, equity, convenience, and the reason "of the thing, and confirmed by long usage."

XXI. These two statements may be said to embrace the substance of all that can be said on this subject. An attempt must now be made to examine in detail, though not precisely in the same order, each of the individual sources set forth in the foregoing citations.

XXII. Moral persons are governed partly by Divine law (*leges divinæ*), which includes natural law—partly, by positive instituted human law, which includes written and unwritten law or custom (*jus scriptum, non scriptum consuetudo*).

States, it has been said, are reciprocally recognized as moral persons. States are therefore governed, in their mutual relations, partly by Divine, and partly by positive law. Divine Law is either (1) that which is written by the finger of God on the heart of man, when it is called Natural Law; or (2) that which has been miraculously made known to him, when it is called revealed, or Christian law (*f*).

XXIII. The Primary Source, then, of International Jurisprudence is Divine Law. Of the two branches of Divine Law which have been mentioned, natural law, called by jurists *jus primarium*, is to be first considered. "In jure gen-"tium" (*g*), Grotius says, "jus naturæ includitur;" and, again, "jure *primo* gentium quod et *naturale* dicitur."

All civilized heathen nations have recognized this law as

(*e*) *Lettres persanes*, liv. xlv.

(*f*) *Arist. Eth.* lib. v. c. 7. St. Paul's Ep. to the Romans, ii. 14, 15.

(*g*) *Mare Liberum*, lib. v.; *Merlin, Rep. de Jurispr.* tom. v. p. 291. "Hanc autem quæstionem *ad jus Naturæ* ideo retulimus, quia ex historiis nihil comperire potuimus ea de re jure voluntario gentium esse constitutum."—*Grot.* l. iii. v. 5.

binding upon themselves in their *internal* relations. They called it the unwritten, the innate law—the law of which mortals had a Divine intuition (*h*)—the law which was begotten and had its footsteps in heaven, which could not be altered by human will (*i*), which secured the sanctity of all obligations—the law which natural reason has rendered binding upon all mankind (*k*).

XXIV. It has been often said that the civilized heathen nations of old, that the Greeks and Romans recognized no such law in their *external* relations; that is, in their intercourse with themselves or with other nations. But this conclusion is founded on slender and insufficient premises, chiefly upon the absence of distinct treatises on the subject, on the want of a distinct phrase expressing the modern term international law—on the etymological meaning of words—on the use of "*jus gentium*" in the repositories of Roman law, as an expression identical with *jus naturæ*—and on the practical contempt for the law, exhibited in the unbounded ambition and unjustifiable conquests of ancient Rome.

XXV. Nevertheless, we know that Aristotle passed a severe censure upon those nations who would confine the cultivation of justice within the limits of their own territories and neglect the exercise of it in their intercourse with other nations (*l*). Thucydides (*m*) prefers the same charge against

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(*h*) *Arist. Rhet.* b. i. c. 13: Ἴδιον μὲν τὸν ἑκάστοις ὡρισμένον πρὸς αὐτούς· καὶ τοῦτον τὸν μὲν ἄγραφον, τὸν δὲ γεγραμμένον. Κοινὸν δὲ τὸν κατὰ φύσιν· ἔστι γάρ, ὃ μαντεύονταί τι πάντες, φύσει κοινὸν δίκαιον καὶ ἄδικον, κἂν μηδεμία κοινωνία πρὸς ἀλλήλους ᾖ, μηδὲ συνθήκη.

(*i*) *Soph. Antig.* v. 450-7; ὑψίποδες νόμοι, *Œd. Tyr.* 866.

(*k*) *Cic. Pro Milone*, 3; *De Rep.* l. iii. c. 22.

(*l*) Αὐτοὶ μὲν γὰρ παρ' αὐτοῖς τὸ δικαίως ἄρκειν ζητοῦσι, πρὸς δὲ τοὺς ἄλλους οὐδὲν μέλει τῶν δικαίων.—*Polit.* lib. vii. c. 2. And when he is discussing the different *ends* of different kinds of oratory, and observing that the speaker in the public assembly dwells on the inexpediency and not the immorality of a particular course of action: ὡς δ' οὐκ ἄδικον τοὺς ἀστυγείτονας καταδουλοῦσθαι, καὶ τοὺς μηδὲν ἀδικοῦντας, πολλάκις οὐδὲν φροντίζουσιν.—*Rhet.* tom. i. c. 3.

(*m*) *Hist.* lib. v.

the Lacedæmonians, which is repeated by Plutarch (*n*); and we find Plato demanding (*o*), with indignation, whether it was reasonable to suppose that any society could flourish which did not respect the rights of other societies. We find Euripides speaking of the natural equality of rights as binding city to city, and ally to ally (*p*). We find Themistocles claiming the right, "*communi jure gentium*," of placing Athens in a state of defence (*q*). We find that the rights of embassy were respected—that treaties were ratified by solemn sacrifices (*r*), and placed under the especial care of the deities who avenged violated faith. We read of the memorable Amphictyonic league, which constituted the tribunal of public international law for the different States of Greece. These and other historical facts demonstrate that the application of the principles of natural justice to international relations, however imperfectly executed, and though never reduced to a system, was not unknown to Greece (*s*).

XXVI. We are led with yet more certainty to this conclusion with respect to Rome, by the consideration of two remarkable institutions which existed there:—1. The *Collegium Fecialium*, with the *Jus Feciale* (*t*), which could not

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(*n*) *Plutarch, Vita Agesilai.*

(*o*) Πόλιν φαίης ἂν ἄδικον εἶναι καὶ ἄλλας πόλεις ἐπιχειρεῖν δουλοῦσθαι ἀδίκως καὶ καταδεδουλῶσθαι, πολλὰς δὲ καὶ ὑφ' ἑαυτῇ ἔχειν δουλωσαμένην; Πῶς γὰρ οὐκ; ἔφη . . . ἀλλὰ δὴ καὶ τόδε μοι χάρισαι καὶ λέγε· δοκεῖς ἂν ἢ πόλιν, ἢ στρατόπεδον, ἢ λῃστὰς, ἢ κλέπτας, ἢ ἄλλο τι ἔθνος, ὅσα κοινῇ ἐπί τι ἔρχεται ἀδίκως, πρᾶξαι ἄν τι δύνασθαι εἰ ἀδικοῖεν ἀλλήλους; Οὐ δῆτα, ἦ δ' ὅς. Τί δ' εἰ μὴ ἀδικοῖεν; οὐ μᾶλλον; Πάνυ γε, κ.τ.λ.—*De Rep.* lib. i. 22–3.

(*p*) Κεῖνο κάλλιον, τέκνον,
ἰσότητα τιμᾷν, ἣ φίλους ἀεὶ φίλοις
πόλεις τε πόλεσι συμμάχους τε συμμάχοις
ξυνδεῖ, τὸ γὰρ ἴσον νόμιμον ἀνθρώποις ἔφυ.
Phœnissæ, 535.

(*q*) *Cornelius Nepos, Vita Themistoc.*

(*r*) *Livy*, l. xxiv.

(*s*) See Appendix for a fuller dissertation upon this subject.

(*t*) Zouch's Treatise on International Law is entitled "De Jur *Feciali*, sive de Jure *inter* Gentes."

be better translated than by the words "Public International "Law." 2. The institution of the *Recuperatores*, with the doctrine of the *Recuperatio*, the precursor of that system which is now called "Private International Law." Traces of the same fact are abundantly scattered over the pages of Latin authors, legal, historical, and philosophical. The phrase "jus gentium," in classical writers, and in the Justinian compilations of law, is indeed generally (though not without exceptions) used as synonymous with natural law (*u*); for there are passages in these compilations, as well as in the pages of Sallust and Livy, in which the phrase, strictly speaking, denotes international law. The fact, moreover, that the expression "*jus gentium*" was used as synonymous with what is now called "*jus naturale*," is by no means inconsistent with the position, that the principles of natural law were, theoretically at least, recognized by Rome in her external as well as her internal relations (*x*).

A cursory reference to the works of Cicero alone will show that in his time, and before the destruction of the Republic, the science of International law was beginning to receive great cultivation in all its branches; nor can the necessity and duty of international obligations be more forcibly inculcated than in these words: "Qui civium rationem habendam "dicunt, exterorum negant, hi *communionem et societatem* "*humani generis dirimunt.*"

Cicero praises Pompey for being well versed, not only in what is now called Conventional or Diplomatic Law, but also in the whole jurisprudence relating to Peace and War.

Cicero maintains, that God has given to all men conscience and intellect; that where these exist, a law exists, of which

(*u*) *Puchta, Instit.* 362. See Appendix.

(*x*) *Taylor*, p. 128. "The law was natural law before: the existence of this situation only gives its use and application. Suppose the observance of faith to be a rule of nature: when, to speak in the language of the Schools, it is *Jus Naturæ ab origine et causa proxima*, it is *Jus Gentium a subjecto.*" And again: "Contracts were introduced by the law of nations; no new law is formed, but an eternal and necessary law has now a scene to exert its operations in."

all men are common subjects. Where there is a *common law*, he argues, there is a *common right*, binding more closely and visibly upon the members of each separate State, but so knitting together the Universe, "ut jam universus hic mun- "dus una civitas sit, communis Deorum atque hominum "existimanda" (*y*).

That law, this great Jurist says, is immortal and unalterable by prince or people, and in glowing language he anticipates the time when one law and one God will govern the world: "Neque erit alia lex Romæ, alia Athenis, alia "nunc, alia posthac; sed et *omnes gentes* et omni tempore "*una lex* et sempiterno et immutabilis continebit, unusque "erit communis quasi magister et imperator omnium "Deus" (*z*).

XXVII. The subject which has been just discussed is not one of mere literary curiosity or philosophical research. It has indirectly a practical bearing on the theme of this

(*y*) *De Rep.* The Epistles of *Seneca*, the contemporary of St. Paul, breathe the very spirit of Christian brotherhood and unity: "Philosophia docuit colere divina, *humana diligere*, et penes Deos imperium esse, *inter homines consortium*" (Ep. 95). "Homo, sacra res homini—omne hoc quod vides, quo divina atque humana conclusa sunt, unum est: *membra sumus corporis magni, natura nos cognatos edidit*, quum ex iisdem et in eadem gigneret. Hæc nobis *amorem dedit mutuum et sociabiles fecit*" (Ep. 90).

Troplong, de l'Influence du Christianisme sur le Droit civil des Romains.—P. 70, &c.

"Homo sum: humani nihil a me alienum puto," is the language which *Terence* puts into the mouth of one of his characters.—*Heautontimor.* act i. sc. i. 25.

(*z*) *De Rep.* lib. iii. c. xxii. See also *De Legibus* (lib. i. c. vii.), and a noble passage (lib. i. c. xxiii.), where he bids his hearer elevate his mind to the prospect of the universe, its rules, and its laws: "Seseque non unius circumdatum mœnibus loci, *sed civem totius mundi quasi unius urbis* agnoverit."

"Of Law there can be no less acknowledged than that her seat is the bosom of God, her voice the harmony of the world: all things in heaven and earth do her homage—the very least as feeling her care, and the greatest as not exempted from her power; both angels and men, and creatures of what condition soever, though each in different sort and manner, yet all, with uniform consent, admiring her as the mother of their peace and joy."—*Hooker*, *ib.* b. i.

treatise. The same school which denies that the polished nations of antiquity recognized international obligations, uses the assumed fact as an illustration of a further and more general position—namely, a denial that any general International Law, not the result of positive compact, exists between Christian nations and those which are not Christian.

XXVIII. This position, it will be seen, directly conflicts with the principle just enunciated; and, on the contrary, the first important consequence which flows from the influence of Natural upon International Law is, that the latter is not confined in its application to the intercourse of Christian nations, still less, as it has been affirmed, of European nations, but that it subsists between Christian and Heathen, and even between two Heathen nations, though in a vaguer manner and less perfect condition than between two Christian communities; so that whenever communities come into contact with each other, before usage or custom has ripened into a quasi contract, and before positive compacts have sprung up between them, their intercourse is subject to a Law (*a*).

Lord Stowell, in one of those judgments in the British High Court of Admiralty which contain a masterly exposition of the principles of International Jurisprudence, speaking of the then Mahometan States in Africa, observed, " It is by the law of treaty only that these nations hold

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(*a*) So *Mr. Jenkinson* (afterwards Earl of Liverpool), in his able treatise " On the Conduct of the Government of Great Britain in 1758," observes (p. 29)—" I shall therefore examine the right which neutral powers claim in this respect, first, according to the law of nations—that is, according to those principles of natural law which are applicable to the conduct of nations, such as are approved by the ablest writers and practised by States the most refined. I shall then consider the alterations which have been made in this right by those treaties which have been superadded to the law of nations, and which communities, for their mutual benefit, have established among themselves."

" Jus *hoc* (i. e. *legationis*) non ut jus naturale ex certis rationibus certo oritur, sed ex voluntate gentium modum accipit." Here the distinction between natural and conventional international law is clearly laid down. —*Grot.* lib. ii. c. xviii. 4, 2.

"themselves bound, conceiving (as some other people have "foolishly imagined) that there is no other law of nations, "but that which is derived from positive compact and con-"vention" (*b*). The true principle is clearly stated in the manifesto of Great Britain to Russia, in 1780: "His Majesty," it is said in that State paper, "has acted towards friendly "and mutual powers according to their own procedure "respecting Great Britain, and conformable to the clearest "principles generally acknowledged as the Law of Nations, "being the only law between powers where no treaties sub-"sist, and agreeable to the tenor of his different engagements "with others; these engagements have altered *this primitive* "*law* by mutual stipulations proportioned to the will and "convenience of the contracting parties" (*c*).

Montesquieu was not ignorant, as has been supposed, of the science of International Law when he said, "Toutes "les nations ont un droit des gens; et les Iroquois mêmes "qui mangent leurs prisonniers en ont un. Ils envoient et "reçoivent des ambassades: ils connoissent des droits de la "guerre et de la paix: le mal est que ce droit des gens "n'est pas fondé sur les vrais principes" (*d*). In other words, these barbarous nations acknowledged, even while polluted by such abominations, that certain rules were to be reciprocally observed in their intercourse with each other, whether in Peace or War—even as the savages who practise infanticide do homage to the Moral Law in holding ingratitude to be infamous.

In the same spirit an eminent writer on English Criminal Law (*e*), speaking of the immunities of Ambassadors, says: "But for murder and other offences of great enormity, which "are against the *light of nature* and the fundamental laws of

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(*b*) *Robinson's Admiralty Reports* (*The Helena*), vol. iv. p. 7.

(*c*) *Ann. Regis.* vol. xxiii. p. 348, Manifesto of England to Russia, April 23rd, 1780.

(*d*) *Montesquieu, de l'Esprit des Lois,* lib. i. c. iii.

(*e*) *Foster on Crown Law,* p. 188; *Ward's Law of Nations,* vol. ii. p. 542. The correctness of the application of this principle to the case of ambassadors will be considered hereafter.

"all society, the persons mentioned in this section are "certainly liable to answer in the ordinary course of justice, "as other persons offending in the like manner are. For "though they may be thought not to owe allegiance to the "Sovereign, and so to be incapable of committing high "treason, yet they are to be considered as members of "society, and consequently bound by that eternal universal "law by which all civil societies are united and kept "together" (*f*). Vattel says: "Les nations étant libres, "indépendantes, égales, et chacune devant juger en sa *con-* "*science* de ce qu'elle a à faire pour remplir ces *devoirs*, etc., "celle qui a tort pèche contre sa *conscience*" (*g*).

XXIX. But if the precepts of Natural Law are obligatory upon Heathen States in their intercourse with each other, much more are they binding upon Christian Governments in their intercourse with Heathen States.

Infidel Nations indeed are, it has been frequently holden, entitled, in the absence of any compact, to an indulgent application of rules derived exclusively from the positive law and established custom of Christian States (*h*), though the application of rules even from these sources becomes

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(*f*) See, in the *Annual Register* for 1840, vol. lxxxii. p. 429, the Chinese Commissioner's Letter to the Queen of England, in which he recognizes "the principles of eternal justice" as binding between nations.

(*g*) *Vattel, Prélim.* s. 21.

(*h*) Lord *Stowell* speaks of the Ottoman Porte as a State long connected with this country by ancient treaties, and at the present day (*i. e.* in 1802) by engagements of a peculiar nature. "But," he adds, "independently of such engagements, it is well known that this Court is in the habit of showing something of a peculiar indulgence to persons of that part of the world. The inhabitants of those countries are not possessors of exactly the same Law of Nations with ourselves. In consideration of the peculiarities of their situation and character, the Court has repeatedly expressed a disposition not to hold them bound to the utmost rigour of that system of public laws on which European States have so long acted in their intercourse with one another."—*The Madonna del Burso*, 4 *Robinson's Adm. Rep.* p. 172.

And again he says: "It has been argued that it would be extremely hard on persons residing in the kingdom of Morocco, if they should be held bound by all the rules of the Law of Nations as it is practised

more stringent as the intercourse increases between the Christian and the Infidel community.

The great point, however, to be established is, that the *principles* of international justice do govern, or *ought* to govern, the dealings of the Christian with the Infidel Community. They are binding, for instance, upon Great Britain, in her intercourse with the native powers of India; upon France, with those of Africa; upon Russia, in her relations with Persia or America; upon the United States of North America, in their intercourse with the Native Indians (*i*).

The violation of these principles is indeed sometimes urged in support of an opposite opinion, but to no purpose; for it is clear that the occasional vicious practice cannot effect the reality of the permanent duty.

XXX. Unquestionably, however, the obligations of International Law attach with greater precision, distinctness, and accuracy to Christian States in their commerce with each other (*k*). The common profession of Christianity both

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among European States. On many accounts, undoubtedly, they are not to be so strictly considered on the same footing as European merchants: they may, on some points of the Law of Nations, be entitled to a very relaxed application of the principles established by long usage between the States of Europe holding an intimate and constant intercourse with each other."—*The Hurtige Hane*, 3 *Robinson's Adm. Rep.* p. 326.

(*i*) Hyder Ali was invited by France and England to accede to the treaty by which the *status quo ante bellum* was established in India.—*Wheaton's History of Int. Law*, p. 305.

Heineccius, in Grotium Præf. v. i. p. 14: "Quid verò si gens quædam cum *Turcis* vel *Sinensibus*," &c.

"Now, having contended, as we still contend, that the Law of Nations is the law of India as well as of Europe, because it is the law of reason and the law of nature, drawn from the pure sources of morality, of public good, and of natural equity, and recognized and digested into order by the labour of learned men, I will refer your Lordships to *Vattel*, b. i. c. xvi., where he treats of such engagements," &c.—*Burke's Works*, xv. 109 (Speech on the Impeachment of Warren Hastings); *Cranch's Reports* (American), vol. v. p. 1; *Peter's Reports* (American), vol. v. p. 1; *Kent's Commentaries*, vol. iii. p. 382; *Wheaton's Éléments du Droit international*, i. 50.

(*k*) The Canon Law, which is in some respects International Eccle-

enforces the observances (*l*) of Natural Law, and introduces, according to the language of Bartolus, a "*speciale jus gentis* "*fidelis*" (*m*), a new and most important element into this as into all other systems of jurisprudence; Christianity imparts a form and colour of its own to those elements of public justice and morality which it finds already existing in these systems, while it binds together by close though invisible ties the different members of Christendom, not destroying indeed their individuality, but constituting a common bond of reciprocal interest in the welfare of each other, in lieu of that exclusive regard for isolated nationality, which was the chief, though certainly not the sole end proposed to itself by the Heathen State. The language of the principal treaties of Europe fully recognizes this doctrine (*n*).

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siastical Law, took distinct and especial cognizance of General International Law, and valuable remarks upon it are to be found in the commentators on the *Decretum*. *Decret. Prima Pars*, dist. i. c. ix.: "Jus gentium est sedium occupatio, ædificatio, munitio, bella, captivitates, servitutes, postliminia, fœdera, paces, induciæ, legatorum non violandorum religio, connubia inter alienigenas prohibita (sect. 1). Hoc inde jus gentium appellatur, quia eo jure omnes ferè gentes utuntur." The great Portuguese canonist, *Barbosa*, observes on this: "Si princeps velit *vel jus gentium primarium, vel secundarium* intra sui imperii limites abrogare, potestate sua abuti censendus est."—*Barbos. Collect.* in c. ix. dist. i. See, too, *Reiffenstuel* and *Schmalzgrueber* on the same passage in the *Decretum*.

(*l*) Clement the Fifth, in his Bull "Pastoralis," annulling the extraordinary semi-legal procedure by which the Emperor Henry VII. meant to deprive Robert, King of Naples, of his kingdom, stated among other reasons, that Robert had been deprived of a natural right—*viz.*, the means and opportunity of defending himself: "Per quæ de crimine præsertim sic quasi deleto defensionis (*quæ a jure provenit naturali*) facultas adimi valuisset;" and, he adds, "*Cum illa imperatori tollere non licuerit quæ juris naturalis existunt.*"—*Clement*, l. ii. t. xi.

(*m*) "Si enim jus gentium de servitute captivorum in bello justo in Ecclesia mutatum est, et inter Christianos id non servatur ex antiqua Ecclesiæ consuetudine quæ est veluti *speciale jus gentis fidelis* ut notavit Bartolus in l. hostis s. de captivis, n. 16."—*Suarez, Ib.* c. xx. s. 8.

(*n*) *Treaty of Westphalia* (*Munster*), 1648: "Au nom et à la gloire de *Dieu*, soit notoire à tous, etc.; eux Seigneurs Roi et États touchés de compassion *chrétienne*, etc.; au bien non-seulement des Pays-Bas, mais de *toute la chrétienté*, convians et prians les autres Princes et

XXXI. This would be called by many who have of late years written on the science, International *Morality*; they would restrict the term *Law* absolutely and entirely to the treaties, the customs, and the practice of nations.

If this were a mere question as to the theoretical arrangement of the subject of International Law, it would be but of little importance; and the disputes to which the different modes of treating the science have given rise would perhaps be found, upon careful examination, to resolve themselves for the most part into disagreements of a verbal character. But it is of great practical importance to mark the subordination of the law derived from the consent of States to the law derived from God (*o*).

Potentats d'icelle de se laisser fléchir par la *Grâce Divine* à la même compassion," &c.—*Schmauss, Corpus Jur. Gent. Acad.* i. 614.

Treaty of Paris, 1763: "Au nom de la très-sainte et indivisible *Trinité*, Père, Fils, et Saint-Esprit, ainsi soit-il. Soit notoire à tous ceux qu'il appartiendra, etc.: Il a plu au *Tout-puissant* de répandre l'esprit d'union et de concorde sur les Princes, dont les divisions avoient porté le trouble dans les quatre parties du monde, etc. (Artic. 1.) Il y aura une *Paix chrétienne* universelle et perpétuelle," &c.—*Wenckii Codex Juris Gentium*, iii. 329.

Treaty of Utrecht, 1713: "Quoniam visum est *Deo* optimo maximo, pro nominis sui gloria et salute universa, ad miserias desolati orbis jam suo in tempore medendas, ita regum animos dirigere ut mutuo pacis studio erga se invicem gerantur; notum sit, &c.: quod sub his *Divinis auspiciis* Seren. ac Poten. Princeps et Domina Anna, &c. &c., et S. ac P. Prin. et Dom. Ludovicus XIV., &c., totius *Christiani orbis* tranquillitate prospicientes, &c. suo proprio motu et paterna ea cura quam erga subditos suos et *Rempublicam Christianam* exercere amant," &c. —*Schmauss*, ii. 1312.

Treaty of Versailles, 1783, Art. 1: "Il y aura une *Paix chrétienne* universelle et perpétuelle tant par mer que par terre," &c.—*Recueil de Traités et de Conventions, De Martens et De Cussy*, i. 301.

Treaty of Vienna, 1815: "Au nom de la très-sainte et indivisible *Trinité*."—*De M. et C.* iii. 61.

"Deux lois suffisent pour régler *toute la république chrétienne*, mieux que toutes les lois politiques—l'amour de Dieu, et celui du prochain."—*Pascal, Pensées*, part ii. art. xvii.

(*o*) *Savigny, R. R.* i. 80; *Burke*, vol. viii. 182, *Letters on a Regicide Peace.*

Suarez, de Legibus a Deo Legislatore, l. ii. c. ii. s. 6, tit. De Lege Æterna et Naturali ac Jure Gentium.

XXXII. One important practical inference from this position is, as has been shown, the necessary existence of International Obligations between Christian and Heathen States. Another practical consequence is, that the Law derived from the consent of Christian States, is restricted in its operation by the Divine Law; and just as it is not morally competent to any individual State to make laws which are at variance with the law of God, whether natural or revealed, so neither is it morally competent to any assemblage of States to make treaties or adopt customs which contravene that Law.

Positive Law, whether National or International, being only declaratory (*p*), may add to, but cannot take from the prohibitions of Divine Law. "Civilis ratio civilia quidem "jura corrumpere potest, naturalia non utique" (*q*) is the language of Roman Law; and is in harmony with the voice of International Jurisprudence, as uttered by Wolff: "Absit vero, ut existimes, jus gentium voluntarium ab "earum voluntate ita proficisci, ut libera sit earum in eodem

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Grot. de J. Bel. & P. l. ii. c. iii. s. 6.

Voet ad Pandectas, lib. i. t. i. s. 19. p. 11. *Vattel, Præf.* 22.

"Quod si populorum jussis, si principum decretis, si sententiis judicum, jura constituerentur: jus esset latrocinari; jus adulterare; jus testamenta falsa supponere: si hæc suffragiis aut scitis multitudinis probarentur. Quæ si tanta potestas est stultorum sententiis atque jussis, ut eorum suffragiis rerum natura vertatur: cur non sanciunt ut quæ mala perniciosaque sunt, habeantur pro bonis ac salutaribus? aut cur, quum jus ex injuria lex facere possit, bonum eadem facere non possit ex malo? Atqui nos legem bonam a mala nulla alia nisi naturæ norma dividere possumus."—*Cic. de Leg.* l. i. c. xvi.

(*p*) "It would be hard to point out any error more truly subversive of all the order and beauty, of all the peace and happiness of human society, than the position that any body of men have a right to make what laws they please, or that laws can derive any authority from their institution merely, and independent of the quality of the subject matter. All human laws are, properly speaking, only declaratory. They may alter the mode and application, but have no power over the substance of original justice."—*Burke's Treatise on the Popery Laws.*

"That power which, to be legitimate, must be according to that immutable law in which will and reason are the same."—*Burke's Works* vol. v. p. 180 (*Thoughts on the French Revolution*).

(*q*) *Instit. de Legit. Agnat.* l. iii.

" condendo voluntas, et stet pro ratione sola voluntas, nulla " habita ratione juris naturalis" (r).

Upon this principle we may unhesitatingly condemn as illegal and invalid all secret articles in treaties opposed to the stipulations which are openly expressed. Upon this principle it is clear that a custom of countries to destroy and plunder foreigners shipwrecked upon their shores must always, and under all circumstances, be an outrage upon the rights of Nations. So with respect to an usage of imprisoning strangers who have innocently arrived in time of peace, under a lawful flag, into a foreign port, on the ground that they are free men of that particular colour or complexion, which disquiets the slaveholder of the country, inasmuch as his slaves, being of the same colour and complexion, are, by the presence of the free strangers, reminded of the possibility of becoming free also; so, if there existed in a country under the government of an autocrat a law or custom of imprisoning all strangers having peaceably arrived from a country under a republican form of government—any usage of this or the like kind, however inveterate, however sanctioned by Municipal Law, however accordant with national feeling, must always be a grievous violation of International Justice. Upon the same principle Grotius condemns the violation of women in time of war, as an undoubted breach of International Law among all Christian nations (s). In the same manner and for the same reason he denies that captives can be lawfully made slaves, and either sold or condemned to the labour of slaves.

(r) *Wolff, Jus Gent. Præf.*

(s) The prohibition even among heathen nations was, he observes, "Jus gentium, non omnium, sed meliorum;" but amongst Christian nations, he proclaims it as an undoubted principle: "Atque id inter *Christianos* observari par est, non tantum ut disciplinæ militaris partem sed et ut partem juris gentium—id est ut qui pudicitiam vi læsit, quamvis in bello, ubique pœnæ sit obnoxius."—lib. iii. c. v. s. 2.

"Sed et *Christianis in universum placuit* bello inter ipsos orto captos servos non fieri, ita ut vendi possunt, ad operas urgeri, et alia pati quæ servorum sunt, atque ita hoc saltem quanquam exiguum est perfecit *reverentia Christianæ legis.*"—lib. iii. c. vii. s. 9.

XXXIII. This branch of the subject may be well concluded by the invocation of some high authorities from the jurisprudence of all countries, in support of the foregoing opinion.

Grotius says emphatically: "Nimirum humana jura *multa* "constituere possunt *præter* naturam, *contra* nihil" (*t*).

John Voet speaks with great energy to the same effect: "Quod si contra rectæ rationis dictamen gentes *usu* quædam "introduxerint, *non* ea jus gentium rectè dixeris, *sed pessi-* "*mam potiùs morum humani generis corruptelam*" (*u*).

Suarez, who has discussed the philosophy of law in a chapter which contains the germ of most that has been written upon the subject, says: "Leges autem ad jus gentium "pertinentes veræ leges sunt, ut explicatum manet, pro- "pinquiores sunt legi naturali quam leges civiles, ideoque "impossibile est esse contrarias æquitati naturali" (*x*).

Wolff, speaking of his own time, says: "Omnium ferè "animos occupavit perversa illa opinio, *quasi fons juris* "*gentium sit utilitas propria*: unde contingit, id potentiæ "coæquari. Damnamus hoc in privatis, damnamus in "rectore civitatis; sed *æquè idem damnandum est in gen-* "*tibus*" (*y*).

Mackintosh nobly sums up this great argument: "The "duties of men, of subjects, of princes, of lawgivers, of "magistrates, and of *States*, are all parts of one consistent "system of universal morality. Between the most abstract "and elementary maxim of moral philosophy, and the most "complicated controversies of civil or public law, there "subsists a connection. The principle of justice, deeply "rooted in the nature and interest of man, pervades the "whole system, and is discoverable in every part of it, even "to its minutest ramification in a legal formality, or in the "construction of an article in a treaty" (*z*).

(*t*) *De J. B. et P.* lib. ii. c. vi. s. 6.

(*u*) *Comment. ad Pand. de Just. et Jure,* t. i. s. 19.

(*x*) Lib. ii. c. xx. s. 3; *De Lege Æterna et Naturali ac Jure Gentium.*

(*y*) *Jus Gent.* s. 163.

(*z*) *Discourse on the Law of Nature and Nations.*

CHAPTER IV.

REASON OF THE THING.

XXXIV. The next question which arises in the prosecution of our inquiries into the sources of International Jurisprudence is this—How are the principles of Natural or Revealed Law to be applied to States?

Though States are properly and by a necessary metaphor treated as moral persons, and as the subjects of those rights and duties which naturally spring from the mutual relations of individuals; nevertheless it must be recollected that a State is actually a different thing from an individual person. Reason, therefore, which governs the application of common principles to diverse subjects, and demands, therefore, a different application of principles Intrinsically the same (*a*) to the State and to the Individual, may be regarded as a distinct source of International Law.

This application must be made justly, and in a manner (*b*) suitable to this actual difference; and in order to effect this, "the reason of the thing," which has been already enumerated as one of the sources of International Law—"necessitas "finis quæ jus facit in moralibus" (*c*)—must in all cases be considered.

Vattel, following and improving upon Wolff, expresses himself upon this point with his usual clearness, and more than his usual force (*d*). There are many cases, he observes,

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(*a*) *Vattel, Préface*, pp. 22, 23.

(*b*) Κατὰ τὴν ὑπωκειμένην ὕλην—*Arist. Eth.* i.; *Wolff, Jus Gentium, Præf.*

(*c*) *Grot. de J. B. et P.* l. ii. c. v. 24, s. 2.

(*d*) *Vattel, ib. et Prélim.* s. 6.

in which Natural Law cannot decide between nation and nation as it would between individual and individual. It is necessary to learn the mode of applying the law in a manner agreeable to the subject; and it is the art of doing this according to justice, founded on *right reason*, which makes International Law a particular science. It must, as Grotius says (*e*), be "recta illatio ex naturæ principiis procedens" which guides the national conscience in its international duties.

XXXV. The most strenuous—it might be said the most vehement—advocate for this source of International Jurisprudence is Bynkershoek. There is no dissertation of his upon any subject of International Jurisprudence which does not teem with references to it. "Ratio" and "Usus" are, according to him, the two props which sustain the whole building; and "Recta ratio" is "Juris gentium magistra."

The tendency of this author, who ranks in the first class of jurists, is rather perhaps to undervalue the authority both of his predecessors and of the tribunals of his own country. His opinion on this matter, however, construed by reference to the context, and subject to the qualification which it must receive from his frequent reliance upon precedents, and upon the opinions both of jurists and civilians, contains in reality nothing objectionable or inconsistent with the doctrine of other writers (*f*) with respect to the international authority due to these precedents and these opinions.

Bynkershoek was very far from meaning to convey the notion that whenever a question arose between nations, either of the contending parties was at liberty to solve it arbitrarily, according to its own notions of convenience or by an independent process of reasoning. On the contrary, in every case of doubt, the reason which long usage had sanctioned was to prevail; and the authorities of writers and of precedents were also recognized as leading to a

(*e*) *Proleg.* s. 40.

(*f*) *Vattel, Prélim.* s. 6. And see Appendix to this Work.

just conclusion of Law. But he more especially recognized the fitness of one authority to direct and guide the *Reason* of States in the adjustment of their mutual relations; that authority was the *written reason* of the Roman Law.

His predecessors indeed, in every page of their writings, had assumed as unquestionable the homage due to this collection of the maxims deducible from right reason and natural justice. None, however, have spoken more strongly with respect to it than Bynkershoek: "Non quod *in iis*," he says, "*quæ sola ratio commendat a jure Romano ad jus gentium* "*non tuta sit collectio*" (*g*).

And again: "Quamvis non de populi Romani, sed de "gentium jurisprudentia agamus non abs re tamen erit de "jure Romano quædam præmonuisse, cum *qui id audit vocem* "*ferè omnium gentium videatur audire*" (*h*).

Again: "Abstine commodo si damnum metuis, *ipsa juris* "*gentium, non sola Ulpiani vox est*" (*i*).

XXXVI. The Roman Law may in truth be said to be the most valuable of all aids to a correct and full knowledge of international jurisprudence, of which it is indeed, historically speaking, the actual basis; and it has been remarked with equal force and elegance by an English civilian, "That "although whatever we read of in the text of the *Civil Law* "was not intended by the *Roman* legislators to reach or "direct beyond the bounds of the *Roman* empire, neither "could they prescribe any law to other nations which were "in no subjection to them. . . . . . . Yet since (*j*) there is "such a strong stream of natural reason continually flowing "in the channel of the Roman Laws, and that there is no "affair or business known to any part of the world now "which the Roman empire dealt not in before, and their

(*g*) *Quæstiones Juris Publici*, l. i. c. iii.

(*h*) *De Foro Legat.* c. vi.

(*i*) *Quæst. J. P.* c. viii. in fine. The passage cited from *Ulpian* will be found *Dig.* lib. xvii. t. ii. s. 23.—*Pro socio*—"abstine commodo quod per servum accessit, si damnum petis."

(*j*) *Albericus Gentilis*, l. i.; *de Jure Belli*, c. i.

"justice still provided (*k*) for; what should hinder but that, "the nature of affairs being the same, the same general rule "of justice, and dictates of reason, may be as fitly accom-"modated to foreigners dealing with one another (as it is "clear they have been by the civilians of all ages), as to "those of one and the same nation, when one common reason "is a guide and a light to them both; for it is not the per-"sons, but the case, and the reason therein, that is consider-"able altogether" (*l*).

In the case of the *Maria* (*m*), Lord Stowell expresses surprise that Vattel should mention a rule of International Law "as a law merely modern, when it is remembered that it is a "principle not only of the Civil Law (on which a great part "of the Law of Nations is founded), but of the private juris-"prudence of most countries in Europe—that a contumacious "refusal to submit to fair inquiry infers all the penalties of "convicted guilt."

XXXVII. Independently of the historical value of the Roman Law as explanatory of the terms and sense of treaties, and of the language of jurists, its importance as a repository of decisions, the spirit of which almost always, and the letter of which very frequently, is applicable to the controversies of independent States, can scarcely be overstated (*n*).

(*k*) "Mirum tamen est hanc novam prudentiam, Romanos, à quibus ad omnes populos juris fecialis, justitiæ fontes purissimi manarunt, antea semper latuisse."—*Bod. de Rep.* l. v. c. vi. p. 594.

(*l*) *Wiseman's Excellency of the Civil Law,* p. 110; *Burke,* viii. 185; *Letters on a Reg. Peace.*

(*m*) 1 *Robinson's Adm. Rep.* p. 363.

(*n*) I am glad to find that the authority of Professor Mancini confirms the opinion which I have expressed:—

"D' altra parte, evocata la memoria del vecchio imperio de' Cesari, e ridestato per opera delle nostre Università lo studio del Dritto romano, l' autorità di questo antico deposito della sapienza italica venne risorgendo da per tutto, e finì (giovamento immenso alla civiltà avvenire!) per riguardarsi come un dritto comune obbligatorio di tutte le nazioni civili."—*Della Nazionalità. Prelezione al corso di Dritto, etc.*, Torino, 1851, p. 15.

From this rich treasury of the principles of universal jurisprudence, it will generally be found that the deficiences of precedent usage, and express international authority, may be supplied.

Throughout the greater portion of Christendom it presents to each State what may be fairly termed their own consent, bound up in the municipal jurisprudence of their own country; and this not merely to the nations of Europe, whose codes are built on the Civil Law, but to their numerous Colonies, and to the independent States which have sprung from those Colonies, and which cover the globe.

And so we find that the Roman law was more than once referred to as an authority, upon the international question of the Free Navigation of Boundary Rivers, by the president and diplomatic ministers of the United States of North America, in the discussion which took place between this Republic and the kingdom of Spain, as to the navigation of the Mississippi, in the year 1792; and to all nations, whatsoever and wheresoever, this Law presents the unbiassed judgment of the calmest reason, tempered by equity, and rendered perfect, humanly speaking, by the most careful and patient industry that has ever been practically applied to the affairs of civilized man.

It may be fairly said, that many International disputes in time of peace might be adjusted by this arbiter, assisted by the helps, and modified by the other sources which will presently be considered; certainly it may be most truly affirmed, that the greater number of controversies between nations would find a just solution in this comprehensive system of practical equity. "Dixi sæpius," said Leibnitz, "post scripta Geometrarum nihil exstare quod vi ac subtili-"tate cum Romanorum scriptis comparari possit: tantum "nervi inest, tantum profunditatis . . . . . nec uspiam juris "naturalis præclarè exculti uberiora vestigia deprehendas; "et ubi ab eo recessum est, sive ob formularum ductus, sive "ex majorum traditis, sive ob leges novas, ipsæ consequen-"tiæ, ex nova hypothesi æternis rectæ rationis dictaminibus

" additæ, mirabili ingenio nec minore firmitate dedu-
" cuntur " (*o*).

So the English civilian before quoted observes (*p*): " And,
" moreover, by, as it were, a general consent of nations,
" there is an appealing to, and a resting in, the voice and
" judgment of the Civil Law in these cases between nation
" and nation. The reason whereof is, because any thing
" that is irrational, unnatural, absurd, partial, unjust, im-
" modest, ignoble, treacherous, or unfaithful, that law
" abhorreth; and for that it is the most perfect image and
" representation of nature, and of the equity and reason
" nature prescribes to humane actions, that was ever yet
" presented or set forth to the world in a law."

In the negotiations between the United States of North America and Spain relative to the navigation of the Mississippi, the provisions of the Roman Law were cited with respect to the public character of rivers, to the use of the shores as incident to the use of the water, and to the occasional extension of this incidental right, when circumstances rendered it necessary that the cargo should be removed further inland, the shores being, for some reason, an unsafe place of deposit (*q*).

XXXVIII. It is hardly necessary to guard against the supposition that what has been said applies to the technical and formal parts of the Roman Code, the " formularum ductus " just mentioned, or to those which related exclusively to the particular policy of the empire; but it should be remarked, that an error of this description tinged the early writings upon International Law, and tended to bring the science itself into disrepute (*r*). It is the "solida et mascula ratio "

(*o*) *Op.* iv. 254.

(*p*) *Wiseman's Excellency of the Civil Law*, p. 110; *Burke*, viii. 185, *Letters on a Reg. Peace*.

(*q*) *Wheaton's Hist.* pp. 510, 511; *Waites' American State Papers*, x. 135–140; *Instit.* l. ii. t. i. ss. 1–5.

(*r*) *Grotius, de J. B. et P.* l. iii. c. ix. s. 1, *De Postliminio*: " Accuratius hæc res a veteribus Romanis tractata est, sed sæpe confusè nimis, ita ut quæ juris gentium, quæque civilis Romani esse vellent,

of Bynkershoek which must guide and enforce the application of it to the affairs of independent nations.

Besides the actual compilations of Roman Law, the Commentaries upon them—for the like reason of their comprehensiveness, impartiality, wisdom, and enlarged equity—are of great use and constant service in elucidating the rules of justice between nations.

For instance, every writer on the Law of Embassy relies for the elementary propositions relating to it upon the Commentary of Huber on the Civil Law; and so Lord Stowell, in the case of the *Twee Gebrœders,* fortified his judgment as to the legal marks of territory, and the evidence by which it is to be supported, by reference to the opinions of *Farrinacius Gail* and *Loccenius* (*s*).

The decisions contained in the Roman Law may often form a safe guide even between nations in whose Municipal Code it has no root; in the interpretation, for example, of agreements, express or tacit, between European and Asiatic nations, and in the equitable resolution of doubts and difficulties unforeseen and unprovided for by the letter of any compact (*t*).

XXXIX. Analogy (*u*) has great influence in the decision

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lector nequiret distinguere." . . . . iv. s. 2: "Sed hæc ratio Romanorum propria non potuit constituere jus gentium," &c.

Heineccius, Prælect. ad Grotium, Procœmium, s. 54, and in his work *Jus Naturæ et Gentium, Præfatio,* p. 14, shows how the "Glossatores" erred in their application of portions of the Roman law to International questions.

It will be seen, when the subject of embassies is treated of, into how serious an error the English civilians were led by applying the text of the Roman law respecting legati as the rule of International law upon the question of the privileges of the ambassador of Mary Queen of Scots.

(*s*) 3 *Robinson's Adm. Rep.* 338, 348, 349.

(*t*) The learned judges of the English Privy Council, in deciding questions arising out of the law and customs of Hindostan, have made reference to the analogies furnished by Roman law.—*Sootragun Satputty* v. *Sabitra Dye,* 2 *Knapp's Privy Council Reports* (*Lord Wynford*)—a case on the law of Hindoo adoption.

(*u*) *Bynkershoek, de Foro Leg.* c. iii. p. 446.

"By the ancient law of Europe, such a consequence (*i. e.* the condem-

of International as well as of Municipal tribunals; that is to say, the application of the principle of a rule, which has been adopted in certain former cases, to govern others of a similar character as yet undetermined. Of course the justice and force of this application must chiefly depend, in each case, on the closeness of the parallel between the circumstances of the precedents appealed to and those of the cases in dispute.

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nation of the ship on account of a contraband cargo) would have ensued; nor can it be said that such a penalty was unjust, or not supported by the *general analogies of law*."—*Lord Stowell, The Maria*, 1 *Rob. Adm. Rep.* 90.

"Is qui jurisdictioni præest ad similia procedere et ita jus dicere debet."—*Dig.* l. i. t. iii. s. 12.

"Semper quasi hoc legibus inesse credi oportet, ut ad eas quoque personas et ad eas res pertinerent, quæ quandoque similes erunt."—*Ib.* 27.

"De quibus causis scriptis legibus non utimur, id custodiri oportet, quod moribus et consuetudine inductum est: et si qua in re hoc deficeret, *tunc quod proximum et consequens est*."—*Ib.* 32.

"Si quid in edicto positum non inveniatur, hoc ad ejus regulas ejusque conjecturas et imitationes possit nova instruere auctoritas."—*Cod.* l. i. t. xvii. 2, 18.

Savigny, R. R. i. s. 46; *Auslegung der Gesetze-Analogie.*

Bowyer's Readings, p. 88: "Analogy is the instrument of the progress and development of the law." See some good observations on the use of analogy in the English Law in the cases of *Mirehouse* v. *Rennell*, 8 *Bingham's Rep.* 518; *Bond* v. *Hopkins*, 1 *Schoales and Lefroy, Rep.* 429.

CHAPTER V.

CONSENT OF NATIONS.

XL. The next and only other source of International Law is the *consent* of Nations. The obligations of Natural and Revealed Law exist independently of consent of men or nations, and although the latter acknowledge no one superior upon earth, they, nevertheless, owe obedience to the laws which they have agreed to prescribe to themselves, as the rules of their intercourse both in peace and war (*a*).

How and where is this consent expressed? It is not indeed to be found in any one written code: but this may be the case with the Municipal or Common Law of any country, as it was till lately with the institutions of every European nation, and as it is now with those of Great Britain.

XLI. This consent is expressed in two ways:—1. It is openly expressed by being embodied in positive conventions or treaties. 2. It is tacitly expressed by long usage, practice, custom,—"Jus moribus et tacito pacto in-"troductum" (*b*),—according to Grotius; or, in the precise language of Bynkershoek, "Ipsum jus gentium, quod oritur e "pactis tacitis et præsumptis quæ ratio et usus inducunt." (*c*).

(*a*) "Quum enim gentes nulla superiore in terris contineantur, sunt illis pro legibus, quæ ipsi sibi dixêre; vel scriptis tabulis vel moribus introductis, qui sæpe scripturis istis comprobantur."—*Leibnitz, Dissertatio* 11, "De actorum publicorum usu atque de principiis juris naturâ et gentium," &c., s. i. p. 310.

"Sed sicut cujusque civitatis jura utilitatem suæ civitatis respiciunt, ita inter civitates aut omnes, aut plerasque, ex consensu jura quædam nasci potuerunt; et nata apparent, quæ utilitatem respicerent non cœtuum singulorum, sed magnæ illius universitatis. Et hoc jus est quod jus gentium dicitur, quoties id nomen à jure naturali distinguimus."—*Grot. De J. B. et P. Proleg.* s. 17.

(*b*) *Grotii Proleg.* s. 1, *De Jure B. et P.*

(*c*) *Quæstiones Juris Publici,* l. iii. c. x. Again he says, "Ut in omni argumento, quod de jure gentium est, ratio et usus faciunt utramque paginam."—*Ib.* c. v.

XLII. *Customs* and *usages* which have long subsisted between nations constitute a law to them: "Nec negamus," says Grotius, "mores vim pacti accipere" (*d*). Each State has a right to count upon the presumption of their continuance: in no instance are they to be lightly departed from by any single nation; never without due notice conveyed to other countries, and then only in those cases in which it may be competent to a nation so to act.

For instance, a State may refuse—though it would be a defeazance of comity bordering upon hostility—to receive the resident Ambassador of another State; but if it does receive him, it must accord to him the full privileges of his station: they are secured to him by the universal consent of all nations, which it is not competent to any individual nation at her pleasure to abrogate or deny.

So in the case of the *Louis,* Lord Stowell reversed the sentence of a Vice-Admiralty Court, which had condemned a French ship for being employed in the slave trade, and resisting the search of a British cruiser, saying, "That "neither a British Act of Parliament, nor any Commission "founded on it, can affect any right or interest of foreigners, "unless they are founded upon principles, and impose regula-"tions that are consistent with the Law of Nations. That "is the only Law which *Great Britain* can apply to them; "and the generality of any terms employed in an Act of "Parliament must be narrowed in construction by a religious "adherence thereto" (*e*).

(*d*) Lib. ii. c. v. s. 24, p. 259. "It is my duty not to admit that, because one nation has thought proper to depart from the common usage of the world, and to meet the notice of mankind in a new and unprecedented manner, I am, on that account, under the necessity of acknowledging the efficacy of such a novel institution, merely because general theory might give it a degree of countenance, independent of all practice, from the earliest history of mankind."—*Flad Oyen,* 1 *Rob.* 139–146. See, too, *Vattel,* ii. l. iv. c. vii. s. 106.

Bynkershoek, de Foro Legatorum, c. v. *ad fin.,* speaking of the attempt to subject a foreign prince to a municipal tribunal by seizing some trifling property of his as it passed through the kingdom, says, "Nec quicquam magis erit contra *præsumtam* si non *testatam mentem gentium.*"

(*e*) 2 *Dodson's Admiralty Reports,* p. 239.

The force of International Custom is emphatically expressed by Grotius in the phrase often repeated by him, "*Placuit gentibus*" (*f*) ; and still more in the phrase, "*Christianis in universum placuit*" (*g*). Bynkershoek speaks of "Illa perpetuo usu inter diversos sui juris populos "observata consuetudo," and repeatedly of the "Gentium "usus" as one of the two pillars of International Law.

Prince Talleyrand, in his note (19th December, 1814) to the Congress of Vienna, expostulated upon the violation of International Law contained in the arrangements which sanctioned the fresh partition of Poland, and the annexation of parts of Saxony to Prussia. He said that such arrangements would tend to establish the principle, "That the "nations of Europe are united to each other by no other moral "ties than those which unite them to the islanders of the "Pacific; that they live among each other under the pure law "of nature, and that what is called the Public Law of Europe "does not exist; since although all the civil societies of the "earth are, wholly or partially, governed by usages which "constitute laws, the customs which are established between "the nations of Europe, and which they have universally, "constantly, and reciprocally observed for three centuries, "do not form a law for them; in one word, that there is no "other law but that of force" (*h*).

XLIII. Lord Stowell frequently expressed his entire concurrence with the opinions of preceding jurists as to the great and inestimable influence of Custom upon the Rights and Duties of Nations. Speaking of the condemnation of a ship in a neutral country, he says: "It has been "contended that such a sentence is perfectly legal, both on

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(*f*) *De J. B. et P.* l. ii. c. xviii. 4, s. 5; l. iii. c. vi. 3; c. vii. 5, s. 2.

(*g*) Lib. iii. c. vii. 9, s. 1. "Hoc saltem . . . perfecit reverentia Christianæ legis."—*Ib.*

As to preserving women from violence: "Atque id inter *Christianos* observari par est non tantùm ut disciplinæ militaris partem, *sed et ut partem juris gentium.*"—Lib. iii. c. v. xix. s. 2; cf. *The Flad Oyen*, 1 *Rob. Adm. Rep.* 141 (*Lord Stowell*).

(*h*) *Wheaton's History of the Law of Nations*, p. 429.

Klüber, Acten des Wiener Congresses, band vii. s. 48.

" principle and authority. It is said that, on principle, the " security and consummation of the capture is as complete in " a neutral port as in the port of the belligerent himself. On " the mere principle of security it may perhaps be so; but " it is to be remembered that this is a matter not to be " governed by abstract principles alone; the *use* and *practice* " of nations have intervened, and shifted the matter from its " foundations of that species: the expression which Grotius " uses on these occasions (*Placuit gentibus*) is, in my opinion, " perfectly correct, intimating that there is a use and practice " of nations, to which we are now expected to conform" (*i*).

In another case (*j*), he says: " This is a position in which " I am justified by the general *practice* of mankind, and the " practice of mankind forms one great branch of the law of " nations." Throughout his celebrated judgment in *The Maria* (*k*) he relies invariably upon " the law and practice of " nations." And again, in *The Santa Cruz*, after having observed that there is no statute of the British Parliament upon the subject of Prize which directly applies to recapture, he continues: " But there is *a law of habit, a law of usage, a* " *standing and known principle*, on the subject in all civilized " and commercial countries: it is the common practice of " European States in every war to issue proclamations and " edicts on the subject of Prize; but till they appear, Courts " of Admiralty have *a law* and *a usage* on which they " proceed, from *habit* and *ancient* practice, as regularly as " they afterwards conform to the express regulations of their " prize acts" (*l*).

Similar expressions abound in the luminous expositions of International Law which these judgments afford.

(*i*) *The Henrick and Maria*, 4 *Rob. Adm. Rep.* pp. 54, 55.

(*j*) *The Progress*, 7 *Rob. Adm. Rep.* 220.

(*k*) 1 *Robinson's Adm. Rep.* 350, 362, &c. See, too, *Flad Oyen*, *Ib.* 140, 141.

(*l*) 1 *Robinson's Adm. Rep.* p. 61.

The Mercurius, 1 *Rob. Adm. Rep.* p. 82: "Under the modern law of nations." *The Maria*, *Ib.* 371 *a*: "According to the modern understanding of the law of nations."

The Santa Cruz, 1 *Rob. Adm. Rep.* p. 65; *The Elsebe*, 4 *Ib.* p. 421.

XLIV. The Law of Nations has received continual accessions and improvements since the first cultivation of it in the Christian world; not only have evil customs been abrogated, but the rigour of many ancient customs has been softened and relaxed in their application, without any departure from the principle on which they were founded. This effect is happily described by Lord Stowell; when speaking of contraband articles found on board a neutral vessel, he says, "I do not "know that *under the present practice of the Law of* "*Nations,* a contraband cargo can affect the ship. By the "*ancient law of Europe,* such a consequence would have "ensued; nor can it be said that such a penalty was unjust, "or not supported by the general *analogies of law,* for the "owner of the ship has engaged it in an unlawful commerce. "But in the *modern practice of the Courts of Admiralty* "*of this country, and I believe of other nations also, a* "*milder rule has been adopted*" (*m*). On the other hand, usage has decided that many things are contraband in naval war concerning which there had formerly been much dispute. Valin says honestly and boldly in his Commentaries, "*De droit* ces choses sont de contrabande aujourd'hui et "depuis le commencement de ce siècle, ce qui n'était pas "autrefois néanmoins" (*n*). There must be, however, a reciprocity (*o*) in the conduct of the nation demanding from another nation the privilege of these mitigations introduced by usage into the ancient Law; and a nation may be estopped by its usage from claiming the benefit of a principle of the Law of Nations which would operate in its favour.

XLV. Such is the influence of universal usage, that it will in some measure affect even the stipulations of a treaty made long prior to the commencement of that usage, and at a time when the law, which has been since settled, was in a state of fluctuation and controversy (*p*).

(*m*) *The Ringende Jacob,* 1 *Rob. Adm. Rep.* p. 90.
(*n*) *Ordonnance de la Marine,* l. iii. t. ix. art. xi.
(*o*) *The Santa Cruz,* 1 *Rob. Adm. Rep.* pp. 49, 64.
(*p*) *The Maria,* 1 *Rob. Adm. Rep.* pp. 371–373.

In 1654, a treaty was entered into between England and Portugal, by which, among other things, both countries mutually bound themselves not to suffer the ships and goods of the other taken by enemies, and carried into the ports of the other, to be conveyed away from the original owners or proprietors. "Now, I have no scruple in saying" (observes Lord Stowell, in 1798), "that this is an Article incapable of "being carried into literal execution, according to the modern "understanding of the Law of Nations, for no neutral "country can interpose to wrest from a belligerent prizes "lawfully taken" (q). This is, perhaps, the strongest instance that could be cited, of what civilians call the "*consuetudo obrogatoria*" (r).

XLVI. So the establishment of Courts of the Law of Nations in all civilized countries in time of war, is an institution introduced by civilized usage, and binding upon all civilized countries.

Neutral Nations in time of War have now no right (s), when they are injured, to exact compensation from the countrymen of the aggressors (t), though the Barbary States were said by Lord Stowell to do so, "under a Law of Nations "now peculiar to themselves" (u). Neither in time of Peace are Nations entitled to have recourse to Reprisals, until reparation for the injury sustained has been formally asked and denied, both of the proper tribunal, and of the government, *in re minimè dubia*.

These points, however, will receive a fuller discussion in another part of this work.

(q) *The Santa Cruz*, 1 *Rob. Adm. Rep.* pp. 49, 64. See also vol. ii. p. 732, of *Sir Leoline Jenkins's Works*.

(r) *Savigny, System des Römischen Rechts*, b. i. 195.

Bynkershoek, de Foro Legat. c. xix. s. 7.

(s) *Bynkershoek, Observationes Juris Romani*, c. ii. vol. ii.: "Propulsatio vis atque injuriæ quo sensu juri gentium tribuatur."

(t) *The Maria*, 1 *Rob. Adm. Rep.* p. 373; *The Walsingham Packet*, *Ib.* p. 83; *The Snipe and others, Edwards's Adm. Rep.* p. 412.

(u) *The Kinder Kinder*, 2 *Rob. Adm. Rep.* p. 88.

CHAPTER VI.

HISTORY.

XLVII. Such being the influence of usage upon International Law (*a*), it becomes of importance to ascertain where the repositories, and what the evidence, may be of this great source of International Law.

XLVIII. (1.) In the enumeration of these, History, unless the term be too general, necessarily takes the first place. It supplies, according to Grotius, both example and authoritative judgments—of which the latter owe their weight to the general acceptance which they have obtained, whilst the former are more or less valuable according as they are more or less derived from epochs and Nations more or less entitled to universal respect (*b*).

It is scarcely necessary to guard against the error which Grotius, in another part of his work, denounces—that instances recorded in History, merely by virtue of being so recorded, constitute precedents of International Law (*c*).

History is a record of the injustice, evil passions, and folly, as well as of the justice, virtues, and wisdom of Nations.

The necessities of the epoch in which Grotius wrote left him

(*a*) "Quamquam enim nec sit exemplis judicandum, et aurea ea dicitur Justiniani lex, ab exemplis tamen duci probabilem conjecturam certum est, et in dubio judicandum imo est exemplis; et cum itum in consuetudinem est. Neque enim mutare decet quæ certam observantiam semper habuerunt, et firmiùs judicium creditur, quod plurimorum sententiis confirmatur."—*Albericus Gentilis*, lib. i. c. ii. *De Jure Belli.*

(*b*) *Grot. Proleg.* s. xlvi.: "Historiæ duplicem habent usum, qui nostri sit argumenti: nam et exempla suppeditant et judicia. Exempla quo meliorum sunt temporum ac populorum eo plus habent auctoritatis; ideo Græca et Romana vetera cæteris prætulimus. Nec spernenda judicia, præsertim consentientia; jus enim naturæ, ut diximus, aliquo modo inde probatur; jus vero gentium non est ut aliter probetur."

The Flad Oyen, 1 *Rob. Adm. Rep.* p. 141.

(*c*) "Solet et illud quæri an jure talionis interfici, aut malè tractari legatus possit ab eo veniens, qui tale quid patraverit. Et sunt quidem ultionis talis exempla in historiis satis multa: sed nimirum historiæ

little or no choice in selecting his examples and precedents chiefly from the antiquity of Greece and Rome. This is not the case with his successors; they have far ampler and far apter materials. But the edifice is not the weaker for the breadth and depth of the classical foundations laid by the first architect; and the principle which guided him is in this, as in most other instances, most valuable to the later and, in spite of their advantages, inferior builders.

XLIX. (2.) Secondly, the consent of Nations is evidenced by the contents of Treaties, which for this, as well as for other reasons, constitute a most important part of International Law (*d*).

L. Upon this point there is one observation which merits, from its importance, precedence over all others. It is this: No treaty between two or more Nations can affect the general principles of International Law prejudicially to the interest of other Nations not parties to such covenant; at the same time, the contracting parties (*e*) may introduce into a treaty expressions so generally worded as to be either explanatory of a previously contested point of law, or declaratory of the future interpretation of it, or in other ways frame the covenants of the Treaty between themselves so as to lay down an universal principle binding on them, at least, in their intercourse with the rest of the world. Nowhere will this important doctrine be found laid down with greater

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non tantum quæ justè, sed et quæ iniquè, iracundè, impotenter facta sunt, memorant."—*Grot.* l. ii. c. xviii. 7.

(*d*) "All this body of old conventions, composing the vast and voluminous collection called the *Corps diplomatique*, forms the code or statute law, as the methodized reasonings of the great publicists and jurists form the digest and jurisprudence of the Christian world. In these treasures are to be found the *usual* relations of peace and amity in civilized Europe."—*Letters on a Regicide Peace, Burke's Works*, ix. 235.

(*e*) "Usus intelligitur ex perpetua, quodam modo, paciscendi edicendique consuetudine; pactis enim principes sæpe id egerunt in casum belli, sæpe etiam edictis contra quoscunque, flagrante bello. Dixi, *ex perpetua quodam modo consuetudine*, quia unum forte alterumve pactum, quod a consuetudine recedit, jus gentium non mutat."—*Bynkershoek, Quæstiones Juris Publici*, l. i. c. x.

Wheaton's El. of Int. Law, i. 60.

precision, or more irresistible argument, than in Lord Grenville's speech in the House of Peers, upon the motion for an address to the throne approving of the convention with Russia in 1801 (*f*). Among the many attributes of a statesman possessed in rare excellence by that minister, was his intimate acquaintance with International Jurisprudence in all its branches. His opinion is, therefore, of very great authority. He argued that, by the language of that convention, a new sense, and one hitherto repudiated by Great Britain, with respect to *contraband of war* would be introduced, so far at least as Great Britain was concerned, into *general* International Law; that inasmuch as some provisions of the Treaty with respect to what should be considered *contraband of war* were merely *prospective,* and confined to the *contracting parties,* England and Russia, while other provisions of the same Treaty were so couched in the preamble, the body, and certain sections which contained them, as to set forth, not the concession of a *special* privilege to be enjoyed by the contracting parties *only,* but *a recognition of one universal pre-existing right,* they must be taken as laying down *a general rule* for all future discussion with *any Power whatever,* and as establishing a principle of law which was to decide *universally* on the just interpretation of the technical term *contraband of war* (*g*).

LI. The constant consent of various nations to adopt a particular interpretation of a particular term is, generally speaking, strong evidence that such is the true International meaning belonging to it. Bynkershoek was in the habit of placing great stress upon the language of Treaties, as evidence of the universal consent of nations, and especially on this point (*h*): " *Excute pacta gentium,* quæ diximus, excute et " alia, quæ alibi exstant, et reperies, omnia illa appellari

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(*f*) This speech was published separately, by Cobbett and Morgan, Pall Mall, November 13, 1802.

See, too, Hansard's Parliamentary Debates, 1801.

(*g*) See Appendix for the extract at length from the speech upon this point.

(*h*) *Quæstiones Juris Publici,* l. i. c. x. 113.

"*contrabanda*, quæ, uti hostibus suggeruntur, bellis gerendis "inserviunt, sive instrumenta bellica sint, sive materia, per "se bello apta;" and, again, "Priusquam autem, quid mihi "videatur, exponam, operæ pretium erit, *pactiones gentium* "consuluisse;" again, "Sed his paulisper sepositis *audi* "*pacta gentium*;"—these and the like expressions abound in his most valuable dissertations. Nor in this respect is he at variance with other jurists; it is their universal opinion that not only the particular provisions, but the general spirit, of Treaties to which at different periods many nations have been parties, is of great moment and account as the evidence of their *consent* to the doctrine contained in them. So Lord Stowell, in his judgment of *The Maria*, arguing for the universal right of the belligerent to visit neutral merchant ships, says: "The right is equally clear in practice, for practice "is uniform and universal upon the subject: the many "European Treaties which refer to this right refer to it as "pre-existing, and merely regulate the exercise of it" (*i*).

So the "*Réponse sans réplique*," already mentioned, of Great Britain to the Prussian memorial, and that memorial itself, refer to a variety of Treaties as containing provisions illustrative and confirmatory of the doctrine maintained in the reply.

LII. When, however, it is said that the consent of nations may be gathered in some degree from the conventions of Treaties, it is not meant that *every kind* of Treaty can furnish even this degree of evidence. Many are concerned with matters of no *general* (*j*) interest to other than the

(*i*) 1 *Robinson's Adm. Rep.* p. 360.

(*j*) "By this means the proposed fraternity is hustled in the crowd of those treaties which imply no change in the public law of Europe, and which do not, upon system, affect the interior condition of nations. It is confounded with those conventions in which matters of dispute among sovereign powers are compromised, by the taking off a duty more or less, by the surrender of a frontier town or a disputed district on the one side or the other, by pactions in which the pretensions of families are settled (as by a convenyancer making family substitutions and successions), without any alterations in the laws, manners, religion, privileges, and customs of the cities or territories which are the subject of such arrangements."—*Burke*, viii. 234, *Letters on a Regicide Peace.*

contracting parties; many contain stipulations wrung from the necessities of one party, and compelled to admit claims to which by the general law its adversary was not entitled (*k*). From Treaties of this description no argument of the consent of Nations can be fairly deduced. But there are certain great and cardinal Treaties in which, after long and bloody wars, a re-adjustment of International relations has taken place, and which are therefore more especially valuable, both from the magnitude and importance of their provisions, which have necessitated a recurrence to, and a re-statement of, the fundamental principles of International Law; and also from the fact, that frequently the greater number of European States, and lately some American and even Asiatic communities, have been parties thereto (*l*).

This subject will come again under discussion in a subsequent consideration of the general subject of Treaties (*m*). It may, however, be as well to mention in this place that the Treaties which have principally affected International Law, are (*n*):—

(*k*) "Quod vero contrà rationem juris receptum est, non est producendum ad consequentias."—*Dig.* i. iii. s. 14 (*De Legibus*).

"Quæ propter necessitatem recepta sunt, non debent in argumentum trahi."—*Dig.* l. xvii. 162; *de Diversis Regulis Juris Antiqui.*

(*l*) "Tous les princes et états de l'Europe se trouvent ainsi directement ou indirectement compris dans ce traité, à l'exception du Pape et du Grand Seigneur, qui seuls n'y prirent aucune part."—*Koch. Hist. des Tr.* c. i. 1, 3, *in fine.*

(*m*) Vol. ii. ch. vi. vii. viii.

(*n*) "Si l'on examine les révolutions qui ont contribué à constituer l'état actuel de l'Europe, on se convaincra qu'il y a peu de traités antérieurs à ceux de Westphalie, d'Oliva, et de Carlowitz, dont l'influence s'étende aux affaires générales, et au système politique de nos jours. L'étude des traités qui les précèdent ne laisse cependant pas d'avoir son utilité, parce que les stipulations qu'ils renferment sont souvent rappelées et confirmées dans des actes plus récents; que les prétentions des puissances dérivent en grande partie des anciens traités, et qu'enfin la connaissance de ceux-ci sert à étendre les vues de la politique; car plus on pénètre dans l'histoire des traités, plus on se rend propre aux négociations et aux travaux diplomatiques.

"Il serait superflu d'entrer dans un plus grand détail sur les avantages que procure la connaissance des traités; il suffit de remarquer qu'elle donne celle de l'état actuel de l'Europe, ainsi que des droits et des obli-

For Europe generally:—Westphalia (1648), to which every Sovereign and State on the Continent of Europe, except the Pope and the Grand Seignor, was a party; Utrecht (1713); Paris and Hubertsbourg (1763); Paris (1814), and the Congress of Vienna.

The Treaty of Paris (with the Conventions annexed to it), March 30, 1856, between England, France, Russia, Sardinia, and the Porte, by which the independence and integrity of the Ottoman Empire are secured, and this Empire is admitted "into the Public Law and System of Europe." The Principalities of Moldavia and Wallachia (*o*) and Servia (the last in a peculiar way) (*p*) are placed under the suzerainty of the Porte. The Black Sea is neutralized and opened to the merchant vessels of the world, but interdicted

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gations réciproques des puissances. Elle est donc indispensable à tous ceux qui sont chargés du maniement des affaires publiques ou qui veulent s'y former. Elle n'est pas d'une moindre utilité à ceux qui étudient l'histoire en philosophes et en politiques.

"En suivant le fil des négociations, on découvre l'origine des événements qui ont changé la face du monde politique et produit l'état de choses qui règne aujourd'hui en Europe. Cette étude conduit donc à la vraie connaissance de l'histoire, et nous met en état de relever beaucoup d'erreurs commises par les historiens qui ont négligé d'approfondir les traités."—*Koch, Hist. des Tr., Préf.*

(*o*) *Article XXI.*—"The territory ceded by Russia shall be annexed to the Principality of Moldavia under the suzerainty of the Sublime Porte."

Article XXVI.—"It is agreed that there shall be in the Principalities a national armed force, organized with a view to maintain the security of the interior, and to ensure that of the frontiers. No impediment shall be opposed to the extraordinary measures of defence which, by agreement with the Sublime Porte, they may be called upon to take in order to repel any external aggression."

(*p*) *Article XXVIII.*—"The Principality of Servia shall continue to hold of the Sublime Porte, in conformity with the Imperial Hats which fix and determine its rights and immunities, placed henceforward under the collective guarantee of the Contracting Powers. In consequence, the said Principality shall preserve its independent and national administration, as well as full liberty of worship, of legislation, of commerce, and of navigation."

Article XXIX.—"The right of garrison of the Sublime Porte, as stipulated by anterior regulations, is maintained. No armed intervention can take place in Servia without previous agreement between the High Contracting Powers."—*Annual Register*, 1856, pp. 316, 317.

to vessels of war. The navigation of the Danube (*q*) made free and placed in the category of the great rivers mentioned in the Treaty of Vienna.

The *Declaration* respecting Maritime (*r*) Law was signed by the Plenipotentiaries of Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey, assembled in Congress at Paris, April 16, 1856.

The Treaty of Prague, 1866, the close of the war by which Prussia destroyed the old German *Bund*, obtained for herself the supremacy which Austria once had in Germany, seized without scruple or justification large portions of her weaker neighbours' territories—a fate which even the ancient Free City of Frankfort could not escape (*s*).

(*q*) *Article XV.*—" The Act of the Congress of Vienna having established the principles intended to regulate the navigation of rivers which separate or traverse different States, the Contracting Powers stipulate among themselves that those principles shall in future be equally applied to the Danube and its mouths.

" They declare that this arrangement henceforth forms a part of the public law of Europe, and take it under their guarantee."—*Annual Register*, 1856, p. 314.

(*r*) See Appendix; also Preface to this volume; also ch. x. of third volume.

(*s*) See *Overthrow of the Germanic Confederation in* 1866, by Sir A. Malet, 1870. "The ancient free city of Frankfort," he says, " obtained, by special favour of the King of Prussia, reimbursement of a portion of the contribution which was exacted; but the Government is abolished, and the city is reduced to a Prussian town of the third rank."—*Chap.* xxv. p. 384.

" Before the war the kingdom of Prussia consisted of nine provinces:—1. Eastern Prussia, with Königsberg as its capital. 2. Western Prussia; capital, Dantzig. 3. The Grand Duchy of Posen, or Polish Prussia; capital, Posen. 4. Silesia; capital, Breslau. 5. Brandenberg; in which is situated Berlin. 6. Pomerania; capital, Stettin. 7. Saxon Prussia, in which is situated the strong fortress of Magdeburg. 8. Westphalia. 9. Rhenish Prussia. After the war, in addition to these territories, she incorporated into her dominions Hanover, Hesse-Cassel, Nassau, Hesse-Homburg, the Duchies of Schleswig, Holstein, and Lauenburg (these last, however, had been previously annexed), that part of Hesse-Darmstadt which lies to the north of the Maine, and the little principality of Hohenzollern—the cradle of the Prussian Royal House—

The amalgamation of the various Italian States into the Kingdom of Italy is not recorded in any Treaty or Treaties.

The union of Lombardy with Piedmont is recorded in the Treaty or Treaties of Zurich (November 11, 1859), between Austria, France, and Sardinia. Austria adopted the course with respect to Lombardy (*t*) which she afterwards pursued with respect to Venetia—namely, that of ceding the territory to France, who transferred it to Sardinia. Events, subsequently to the Treaties of Zurich, led to the formation of the present Italian Kingdom, which has been recognized by all Powers but the Pope.

The principal Treaties between the United States of North America and the European Powers are—

The Treaty of Versailles (1783), containing the recognition of this Republic.

The Treaty of Ghent (December, 1814), between Great Britain and the United States, chiefly as to boundaries of their respective dominions in North America.

The Treaty between the United States of North America with the Confederation of Central America (December 4, 1845).

The international position of the Republics of Honduras and Nicaragua, in Central America, was materially affected by the claims of Great Britain to the Protectorate of the Mosquito territory. The Treaty called the Clayton-Bulwer

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situated on the borders of Lake Constance, between Würtemberg and Switzerland." Frankfort is omitted.—*Ann. Reg.* for 1866, p. 239.

Article IV. of the Treaty of Prague.—" His Majesty the Emperor of Austria recognizes the dissolution of the late German Bund, and gives his consent to a new formation of Germany, in which the Imperial State of Austria shall take no part. Moreover, his Majesty promises to recognize the closer Federal relations which his Majesty the King of Prussia is about to establish north of the line of the Maine, and also agrees that the German States to the south of this line shall form an union, the national connection of which with the northern confederacy is reserved for a more definite agreement between both parties, and which is to maintain an international independent existence."

(*t*) *Ann. Reg.* 1859, p. 254.

Treaty, and the explanatory subsequent Dallas-Clarendon Treaty, which the United States Senate refused to ratify, failed to remove the dispute between Great Britain and the United States of North America relatively to these Republics. But by a Treaty between Great Britain and Honduras, 28th November, 1859, and with Nicaragua, 28th August, 1860, relinquishing the Mosquito Protectorate, these troublesome questions were finally set at rest (*u*).

The Treaty which established the kingdom of Belgium (1839).

A group of Treaties negotiated for the North of Europe only:—Oliva (1660); Kiel (1814), with the Ottoman Porte; Carlowitz (1699); Bucharest (1812).

The Treaties which have affected the relations between the Ottoman Porte and the European Powers generally:—

The Act of the Porte granting to British merchant vessels the privileges of commerce in the Black Sea (October 30, 1799).

The Treaty which established the kingdom of Greece (1832).

The Convention concluded between the Courts of Great Britain, Austria, Prussia, and Russia, and the Sublime Ottoman Porte, for the Pacification of the Levant, signed at London, July 15, 1840.

The Treaty of July 13, 1841, as to the Navigation of the Dardanelles and the Bosphorus, which incorporated into the written Law of Nations the conventional maxim as to territorial jurisdiction over adjacent waters, revised and altered by Treaty of Paris (already mentioned), 1856. The separate Treaty between England, Austria and France guaranteeing the independence and integrity of the Ottoman Empire (Paris, 1856). The Firman and Hatti-Sherif in 1856, relative to the *status* and privileges

(*u*) They were constantly referred to in the speeches of Presidents of the United States. See *Ann. Register* for 1857, p. 345; for 1858, p. 283; for 1859, p. 274; for 1860, p. 284.

of Christians and non-Mussulmans in Turkey, issued in accordance with Article IX. of the Treaty of Paris, 1856 (*x*).

The Treaty between Russia and Persia, signed at Seïwa (1813), and confirmed at Teflis, under the mediation of Great Britain, in which Persia recognized the exclusive right of Russia to have ships of war in the Caspian Sea.

The Treaty between Great Britain and Persia, signed at Tehran, November 25th, 1814, followed by the royal order of the Schah relative to the trade of British subjects in Persia (*y*).

LIII. These Treaties furnish one of the many reasons why the science of International Law has made such progress since the Treaty of Westphalia, which is usually considered as the first great adjustment of International Relations on the Continent of Europe. It is, then, a sound maxim that a principle of International Law acquires additional force from having been solemnly acknowledged as such in the provisions of a Public Treaty (*z*).

LIV. How far a provision of a Treaty may be affected by its omission in a subsequent Treaty between the same Powers is a question of much gravity. When the independence of the United States of North America was acknowledged, the right of navigating the Mississippi was secured to the subjects of Great Britain as well as those of the United States by a Treaty (1783) between these two Powers: but in the Treaty of Ghent (1814), which put an end to the war between these Powers which had broken out in 1812, the stipulation of 1783 in favour of British subjects was not renewed, and it is now contended by the United States that the right belongs exclusively to their own subjects (*a*).

When a Treaty, dealing with certain subjects, is silent as

(*x*) See also pt. ii. ch. i. on States.

(*y*) In vol. ii. pt. viii. the International *status* of foreign Spiritual Powers, especially the Pope, is considered, and the History of *Concordata*, or Treaties between such Powers and the State.

(*z*) For a list of Treaties relating to the *opening* of ports *usually closed* to foreigners—*relâche forcée*—see Appendix.

(*a*) *Wheaton's Hist.* 507, 508, 585.

to others naturally connected with them, or leaves them on an indefinite and disputable footing, questions afterwards arising upon subjects of this latter class will then be decided according to the subsequent judgment and practice of nations, which must be looked to for exposition of these subjects; and when in a Treaty an enumeration is made of particular articles, or particular matters, according to the nature of the Treaty, this is held to be done in order to prevent misunderstanding, and not to warrant the inference, that the articles or matters excepted from the enumeration should be considered as tacitly sanctioned thereby: the rule "*Exceptio* "*confirmat regulam*" is not applicable to cases of this description (*b*).

LV. The consent of Nations is also evidenced by the Proclamations or Manifestoes (*c*) issued by the Governments of States to the subjects of them upon the breaking out of war. These frequently contain, not only expositions of the causes which have led to this result, but also a defence of the conduct of the Government, founded upon a reference to the principles of International Law, in declaring an offensive or undertaking a defensive war.

These public documents furnish, at all events, decisive evidence (*d*) against any State which afterwards departs from the principles which it has thus deliberately and solemnly invoked; and in every case they clearly recognize the *fact*, that a system of law exists which *ought* to regulate and control the International relations of every State.

LVI. The Marine Ordinances or regulations of a State afford valuable testimony, first, as to the practice of the State

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(*b*) *The Ringende Jacob*, 1 *Rob. Adm. Rep.* p. 92 (*Lord Stowell*).

(*c*) *The Santa Cruz*, 1 *Rob. Adm. Rep.* 61.

(*d*) The remarks which Æschines so forcibly urges as to the advantage of public records, and the testimony they bear to the character of public men, is equally applicable to States: Καλόν, ὦ ἄνδρες Ἀθηναῖοι, καλὸν ἡ τῶν δημοσίων γραμμάτων φυλακή· ἀκίνητον γάρ ἐστι καὶ οὐ συμμεταπίπτει τοῖς αὐτομολοῦσιν ἐν τῇ πολιτείᾳ, ἀλλ' ἐπέδωκε τῷ δήμῳ, ὁπόταν βούληται, συνιδεῖν τοὺς πάλαι μὲν πονηρούς, ἐκ μεταβολῆς δ' ἀξιοῦντας εἶναι χρηστούς. —*Æschin. Orat. adv. Ctesiph.* s. 75.

itself upon this branch of International Law; and also, in some degree, as to the usage of Nations as generally recognized at that time by the jurists and statesmen, and legislative assemblies of the country which issued them (*e*).

When the institutes of great maritime countries agree upon a question of International Maritime Law, they constitute a tribunal from which there can rarely, if ever, be any appeal.

Certain of these institutes, independently of their agreement or disagreement with other maritime codes, have always been held in the highest respect; and certainly no English writer or judge can be accused of national partiality for relying upon them (*f*). These are the celebrated "Consolato del Mare," with the commentary of Casaregis, and the French *Ordonnance sur la Marine* of 1681, with the commentary of Valin; and, due regard being had to the modern practice, the "*Collection des Lois maritimes antérieures au XVIIIe Siècle*," by Pardessus.

LVII. The consent of Nations is also evidenced by the decisions of Prize Courts, and of the tribunals of International Law sitting in each country.

It has been already observed, that in time of war, neutral States have a right to demand *ex debito justitiæ* (*g*) that there be courts for the administration of International Law sitting in the belligerent countries (*h*).

(*e*) *Wheaton* states the proposition in a less limited shape.—*Elements of Intern. Law*, p. 101.

See *The Maria, passim*, especially p. 368, 1 *Rob. Adm. Rep.*: *The Hoop*, 1 *Rob. Adm. Rep.* pp. 198, 199.

(*f*) *The Maria, passim.*

Oppenheim, System des Völkerrechts, kap. v. s. 8.

"The venerable authority of the Consolato."—*Lord Stowell*, 5 *Rob. Adm. Rep.* p. 4, *Henrick and Maria.*

"*Il Consolato del Mare*, cap. 273, expressly says, 'The enemy's goods found on board a friend's ship shall be confiscated;' and this is a book of great authority."—*The Duke of Newcastle's Letter to M. Michel, note to first Proposition*, p. 64.

(*g*) *The Snipe and others, Edwards's Adm. Rep.*: also published separately.

(*h*) See important remarks of *Mably, Droit public*, vol. iii. pp. 350, 351; and *Wheaton, Hist.* p. 171, note.

The duties of those courts are faithfully described by Lord Stowell, in the case of the Swedish Convoy (*i*): "In forming "my judgment, I trust that it has not for a moment escaped "my anxious recollection what it is that the duty of my sta- "tion calls for from me; namely, not to deliver occasional "and shifting opinions to serve present purposes of particular "national interest, but to administer with indifference that "justice which the Law of Nations holds out, without distinc- "tion, to independent States, some happening to be neutral, "and some belligerent: the seat of judicial authority is indeed "locally *here*, in the belligerent country, according to the "known law and practice of nations, but the law itself has no "locality. It is the duty of the person who sits here to "determine this question exactly as he would determine the "same question if sitting at *Stockholm*; to assert no preten- "sions on the part of *Great Britain* which he would not allow "to *Sweden* in the same circumstances; and to impose no "duties on *Sweden*, as a neutral country, which he would not "admit to belong to *Great Britain* in the same character."

In another case (*k*), he says: "It is to be recollected that "this is a Court of the Law of Nations, though sitting here "under the authority of the King of Great Britain. It belongs "to other nations as well as to our own; and what foreigners "have a right to demand from it is the administration of the "*Law of Nations* simply, and exclusively of the introduction "of principles borrowed from our own municipal jurispru- "dence, to which it is well known they have at all times "expressed no inconsiderable reluctance."

It cannot be denied that this theory of judicial duty breathes the very spirit of pure and impartial justice. It is to be remembered, also, that the simple enunciation of such a theory is, to a certain extent, a guarantee for a correspond- ing practice on the part of the nation proclaiming it. It holds up the severest standard by which to measure

(*i*) *The Maria*, 1 *Robinson*, p. 350.
(*k*) *The Recovery*, 6 *Dodson's Adm. Rep.* p. 349.

the decisions of the court; and it witnesses beforehand, as it were, against any deviation from the path of duty thus emphatically pointed out.

The remark of Mr. Wheaton upon this theory, expounded, he admits, by "one of the greatest of maritime judges," is, that those whose interests are affected by those adjudications will always doubt whether the practice corresponds with the theory—especially in the case of a great maritime country, whose judge must, he thinks, unconsciously feel the national bias in favour of whatever operates to the encouragement of the national navy. These judgments, however, he says, if the principles upon which they are founded be rigorously examined, may be an instructive source of information upon Prize Law; and he himself enumerates "the adjudication of "Boards of Arbitrators and Prize Courts" among the sources of International Law, ascribing greater weight to the former than to the latter authority.

It is true that the value of the judgments referred to depends upon the principles, reasonings, and authorities upon which they rely; but it is the constant practice in these cases to state the *data* at length, as well as the judicial conclusion; and Mr. Wheaton himself does not suggest that the latter are often found inconsistent with the former.

In the very elaborate letter addressed, March 28, 1843, to the British Government, by Mr. Webster, then Foreign Secretary to the United States, that eminent person, after contending that there is no distinction between the right of *Visitation* and the right of *Search*, observes: "If such well-"known distinction exists, where are the proofs of it? What "writers of authority on the public law, *what adjudications* "*in Courts of Admiralty*, what public Treaties, recognize "it?" (*l*)

As reference has been, and must afterwards be made, in the course of this work, to the judgments of Lord Stowell, and as it is important to mark the place which these are

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(*l*) *Wheaton's Hist.* p. 711.

entitled to occupy among the sources of International Law, the opinion of American jurists with respect to them becomes valuable, and for many reasons. When they were delivered, the greater portion of Continental Europe was under the actual dominion, or at least the predominating influence, of France, which then disregarded all the authorities of the ancient Law of Nations. These judgments contain frequent references to French writers upon Maritime Law, and to Vattel generally, as a work of the highest authority. The assent or dissent therefore of France, and the countries subject to France *at that time*, could not affect the merit of these decisions. The United States of North America, however, were naturally inclined to favour France from motives of gratitude. These States composed a free maritime nation, daily increasing in all the elements of national greatness and prosperity; occupying an immense territory in the new world; avowedly adhering to the system of International Law (*m*) as acknowledged and received at the time when they became an independent kingdom: they were themselves, during a portion of the momentous period over which these decisions extend, a Neutral Power, upon whom the principles laid down in them pressed, however justly, with great and acknowledged severity; and during another portion a Belligerent, actuated by the keenest hostility against the country in which these judgments were delivered.

The verdict of such a nation is unquestionably entitled to great weight in matters of International Law, and not open to the charge, with respect to this epoch at least, of partiality to the Prize Tribunals of Great Britain. For this reason, the opinion of Mr. Chancellor Kent upon the subject of Lord Stowell's judgments is very valuable. A portion of the Chancellor's work was devoted by him to the subject

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(*m*) *Commentaries upon American Law, by Mr. Chancellor Kent*, vol. i. p. 1, citing instance of the 4th of December, 1781; *Annals of Congress*, vol. vii. 185.

of International Jurisprudence, and it is certainly in no way inferior to the rest of the Commentaries which have earned for him a very high legal reputation in the Western hemisphere (n):—

" In the investigation of the rules of the Modern Law of " Nations, particularly with regard to the extensive field of " maritime capture, reference is generally and freely made to " the decisions of the English Courts. They are in the habit " of taking accurate and comprehensive views of general " jurisprudence, and they have been deservedly followed by " the Courts of the United States on all the leading points " of National Law. We have a series of judicial decisions " in England and in this country, in which the usages and " the duties of nations are explained and declared with that " depth of research, and that liberal and enlarged inquiry, " which strengthen and embellish the conclusions of reason. " They contain more intrinsic argument, more full and pre- " cise details, more accurate illustrations, and are of more " authority, than the loose *dicta* of elementary writers. When " those courts in this country which are charged with the " administration of International Law have differed from the " English adjudications, we must take the Law from domestic " sources; but such an alternative is rarely to be met with; " and *there is scarcely a decision in the English Prize Courts* " *at Westminster, on any general question of public right,* " *that has not received the express approbation and sanction* " *of our National Courts.* We have attained the rank of a " great commercial nation; and war, on our part, is carried " on upon the same principles of maritime policy which have " directed the forces and animated the councils of the naval " powers of Europe. When the United States formed a " component part of the British empire, our Prize Law and " theirs was the same; and after the revolution it continued

(n) *Kent's Commentaries upon American Law,* vol. i. p. 8.

" to be the same as far as it was adapted to our circum-
" stances, and was not varied by the power which was
" capable of changing it. The great value of a series of
" judicial decisions in prize cases, and on other questions
" depending on the Law of Nations, is, that they render
" certain and stable the loose general principles of that Law,
" and show their application, and how they are understood, in
" the country where the tribunals are sitting. They are,
" therefore, deservedly received with very great respect, and
" are presumptive, though not conclusive, evidence of the Law
" in the given case. This was the language of the Supreme
" Court of the United States so late as 1815; and the
" decisions of the English High Court of Admiralty, espe-
" cially since the year 1798, have been consulted and
" uniformly respected by that Court as enlightened commen-
" taries on the Law of Nations, and affording a vast variety of
" instructive precedents for the application of the principles
" of that Law."

Few names have obtained greater celebrity upon questions of International Law than that of Dr. Story; and with his opinion this branch of the subject may be concluded: "How
" few," he says, "have read with becoming reverence and
" zeal the decisions of that splendid jurist—the ornament, I
" will not say, of his own age or country, but of all ages and
" all countries; the intrepid supporter equally of neutral and
" belligerent rights; the pure and spotless magistrate of
" nations, who has administered the dictates of universal
" jurisprudence with so much dignity and discretion in the
" Prize and Instance Courts of England!—Need I pronounce
" the name of Sir William Scott?"

During the last Russian war the English Prize Tribunals—both the High Court of Admiralty and the Judicial Committee of the Privy Council—applied to the cases brought before them the principles of the American and English judgments as of equal authority.

During the late civil war in the United States the tri-

bunals of both belligerents professed to administer, and with very few exceptions did administer, the law as already expounded by these Courts.

The seal of Courts of Admiralty, being also Courts of International Law, is *judicially* taken notice of, without positive proof of its authenticity, by the Courts of all Nations (*o*).

(*o*) *Yeaton* v. *Fry*, 5 *Cranch's* (*American*) *Rep.* 335, 343 (*Ch. J. Marshall*); *Thompson* v. *Stewart*, 3 *Conn.* (*American*) *Rep.* 171; 2 *Kent's Commentaries*, 121, note. But the rule is different as to the seal of other foreign courts: *Delafield* v. *Hand*, 3 *Johns.* (*American*) *Rep.* 310; *Desobrey* v. *Laistre*, 2 *Harr. & Johns.* (*American*) *Rep.* 192.

Henry v. *Adey*, 3 *East*, 221: "In an action upon a judgment obtained in the island of *Grenada*, the plaintiff, at the trial before *Lord Ellenborough*, C. J., at the sittings after last term at *Guildhall*, proved the handwriting of the Judge of the Court subscribed to the instrument purporting to be the judgment of the Court, but could not prove that the seal affixed to it was the seal of the island; for want of which proof the plaintiff was nonsuited." The Court, on an application to set aside the nonsuit, upheld it.

CHAPTER VII.

WRITERS ON INTERNATIONAL LAW.

LVIII. The consent of nations is further evidenced by the concurrent testimony of great writers (*a*) upon International Jurisprudence. The works of some of them have become recognized digests of the principles of the science; and to them every civilized country yields great, if not implicit, homage (*b*).

When Grotius wrote his immortal work he derived but little help (*c*) from any predecessor in the noble career which

(*a*) See some very sensible remarks on this head, by *M. Ortolan*, *Diplomatie de la Mer*, l. i. c. iv. t. i. p. 74, &c.

"Text writers of authority showing what is the approved usage of nations, or the general opinion respecting their mutual conduct, with the definitions and modifications introduced by general consent," are placed as the second branch of International Law by *Wheaton.—El. of Int. Law*, vol. i. p. 59.

(*b*) The English courts of Common Law, and English commentators upon that law, both in cases of public and private International Law, have been in the habit of referring to other works of these foreign authors, as containing evidence of the law to be administered in England: *e. g.* see *Comyn's Digest*, tit. Ambassador, where *Grotius* is cited. See the authorities cited by *Lord Mansfield* in the cases relating to ambassadorial privileges, mentioned in a later part of this work; and see the whole part of this work on *Comity*, or *Private International Law*. *Lord Mansfield*, in fact, built up the fabric of English Commercial Law upon the foundation of the principles contained in the works of foreign jurists. In the Admiralty and Ecclesiastical Courts, these works had been always referred to as authorities. It is by these courts indeed, and the practitioners therein, that the study of Civil and International Law was alone preserved from perishing in these Islands: the seed was sown and kept alive in them, which subsequently bore fruit of which no country need be ashamed.—See *Preface, by Dr. Phillimore, to Sir G. Lee's Reports.*

(*c*) *Grotii Prolegomena*, xxiii., as to the *auxilia scripti* which he had.

"Solent autem gentium sententiæ de eo quod inter illos justum esse debet triplici modo manifestari, moribus scilicet et usu, pactis et fœde-

he chose for himself. Albericus Gentilis, Arthur Duck, and Suarez had indeed left him materials of which he fully availed himself, as well as of the labours of publicists like Ayala and Bacon, and of the commentators on the Civil and Canon Law; but he may be almost said to have himself laid the foundation of that great pillar of International Law—the authority of International Jurists. His own book, one of the firmest barriers yet erected by Christendom against barbarism, and the works of some subsequent writers upon the same subject, have long obtained the honour of being the repositories to which nations have recourse for argument to justify their acts or fortify their claims. They are, indeed, with the modifications that reason and usage apply, admitted umpires in International disputes; and this fact has greatly contributed, and still does contribute, to clothe the Law of Nations, more and more, with the precision and certainty of positive and municipal law.

The value ascribed to the opinion (*d*) of each writer, in the event of there being a difference between them, is a point upon which it is impossible to lay down a precise rule; but among the criteria of it will be the length of time by which it is, as it were, consecrated, the period when it was expressed, the reasoning upon which it rests, the usage by which it has been since strengthened, and to the previous existence of which it testifies (*e*).

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ribus, et tacitâ approbatione juris regularum, a prudentibus ex ipsis rerum causis per interpretationem et per rationem deductarum."—*Warnkönig, Doctrina Juris Philosophica Aphorismis Distincta* (a most valuable little work), s. 146, p. 190.

(*d*) No rule of International Law exists like that of the Imperial Law of Rome, which decided that the opinions of *Papinianus, Paulus, Gaius, Ulpianus,* and *Modestinus* should have the force of law: that, in points where they differed, the opinion of the majority, and, where they were equally divided, the side on which *Papinianus* was found, should prevail.—*Th. Cod.* i. 4, *De Responsis Prudentum L. un.*; *Ib.* ix. 3, *L. un. Pr. de Sent. Pass.*; *Cod.* ix. 51, 13 *de Sent. Pass.*; *Mühlenbruch, Doctr. Pand. Pr.* s. 8.

(*e*) *Vattel* cited "as a witness as well as a lawyer."—*The Maria*, 1 *Rob. Adm. Rep.* p. 363. See the case generally on this point.

When, on the other hand, their authority, in the absence of any contrary usage or convention, may be safely said to be binding upon all nations: "All writers upon the Law "of Nations unanimously acknowledge it," is not the least of Lord Stowell's arguments for the Belligerent's right of search (*f*).

"In cases where the principal jurists agree, the presump- "tion will be very great in favour of the solidity of their "maxims; and no civilized nation that does not arrogantly "set all ordinary law and justice at defiance will venture to "disregard the uniform sense of the established writers of "International Law" (*g*).

And how great is the advantage of this, that a controversy between France and England should be capable of being referred to principles laid down by an arbitrator who existed long before the disunion arose, and whom it is impossible to accuse of partiality! This remark supposes the reference made to a neutral jurist, belonging to neither country; but the advantage is not so limited—it may be that the authorities belonging to the very country which is urging a demand will be found to pronounce against it.

If the authority of Zouch, of Lee, of Mansfield, and, above all, of Stowell, be against the demand of England—if Valin, Domat, Pothier, and Vattel (*h*) be opposed to the preten- sions of France—if Grotius and Bynkershoek confute the claim of Holland — Puffendorff (*i*) that of Sweden — if

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(*f*) *The Maria*, 1 *Rob. Adm. Rep.* p. 360.

(*g*) *Kent's Commentaries*, vol. i. p. 19.

(*h*) "I stand with confidence upon all fair principles of reason—upon the distinct authority of *Vattel*—upon the *Institutes* of other great maritime countries as well as those of our own countries—when I venture to lay it down that, by the Law of Nations," &c.—*The Maria*, 3 *Rob. Adm. Rep.* p. 369 (*Lord Stowell*).

(*i*) So, in the case of the *Swedish* convoy, *Lord Stowell* said: "If authority is required, I have authority—and not the less weighty in this question for being *Swedish* authority; I mean the opinion of that distinguished person—one of the most distinguished which that country (fertile as it has been of eminent men) has ever produced—I mean

Heineccius, Leibnitz, and Wolff array themselves against Germany—if Story, Wheaton, and Kent condemn the act of America, it cannot be supposed (except, indeed, in the particular epoch of a Revolution, when all regard to law is trampled under foot) that the *argumentum ad patriam* would not prevail—at all events, it cannot be doubted that it *ought* to prevail, and should the country relying upon such authority be compelled to resort to arms, that the guilt of the War would rest upon the antagonist refusing to be bound by it.

It is with reference to the authority of jurists that we find Lord Stowell using such expressions as these: "It is the "necessary consequence acknowledged in *all books*." "The "institution (*i.e.* of a particular State with respect to a "matter of the Law of Nations) must conform to the text "law, and likewise to the constant usage upon this matter;" and again: "All writers upon the Law of Nations unani-"mously acknowledge it, without the exception of even "Hubner himself, the great champion of neutral privileges."

And Lord Mansfield, deciding a case in which the privileges of the attendant of an ambassador were concerned, said: "I remember, in a case before Lord Talbot, of *Burvot* "v. *Barbut*, upon a motion to discharge the defendant (who "was in execution for not performing a decree) 'because he "'was agent of commerce, commissioned by the King of "'Prussia, and received here as such,' the matter was very "elaborately argued at the bar, and a solemn, deliberate "opinion given by the court. These questions arose and were "discussed: 'Whether a minister could, by any act or acts, "'waive his privilege?'—'whether being a trader was any ob-"'jection against allowing privilege to a minister personally?' "—'whether an agent of commerce, or even a consul, was "'entitled to the privileges of a public minister?'—'what was

Baron Puffendorff. . . . In the opinion, then, of this wise and virtuous *Swede* . . . his words are memorable. I do not overrate their importance when I pronounce them to be well entitled to the attention of *his* country."

"'the rule of decision?' Lord Talbot declared a clear opi-
"nion, 'That the Law of Nations, in its full extent, was
"'part of the law of England;' 'that the Act of Parlia-
"'ment was declaratory, and occasioned by a particular inci-
"'dent;' 'that the Law of Nations was to be collected from
"'the practice of different nations, and the authority of
"'writers.' Accordingly, he argued and determined from
"such instances, and the authority of Grotius, Barbeyrac,
"Bynkershoek, Wiquefort, &c., there being no English
"writer of eminence upon the subject" (*k*).

In truth, a reverence for the opinions of accredited writers upon Public and International Law has been a distinguishing characteristic of statesmen in all countries, and perhaps especially of those who have deserved that appellation in this kingdom.

It has been felt, and eloquently expressed by them, that though these writers were not infallible, nevertheless, "the "methodized reasonings of the great publicists and jurists "formed the digest and jurisprudence of the Christian "world;" that their works contained principles which influenced every State, and constituted the permanent and embodied voice of all civilized communities; and that upon their decisions depended one of the best securities for the observance and preservation of right in the society of nations.

Sir James Mackintosh, in his speech on the annexation of Genoa to the kingdom of Sardinia, touched upon this important subject, in the following well-weighed and emphatic terms: "It is not my disposition to overrate the authority "of this class of writers, or to consider authority in any case "as a substitute for reason. But these eminent writers were, "at least, necessarily impartial. Their weight, as bearing "testimony to general sentiment and civilized usage, receives "a new accession from every statesman who appeals to their

(*k*) *Triquet and Others* v. *Bath, Peach and Others* v. *Same*, 3 *Burrows' Rep.* 1480.

Burke's Works, vol. viii. p. 235, *Letters on a Regicide Peace.*

"writings, and from every year in which no contrary practice "is established, or hostile principles avowed. Their works "are thus attested by successive generations to be records of "the customs of the best times, and depositories of the deli-"berate and permanent judgments of the more enlightened "part of mankind. Add to this, that their authority is "usually invoked by the feeble, and despised by those who "are strong enough to need no aid from moral sentiment, "and to bid defiance to justice. I have never heard their "principles questioned, but by those whose flagitious policy "they had by anticipation condemned" (*l*).

In the same spirit Cicero had long ago observed: "Qui "peritis non putat esse obtemperandum, non homines lædit, "sed leges ac jura labefactat" (*m*).

(*l*) *The Miscellaneous Works of Sir J. Mackintosh*, vol. iii. p. 342.

(*m*) *Cicero, pro Cæcina*, ss. 23–25.

Suarez has the following remarks concerning what he designates the *doctrinalis interpretatio* of Laws: "De hac igitur interpretatione certum est, non habere vim legis, quia non procedit à potestate jurisdictionis, sed à scientia, et judicio prudentum; et ideo dicimus per se non inducere obligationem. Quia verò in omni arte judicium peritorum in illa magnam inducit probabilitatem, ideo etiam in hac legum humanarum interpretatione hæc doctrinalis interpretatio magnum habet authoritatis pondus. In quo varii gradus esse possunt; nam si in alicujus legis intelligentia omnes interpretes conveniant, faciunt humanam certitudinem, et regulariter loquendo, etiam inducunt obligationem servandi legem, et utendi illa in praxi juxta talem interpretationem."—*De Legibus*, lib. vi.

CHAPTER VIII.

RECAPITULATION OF SOURCES OF INTERNATIONAL LAW.

The sources, then, from which International Jurisprudence is derived, are these:—

1. The Divine Law, in both its branches—namely: The principles of Eternal Justice implanted by God in all moral and social creatures, of which nations are the aggregate, and of which governments are the International Organs—

2. The Revealed Will of God, enforcing and extending these principles of Natural Justice.

3. Reason, which governs the application of these principles to particular cases, itself guided and fortified by a constant reference to analogous cases and to the written reason embodied in the text of the Roman Law, and in the works of Commentators thereupon.

4. The universal consent of Nations, both as expressed (1) by positive compact or treaty, and (2) as implied by usage, custom, and practice: such usage, custom, and practice being evidenced in various ways—by precedents recorded in History; by being embodied and recorded in Treaties; in public documents of States; in the Marine Ordinances of States; in the decisions of International Tribunals; in the Works of eminent writers upon International Jurisprudence.

LIX. It may be well to illustrate by an example the practical application of the principles of International Law derived from the sources which have been enumerated in the preceding pages.

In 1839, the Emperor of China seized the opium of certain British merchants at Canton. Reparation was demanded by Great Britain, and on the refusal of it, war followed between the two countries. Peace being made, and the reparation promised, a question arose, Whether,

according to the principles of International Law, the measure of compensation which one government ought to demand of another for the forcible seizure of the property of its subjects was the *cost price* of the property, or its *market price* at the place of seizure?

This curious and important question between a Christian and civilized Heathen nation might have been impartially answered by a reference to the principles of the Roman Law, and to the commentaries of foreign jurists, aided by the analogy derived from similar cases adjudicated upon between subject and subject, both in England and other countries. The decision which these authorities pronounced would have furnished no unfair measure of the redress due from the Chinese Government to the subjects of Great Britain.

The claims of the British Government on behalf of her merchant subjects might have been supported by the following arguments: First, the obligations which the Chinese Government would have incurred if they had simply constituted themselves the purchasers of the opium, and deferred the payment till the period of the treaty; and, Secondly, the obligations which they incurred by the act of violence, and the character of wrong-doers with which that act clothed them.

As to the first point, then—that is to say, let the Chinese be considered simply as debtors, who had delayed the fulfilment of their contract till the price of the article had fallen in the market. Perhaps the portion of the Roman Law which, on account of its acknowledged wisdom and equity, is most generally incorporated into the municipal codes of Europe is that which relates to obligations. One of the most celebrated expounders of this branch of Jurisprudence is *Pothier*. In the third article of the second chapter, and first part of his Treatise, he considers "des dommages et intérêts résul-"tant, soit de l'inexécution des obligations, *soit du retard* "*apporté à leur exécution*." And he begins by defining his subject thus: "On appelle *dommages et intérêts*, la perte "que quelqu'un a faite, et le gain qu'il a manqué de faire:

"c'est la définition qu'en donne la loi (13 Ff. *Rat. rem hab.*)—
"*Quantùm meâ interfuit, id est quantum mihi abest, quantùmque lucrari potui.*" The result of his examination of this law is, that in all cases, even where the debtor is guilty of no bad faith, he shall be compelled to indemnify the creditor both for the actual loss which he has sustained, and for the gain which it may reasonably be supposed that he would have made, had he not been impeded by his engagement. In cases of bad faith, the rule is much more severe.

A particular kind of action was known to the Roman Law, in cases where the price or value of a thing in which one person was indebted to another was sought in lieu of the thing itself, payment of which had been delayed. The action was called, for an antiquated reason which need not be discussed, *Condictio triticaria* (*a*); and it is most learnedly treated by *J. Voet*, who says, it is necessary to consider, first, whether the value of the thing is the principal object of the suit, or whether the thing itself be the principal object, and the value only the necessary substitute, under the circumstances. If it be the value of the thing, if the price was to be paid in money, the law, he says, is clear—the sum due is to be measured by the value of the article at the time when the obligation was first contracted, not at the time when the payment was enforced (*b*). If the thing itself be the principal object of the suit, its value should be estimated, either by that which it was worth at the time of beginning the suit (*litis contestatio*), or at the time the sentence was pronounced (*condemnationis tempus*); provided always that *no delay has been caused by the party against whom the suit is brought*, because then "dubium non est, quin frustratio moratori, et "non alteri obesse debeat; ac propterea, si inter moram et "litem contestatam remve, judicatam res pluris valuerit, quam

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(*a*) *Dig. de Condic. Tritic.* xiii. iii. 1.

(*b*) "Neque aliam contrahentes videri possunt æstimationem adeoque quantitatem pecuniariam respexisse, quam quæ fuit eo tempore, quo primitus obligatio nascebatur, sive bonæ fidei sive stricti juris negotium sit"—*Voet, ad Pand.* l. xiii. tit. iii.

"ipso litis contestatæ vel condemnationis momento, reus in "id, quanti res plurimi fuit, à tempore moræ ad tempus litis "contestatæ, in stricti juris, aut rei judicatæ in bonæ fidei "judiciis, damnandus foret."

There can be no doubt that the Chinese Government was the "Morator" in this case, or that, according to the maxim of jurisprudence which has been cited, it ought to have been condemned in the costs of the opium *at the time* it became possessed of that article, unless, between that period and the period of restitution, the opium had become of greater value; for the only doubt raised by *Voet* is, whether in cases of *bona fides,* the augmented price should be due.

Again, from the time of the seizure, the Chinese Government became the *Emptor*; and whatever depreciation of price happened in the interim betwixt that time and the treaty, enured to the detriment of the purchasers, no maxim being clearer than "periculum rei venditæ ad emptorem statim "pertinet" (*c*).

Again, let the Chinese Government be considered, not as the actual purchasers, but as securities for the payment of the money, and let the question be tried by the principle of Commercial, which is *quasi*-International Jurisprudence. What is the value in which the insurer is bound to indemnify the insured—that of the goods at the time of their loss, or that of their invoice price? *Émérigon,* no light authority, is clear upon this point. He says (*d*), adopting the language of other writers: "En fait de prêt à la grosse et d'assurance, "on ne fait point attention à la valeur des effets au temps de "leur perte; *mais seulement à ce qu'ils valoient au temps de "leur chargement.*" So the English law adopts the original value of the goods as the basis of the calculation of the amount in which the *partial* loss of the insured is to be indemnified by the insurer (*e*).

Secondly, as to the obligations which the Chinese Govern-

(*c*) *Vide passim, Dig.* lib. xviii. tit. vi.; *Cod.* lib. iv. tit. xlviii.
(*d*) Tom. i. p. 262.
(*e*) *Langhorn* v. *Allnutt,* 4 *Taunton's Reports,* 511.

ment incurred by its act of violence, and by the character of a wrong-doer with which it thereby clothed itself; and if the language and spirit of Roman Jurisprudence was in favour of the claim of the opium owners against the Chinese Government, considered as simple debtors, or as securities for debtors, infinitely more was it in their favour against that Government treated as wrong-doers.

And, first, as to the Civil Law, which throughout that large chapter, "De obligationibus quæ ex delicto nascuntur," teems with analogies, and those of great force and directly bearing upon this subject.

When a party, wrongfully deprived, was reinstated in his property by the well-known decree of the Prætor, the "restitutio in integrum"—the law said, "Sive quid amiserit "*sive lucratus* non sit, restitutio facienda est, etiamsi non ex "bonis quid amissum sit;" and in cases of theft, where the sentence restored with heavy damages the stolen property, it also provided for the value of the property where it could not be so restored—"æstimatione relatâ in id tempus quo fur-"tum factum est" (*f*).

So by the "Lex Aquilia," where there had been "dam-"num injuria datum," in consequence of which the thing had diminished in value, the measure of restitution was "*quanti* ea res in anno *plurimi fuit* tantum domino dare "damnetur" (*g*); and again it is said, "placet ad id tempus "spectandum *quo res* unquam *plurimi fuit*" (*h*).

So Pothier, in the chapter already cited, after stating the mitigating circumstances attaching to transactions of *bona fides*, observes (*i*): "Les principes que nous avons établis "jusqu'à présent n'ont pas lieu lorsque c'est le dol de mon "débiteur qui a donné lieu à mes dommages et intérêts. En "ce cas le débiteur est tenu indistinctement de tous les

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(*f*) *Dig. de Furtis*, xlvii. t. ii. 51.
Inst. iv. t. iii. (*De Lege Aquilia*).
(*g*) *Dig.* lib. ix. tit. ii. 23.
(*h*) *Dig.* lib. xiii. tit. i. 8. 1. *De Condictione Furtiva.*
(*i*) Lib. i. p. 72.

" dommages et intérêts que j'ai soufferts, auxquels son dol a " donné lieu, non-seulement de ceux que j'ai soufferts par " rapport à la chose qui a fait l'objet du contrat, *propter rem* " *ipsam*, mais de tous les dommages et intérêts que j'ai souf- " ferts par rapport à mes autres biens, sans qu'il y ait lieu " de distinguer et de discuter en ce cas, si le débiteur doit " être censé s'y être soumis ; car celui qui commet un dol " s'oblige, *velit, nolit*, à la réparation de tout le tort que ce " dol causera."

Grotius (*j*), in that chapter of his work which treats " De " damno injuriâ dato, et de obligationibus quæ ex delicto " nascuntur," fully adopts these maxims of the civil law.

To the same effect are the instances cited by Sir John Davis (*k*), in a very curious case, called " Le case de mixt " moneys." In that case the English Privy Council (*l*), assisted by the Judges, seem to have said, that if a man, upon marriage, receives £1000 as a portion with his wife, paid in silver money, and the marriage is dissolved *causa precontractûs*, so that the portion is to be restored, it must be restored in equal good silver money, though the State shall have depreciated the currency in the meantime (*m*) ; so if a man recover £100 damages, and he levies that in good silver money, and that judgment is afterwards reversed, by which the party is put to restore back all he has received, the judgment creditor cannot liberate himself by merely restoring £100 in the debased currency of the time, but he must give the very same currency that he had received.

To the same, or even to a stronger effect, were the decisions of Lord Stowell (*n*) in restoring captured vessels which had been condemned *by illegally* constituted Courts in the West Indies. The ship and cargo were directed to be restored *in value* ; and on reference being made to the registrar and

(*j*) *De J. B. et P.* lib. ii. c. xvii.
(*k*) *Sir John Davis's Reports*, p. 27.
(*l*) *Knapp, Privy Council Rep.* vol. ii. p. 20.
(*m*) *Conf. Burke, Thoughts on the French Revolution*, v. 277.
(*n*) *The Lucy*, 3 *Robinson's Adm. Rep.* p. 208.

merchants, they took the *invoice prices* as the *measure* of the value, allowing upon it ten per cent. profit. Nor was this a solitary case; it was, as the Queen's advocate of that day said, " A question in which a great number of cases, and very " considerable amount of property, were involved " (*o*).

Lastly, there was in favour of this position the elaborate judgment of Sir William Grant, in the case of Pilkington *v.* The Commissioners for Claims on France (*p*). The circumstances of that case were, that the Revolutionary Government had confiscated the debts owing from the subjects of France to those of Great Britain. By the Treaty of 1814 compensation was to be made to the latter. Between the decree of confiscation and the repeal of it, the *assignats* in which the debts were to be paid had been depreciated in value: it was disputed whether or no the depreciation should be charged to the French. Sir William Grant, after touching upon the curious question of depreciated currency as affecting the relations of debtor and creditor, observes: " I have said it is " unnecessary to consider whether the conclusion drawn by " Vinnius or the decision in Davis's Reports be the correct " one, for we think this has no analogy to the case of " creditor and debtor. *There is a wrong act done by the* " *French Government; then they are to undo that wrong act,* " *and to put the party into the same situation as if they never* " *had done it.* It is assumed to be a wrong act, not only " in the Treaty, but in the repealing decree. They justify it " only with reference to that which, as to this country, has a " false foundation—namely, on the ground of what other " Governments had done towards them, they having confis- " cated the property of French subjects; therefore they say, " we thought ourselves justified at the time in retaliating " upon the subjects of this country. That being destitute of " foundation as to this country, the Republic themselves, in " effect, confess that no such decree ought to have been

(*o*) *The Lucy*, 3 *Robinson's Adm. Rep.* p. 210.
(*p*) *Knapp, Privy Council Rep.* p. 19.

" made, as it affected the subjects of this country; therefore
" it is *not merely* the case of a debtor paying a debt at the
" day it falls due, but it *is the case of a wrong-doer who*
" *must undo, and completely undo, the wrongful act he has*
" *done*; and if he has received the assignats at the value of
" 50*d.*, he does not make compensation by returning an
" assignat which is only worth 20*d.*—*he must make up the*
" *difference between the value of the assignat at different*
" *periods* * * * *. If the act is to be undone, it must be
" completely undone, and the party is to be restored to the
" situation in which he was at the time the act to be undone
" took place."

If in the case of the British merchants and the Chinese Government, the Treaty had not specified the sum of six millions for the compensation, but merely promised in general terms to restore the value of the opium seized—then the principles of International Law which govern the construction of Treaties (*q*), would have entitled the original possessors of the opium to demand the *most* favourable interpretation which could be put upon the term " value " (*r*).

The conclusion then to which we are led with respect to the case which has been discussed, from the application of the principles of International Law, derived from all the sources which have been enumerated, is this: That the British Government would have been justified by the Law of Nations in demanding the *cost* price of the opium from the Chinese Government, even if the depreciation in value of that article at the time of the conclusion of the Treaty had been the result of the usual fluctuations of commerce. It is obvious that this conclusion applied with increased force to a case where the diminished value was one of the consequences of the wrongful acts of that Government itself.

(*q*) *Grotius*, lib. ii. c. xiv. (*r*) *Vattel*, t. ii. p. 33.

CHAPTER IX.

OBJECTION THAT THERE IS NO LAW BECAUSE NO SUPERIOR.

LX. It is sometimes said that there can be no Law between Nations because they acknowledge no common superior authority, no International Executive capable of enforcing the precepts of International Law. This objection admits of various answers: First, it is a matter of fact that States and Nations recognize the existence and independence of each other; and out of a recognized society of Nations, as out of a society of individuals, Law must necessarily spring. The common rules of right approved by Nations as regulating their intercourse are of themselves, as has been shown, such a Law. Secondly, the contrary position confounds two distinct things; namely, the physical sanction which Law derives from being enforced by superior power, and the moral sanction conferred on it by the fundamental principle of Right; the error is similar in kind to that which has led Jurists to divide moral obligations into Perfect and Imperfect. All moral obligations are equally perfect, though the means of compelling their performance is, humanly speaking, more or less perfect, as they more or less fall under the cognizance of human laws (*a*). In like manner, International Justice would not be the less deserving of that appellation, if the sanctions of it were wholly incapable of being enforced.

(*a*) *Kant*, *Rechtslehre*, s. 54, *req.*—*Warnkönig* says, with much force and truth, "Nonne ex mutua inter sese invicem agnitione inter eas quædam constituitur societas, et probantur communes justi regulæ quæ verum jus efficiunt? miscet vir summus (i. e. *Kant*) juris sanctionem cum justi notione, eaque in re parum sibi constans esse videtur."—*Doctrina Juris Philosophica*, s. 147.

Brown's Philosophy of the Human Mind, vol. iv. pp. 396-7-8.

How far and by what means they are capable of being executed are questions which have been already alluded to, and which will be more fully discussed in a subsequent portion of this work, when the International Process of enforcing the execution of International Justice by Negotiation, Treaties, Reprisals, or War comes under consideration.

But, irrespectively of any such means of enforcement, the Law must remain (*b*). God has willed the society of States as He has willed the society of individuals. The dictates of the conscience of both may be violated on earth: but to the national, as to the individual conscience, the language of a profound philosopher is applicable: "Had it strength as it "had right, had it power as it has manifest authority, it "would absolutely govern the world" (*c*).

Thirdly, most, if not all, civilized countries have incorporated into their own Municipal Law a recognition of the principles of International Law.

The United States of North America, almost contemporaneously with the assertion of their independence (*d*), and the new Empire of Brazil in 1820, proclaimed their national adherence to International Law: in England it has always been considered as a part of the law of the land (*e*).

(*b*) *Kaltenborn*, *Kritik des Völkerrechts*, has a very good chapter on this head, entitled, *Die Läugner des Völkerrechts*, kap. vi. p. 306: "Mit Recht nennt *Stein* es einen *kahlen* und *trostlosen* Satz, das es kein Völkerrecht geben solle."—"*Stahl* (Rechtsphilosophie) erklärt, nicht alles Recht sei erzwingbar, unter Anderen nicht das Völkerrecht. Wenn man aber nur richtiger und allgemeiner Weise die Erzwingbarkeit als äussere Realisirbarkeit auffasst, so ist auch das Völkerrecht erzwingbar zu nennen," pp. 307, 309, n.

(*c*) *Bishop Butler* (*Sermon III.*), *On Human Nature.*

"Si les loix naturelles ont assez de force pour régner sur les Rois mêmes par la crainte de l'Auteur de ces loix, elles ne règnent pas moins entre les Rois qu' *entre les différentes nations* comparées les unes avec les autres. Elles sont le seul appui ordinaire de ce droit qui mérite proprement le nom de *Droit des Gens*; c'est-à-dire, de celui qui a lieu de Royaume à Royaume ou d'Etat à État."—*Institution du Droit public*, xii. t. i. 498; *Œuvres d'Aguesseau.*

(*d*) "According to the general usages of Europe."—*Kent*, *Comm.* i. p. 1.

(*e*) *Blackstone's Commentaries on the Laws of England*, book iv. c. v.

Lastly, it may be observed on this head, that the History of the World, and especially of modern times, has been but incuriously and unprofitably read by him, who has not perceived the certain *nemesis* which overtakes the transgressors of International Justice; for, to take but one instance, what an "Iliad of woes" (*f*) did the precedent of the first partition of Poland open to the kingdoms who participated in that grievous infraction of International Law! The Roman Law nobly expresses a great moral truth in the maxim—"Jurisjurandi contempta religio satis Deum habet "ultorem" (*g*). The commentary of a wise and learned French jurist upon these words is remarkable, and may not inaptly close this first part of the work: "Paroles (he says) "qu'on peut appliquer également à toute infraction des loix "naturelles. La justice de l'Auteur de ces loix n'est pas "moins armée contre ceux qui les transgressent, que contre "les violateurs du serment, qui n'ajoute rien à l'obligation "de les observer, ni à la force de nos engagements, et qui ne "sert qu'à nous rappeler le souvenir de cette justice in-"exorable" (*h*).

(*f*) *Burke, Letters on a Regicide Peace.*

(*g*) *Cod.* lib. iv. t. i. 2, *De Reb. Cred. et de Jurejurando* (*Alexander Severus*).

(*h*) *D'Aguesseau*, Ib. xiv. t. i. p. 500. See, too, p. 482.

"Auch ist die Erzwingbarkeit nicht der einzige Charakter des Rechts, auch nicht sein wesentlichster—Dieser besteht vielmehr darin, das es Norm und Ordnung für alle menschlichen *Gemeinverhältnisse* in allen Sphären und Dimensionen des privaten und des öffentlichen Lebens, mithin auch des socialen Verhältnisses der Völker und Staaten untereinander also *Völkerrecht* ist—Der Zwang geht nun aber von Gemeinschaft als solcher aus—Dies ist die Ordnung die aufrecht erhalten werden soll—Das Rechtsleben ist das Gemeinleben u. s. w."—*Kaltenborn*, 310, ib.

PART THE SECOND.

CHAPTER I.

SUBJECTS OF INTERNATIONAL LAW—STATES.

LXI. STATES are the proper, primary, and immediate subjects of International Law. It will be seen, indeed, that questions of this jurisprudence may be raised in matters affecting the persons and property both of Private Individuals and of Sovereigns and Ambassadors—the Representatives of States—and of public officers like Consuls, but mediately and indirectly, and in so far only, as they are members, or representatives, or public officers of States. Under the appellation of State are included all the possessions of a Nation; so that if a Nation establish a Colony, however distant, that is looked upon by the eye of the Law as a part of the State, in the same manner as a province or city belonging to her ancient territory; and therefore, unless by the policy of the Mother State, or by the provisions of Treaty, a different character has been impressed upon the Colony, the Law applicable generally to the territory of the State is applicable to the Colony or Colonies belonging to her: all together make up one State, and are to be treated as one by International Law (*a*).

LXII. The question as to the origin of States belongs rather to the province of Political Philosophy than of International Jurisprudence. The idea that any descendant of

(*a*) *Vattel*, lib. i. c. xviii. s. 210: "Tout ce qui est dit du territoire d'une nation, doit s'entendre aussi de ses colonies."

Adam ever existed in what has been falsely called a state of nature, that is, out of the society of his fellow-men, has been long ago demonstrated to be equally inconsistent with reason and experience. The occasions, however, which led to the first formation of the particular society, of which each man is a member, may be of various kinds. That society may have been created by the division of a great empire into several kingdoms, whether by force of arms or by mutual consent; thus the empires of Alexander, of Charlemagne, and of Charles V. were distributed, among their successors, into separate kingdoms. It may have been founded by an accidental concourse of individuals abandoning another country, according to the classical legend of Antenor (*b*) and the story of the fugitives from the oppression of Attila, to which Venice (*c*) was said to owe her origin, or it may have been formed by the separation of a province from the community of which it was formerly an integral part, and by its establishment as an independent nation (*d*). In all the foregoing ways, "novus "populus *sui juris* nascitur" (*e*). The last instance will be

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(*b*) "Antenor potuit, mediis elapsus Achivis,
Illyricos penetrare sinus, atque intima tutus
Regna Liburnorum et fontem superare Timavi:
* * * * * * *
Hic tamen ille urbem Patavi, sedesque locavit
Teucrorum, et *genti* nomen dedit, armaque fixit
Troïa."— *Æn.* i. 242–249.

(*c*) *Gibbon, Decline and Fall of the Roman Empire*, vol. vi. c. xxxv. 119–121.

(*d*) *Vattel*, liv. i. c. xviii. s. 206; *Rutherforth*, b. ii. c. ii. s. 5, p. 1259; *Klüber*, pt. i. c. i.; *Wheaton's Elements*, vol. i. p. 91.

(*e*) *Grotius*, lib. ii. c. x. p. 327.

"Concilia cœtusque hominum *jure sociati* quæ *civitates* appellantur." —*Cicero, Somn. Scip.* iii.

"Quid est enim *civitas* nisi *juris societas?*"—*De Rep.* lib. i. 32.

"Est igitur, inquit Africanus, respublica res populi, populus autem, non omnis hominum cœtus, quoquo modo congregatus, sed cœtus multitudinis *juris consensu et utilitatis communione sociatus.*"—*Ib.* lib. i. 25.

"Consociatio juris atque imperii."—*Grotius, De J. B. et P.* lib. ii. c. ix. s. 8, p. 326.

Ὁ ὄχλος (ἐστι) πλῆθος ἀόριστον, πλῆθος συγκεχυμένον, πλῆθος ἀσύνακτον

more particularly considered in another part of this work, when the doctrine of Recognition comes under discussion (*f*).

LXIII. But for all purposes of International Law, a State (*δῆμος, civitas, Volk*) may be defined to be, a people permanently occupying a fixed territory (*certam sedem*), bound together by common laws, habits, and customs into one body politic, exercising, through the medium of an organized Government, independent sovereignty and control over all persons and things within its boundaries, capable of making war and peace, and of entering into all International relations with the other communities of the globe. It is a sound general principle, and one to be laid down at the threshold of the science of which we are treating, that International Law has no concern with the form, character, or power of the constitution or government (*g*) of a State, with the religion of its inhabitants, the extent of its domain, or the importance of its position and influence in the commonwealth of nations. "Russia and Geneva have equal rights" (*h*): "Une

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—οὐ γὰρ οἷον ὁ χορός, οὐδὲ οἷον ὁ δῆμος· ὁ μὲν γὰρ δῆμός ἐστι πλῆθος συνδεόμενον, ὁ δὲ ὄχλος διεσπασμένον.—*Plato, Proclus in Alcib.* lib. xviii.

Ὥσπερ γὰρ οὐδὲ ἐκ τοῦ τυχόντος πλήθους πόλις γίγνεται.—*Arist. Polit.* v. 3, 10.

"Facultas ergo moralis civitatem gubernandi, quæ potestatis civilis vocabulo nuncupari solet a Thucydide, tribus rebus describitur, cum civitatem, quæ verè civitas sit, vocat *αὐτόνομον, αὐτόδικον, αὐτοτελῆ* (lib. v. 18), suis utentem legibus, judiciis, magistratibus."—*Grotius*, lib. i. c. iii. s. vi.

Grotius observes (lib. ii. c. xviii. s. 2) most truly, "Qui autem externi habendi sint, ita clarè exposuit Virgilius ut nemo jurisconsultorum possit clarius:

'Omnem equidem sceptris terram quæ *libera* nostris
Dissidet, *externam* reor.'"—*Æn.* vii. 369, 370.

(*f*) See also Preface to this volume.

(*g*) *Vattel*, liv. i. c. i. s. 4: "Toute nation qui se gouverne elle-même sous quelque forme que ce soit, sans dépendance d'aucun étranger, est un État souverain." The words "sans dépendance" are, it will be seen, too lax.

(*h*) *Judgment of Chief Justice Marshall*, in the case of *The Antelope*, *Wheaton's Reports* (*American*), vol. x. p. 66; *Wheaton's History of the Modern Law of Nations*, p. 637.

"petite République n'est pas moins un État souverain que "le plus puissant royaume" (*i*). Provided that the State possess a Government capable of securing at home the observance of rightful relations with other States, the demands of International Law are satisfied.

LXIV. If the foregoing definition be considered in detail, it will be found to exclude from the legal category of a State the following aggregates of individuals: (1.) All hordes or bands of men recently associated together, newly arrived at or occupying any previously uninhabited tract or country, though it may be possible that such horde or band may, in course of time, change its character, and ripen into a body politic, and have a claim to be recognized as such. "Est "autem civitas," Grotius says (*j*), "cœtus perfectus libe- "rorum hominum, juris fruendi et communis utilitatis "causa sociatus;" and in another place, defining the character of sovereignty, "Summa autem illa dicitur (*i. e.* "potestas civilis) cujus actus alterius juri non subsunt, "ita ut alterius voluntatis humanæ arbitrio irriti possint "reddi . . . . . summæ potestatis subjectum commune est "civitas quam perfectum cœtum esse suprà diximus" (*k*). (2.) All migratory hordes not occupying a fixed or certain seat —and all associations of men united for the accomplishment of immoral ends (*sceleris causa*), such as piratical hordes, although they may have a fixed abode, and call themselves by the name of States. The Malay and Sooloo pirates of Borneo and the Eastern Archipelago furnish an existing example of such societies (*l*). "Populus autem," Cicero says, in a definition copied by most jurists, "non omnis hominum cœ- "tus, *quoquo modo* congregatus, sed cœtus multitudinis *juris*

(*i*) *Vattel*, *Prélim.* s. 18, *Égalité des Nations*; and s. 19, "Par une suite nécessaire de cette égalité, ce qui est permis à une nation l'est aussi à toute autre, et ce qui n'est pas permis à l'une, n'est pas non plus à l'autre."

(*j*) *De J. B. et P.* lib. i. c. i. s. 14. (*k*) *Ib.* c. iii. s. 7.

(*l*) *Serhassan Pirates*, 2 *Robinson, Jun.*, *Adm. Rep.* pp. 354–358; *The Illeanon Pirates, Queen* v. *Belcher*, 6 *Moore's Privy Council Rep.* pp. 471–484.

"*consensu* et *utilitatis communione* sociatus" (*m*); and in another place, "Neque esset unum vinculum juris, nec con-"sensus ac societas cœtus, *quod est populus*" (*n*).

LXV. With respect to societies united *sceleris causa*, the philosophers and jurists of antiquity are in perfect accordance with those of modern times. All agree to class such bodies amongst those of whose corporate existence the law takes no cognizance (*qui civitatem non faciunt*), and therefore as not entitled to International Rights either in peace or war. The question has generally been raised in time of war as to when a State should be considered a legitimate enemy (*hostis*), and when as a lawless freebooter (*pirata latro*) (*o*). It is not, however, because a nation commits a piratical act, or is guilty of the violation of International Rights, that it is to be considered as wholly without the pale of a State. The ancient Greeks, we learn from Homer and Thucydides, practised rapine and piracy, and considered these exploits rather glorious than shameful. The Normans, the original discoverers of America who swept the seas with their victorious galleys, and subverted and founded kingdoms by the prowess of their individual subjects, dealt, it is said, with the ships which they encountered upon the high seas as their legitimate prey (*p*). The ancient Greeks and Normans, however, were not pirates in the legal sense of the term. Their

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(*m*) *De Rep.* lib. i. 25. (*n*) *De Rep.* lib. iii. 31.

(*o*) *Grotius, De J. B. et P.* lib. iii. c. iii. ss. 1, 2: "Distinctio populi, quamvis injustè agentis, a piratis et latronibus."

(*p*) *Thucyd.* i. 5: Οἱ γὰρ Ἕλληνες τὸ πάλαι . . . . ἐτράποντο πρὸς λῃστείαν . . . . καὶ ἥρπαζον . . . . οὐκ ἔχοντές πω αἰσχύνην τούτου τοῦ ἔργου, φέροντες δέ τι καὶ δόξης μᾶλλον. *Arist. Pol.* v. 2, 3; *Hom. Od.* iii. 73; ix. 252; *Herod.* ii. 152; iii. 39, 47; *Thucyd.* vi. 4; *Apollod.* i. 9, 18. *Liv.* v. 28: "Haud procul freto Siculo a piratis Liparensium excepti, devehuntur Liparas. Mos erat civitatis, *velut publico latrocinio* partam prædam dividere."

Lord *Clarendon's* account of the Privateers of Ostend, by whom he was taken prisoner, puts them pretty much upon the same level as the classical Freebooters. See *Clarendon's Life* (8vo. ed.), p. 208: "All the ships, though they had the King of Spain's commission, were freebooters, belonging to private owners, who observed no rules or laws of nations." See, too, p. 212.

society was formed for civil and moral objects, not for plunder; and their acts of violence sprung from a confusion, incident to a barbarous age, as to the principles of right and wrong, and the laws of war and peace.

Pompey was allowed the honour of a triumph for his victory over the Illyrians, who certainly exercised indiscriminate hostilities against the ships of all countries, but they were considered a "*gens*," and as having "*justum imperium.*" He did not receive the same distinction for his destruction of the pirates who infested the Mediterranean: "Tantum discri-" men," Grotius observes (*q*), "est inter populum quantumvis "sceleratum, et inter eos, qui, cum populus non sint, sce-"leris causa coeunt."

In the time of Charles the Second of England, Molloy wrote as follows: "Pirates that have reduced themselves "into a Government or State, as those of *Algiers*, *Salley*, "*Tripoli*, *Tunis*, and the like, some do conceive ought not "to obtain the rights and solemnities of war, as other towns "or places; for though they acknowledge the supremacy of the "*Porte*, yet all the power of it cannot impose on them more "than their own wills voluntarily consent to." He there mentions that Louis IX. treated them as a nest of wasps (*r*), and unworthy of the rights of civilized war; "notwithstanding," he adds, "this *Tunis* and *Tripoli*, and their sister *Algiers*, do "at this day (though nests of pirates) obtain the rights of "legation: so that now (though indeed pirates), yet having "acquired the reputation of a Government, they cannot "properly be esteemed pirates, but enemies" (*s*). Bynkershoek (*t*), some years afterwards, expressed yet more strongly

(*q*) Lib. iii. c. iii. s. 2.

(*r*) "Bugia ed Algieri, infami nidi di corsari."—*Tasso*.

(*s*) *Molloy*, s. 4, p. 33.

(*t*) "Quod autem *Albericus Gentilis* (*Advoc. Hispan.* l. i. c. xv.) aliique eos qui *Barbari* in Africa vocantur, jure piratarum censent, et eorum occupatione dominium mutari negant, nulla ratione defendi potest—Algerienses, Tripolitani, Tunitani, Zaleenses piratæ non sunt, sed civitates, quæ certam sedem atque ibi imperium habent, et quibuscum nunc pax est nunc bellum, non secus ac cum aliis gentibus, quique propterea

the same opinion. And in the year 1801, Lord Stowell fully adopted this position, and asserted that the African States had long ago acquired the character of established Governments, with whom we have regular treaties acknowledging and confirming to them the relations of legal communities (*u*); and he remarked that, although their notions of International justice differ from those which we entertain, we do not on that account venture to call in question their public acts—that is to say, that although they are perhaps on some points entitled to a relaxed application of the principles of International Law, derived exclusively from European custom, they are nevertheless treated as having the rights and duties of States by the civilized world (*x*).

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ceterorum principum jure esse videntur."—*Bynkershoek, Quæst. J. P.* b. i. c. 17.

(*u*) *The Helena,* 4 *Rob. Adm. Rep.* p. 5. *Life of Sir Leoline Jenkins,* vol. ii. p. 794.

(*x*) It is well known that, for some time, the lawfulness of any dealings, much more any treaty, between the Christian and the Turk was denied. *Albericus Gentilis* discusses (*De Jure Belli,* lib. iii. c. xix.), "Si fœdus rectè contrahitur cum diversæ religionis hominibus, quæstio partim theologica, partim civilis." He treats it, however, for the most part, theologically, and arrives at the conclusions that commerce is lawful between Christian and Heathen States, but not in alliance against another Heathen State; and, *à fortiori,* not against another *Christian* State. Nevertheless, in a former chapter he had said, with a liberality scarcely known to the age in which he lived, "Religionis jus hominibus cum hominibus propriè non est: itaque nec jus læditur hominum ob diversam religionem; itaque, nec bellum causa religionis. Religio erga Deum est; jus est divinum, id est, inter Deum et hominem; non est jus humanum, id est, inter hominem et hominem: nihil igitur quæritat homo violatam sibi ob aliam religionem."—Lib. i. c. ix.

Grotius, De J. B. et P. lib. ii. c. xv. 8–12: "De fœderibus frequens est quæstio, licitène ineantur cum his qui à vera religione alieni sunt: quæ res in jure naturæ dubitationem non habet; nam id jus ita omnibus hominibus commune est, ut religionis discrimen non admittat. Sed de jure divino quæritur."

Lord Coke said there were four kinds of Leagues: 1st, *Fœdus Pacis*; 2nd, *Fœdus Congratulationis*; 3rd, *Fœdus Commutationis Mercium*: these three might exist between a Christian and an Infidel State, but the 4th, *Fœdus Mutui Auxilii,* could not.—*4th Instit.* 155.

Ward's Law of Nations, ii. 321 (*Of Treaties with Powers not Christian*).

These observations were always applicable in some degree to the relations of the Ottoman Porte itself with other Governments. The Ottoman Empire extends, whether in Asia, Africa, or Europe, over a vast variety of distinct nations and separate races. Hardly have those separate races which profess the Mahometan religion coalesced into one nation. But the Christian, whether of the Greek or the Roman Catholic Faith, has never entirely lost those distinctions of origin, manners, institutions, and, above all, of religion, which eternally separate him from the Turk. These distinctions have always been and must always be indelible. The Mahometan and the Christian may live under the same government (*y*), but they will remain distinct nations. The two streams are immiscible in their character, and will never "flow the same."

It is unnecessary to consider the relations of the Algerine State with Europe. The gallant exploit of Lord Exmouth in 1815, and the bombardment of Algiers, compelled the Dey not only to set free his slaves and to abolish all Christian slavery, but also to promise a compliance with the usages of civilized States (*z*). Nevertheless, Algerine piracy was not entirely suppressed till 1830–1838, when the French took possession of Algiers and a portion of the adjoining territory. It is unnecessary to consider whether, in these circumstances, this act was entirely justifiable, whether a conquest of the territory was the only or right means of avenging an insult (*a*). The conquest has, I think, been of service to Christendom, and generally to the civilized world. It should be observed, however, that, in spite of the remonstrance of England, no attention whatever was paid by France to the rights and interests of the Porte as Suzerain of the Dey (*b*). The subsequent incorporation of all the

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(*y*) See Lord Stowell's Judgment on *The Indian Chief*, 3 *Robinson's Admiralty Reports*, p. 29.

(*z*) *Ann. Reg.* 1816, p. 97.

(*a*) *Ann. Reg.* 1830, p. 238.

(*b*) M. Guizot is silent on this point, and I cannot agree with the pro-

Algerine territory in 1841–1847 was another act of con quest which the necessity of maintaining the former con quest was alleged to justify (*c*).

For some time after the conquest of Constantinople (1453) grave doubts were entertained by the nations of Christendom as to the lawfulness of any pacific intercourse with the Sultan. It was not till after the Treaty of Constantinople in 1720, that the Russian minister was permitted to *reside* at Constantinople; and direct relations between Roman Catholic Sovereigns and the Porte can scarcely be said to have an earlier date than the end of the eighteenth century (*d*). Even after the lapse of nearly four centuries, at the Congress of Vienna, 1815, the Ottoman Empire was not represented, nor was it included in the provisions of positive public law contained in the Treaty which was the result of the Congress. Nevertheless, the International intercourse between the

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position which precedes his historical reference to the fact of the capture of Algiers. The doctrine of national instincts of aggrandisement is, *pace tanti viri*, most unsound, and has been very mischievous to France.

(*c*) "L'immobilité extérieure n'est pas toujours la condition obligée des États, de grands intérêts nationaux peuvent conseiller et autoriser la guerre; c'est une honnête erreur, mais une erreur de croire que, pour être juste, toute guerre doit être purement défensive; il y a eu et il y aura, entre les États divers, des conflits naturels et des changements territoriaux légitimes; les instincts d'agrandissement et de gloire ne sont pas, en tout cas, interdits aux nations et à leurs chefs. Quand le roi Charles X, en 1830, déclara la guerre au dey d'Alger, ce n'était point là, de notre part, une guerre défensive, et pourtant celle-là était légitime; outre l'affront que nous avions à venger, nous donnions enfin satisfaction à un grand et légitime intérêt, français et européen, en délivrant la Méditerranée des pirates qui l'infestaient depuis des siècles."—*Guizot*, *Mémoires pour servir à l'Histoire de mon Temps*, tome iv. pp. 9, 10.

The same author writes (tome vii. ch. xli. pp. 125–6): "Quant à la nécessité de soumettre complètement les Arabes et d'établir la domination française dans toute l'étendue de l'Algérie, j'étais de l'avis du général Bugeaud; la question n'était plus, comme de 1830 à 1838, entre l'occupation restreinte et l'occupation étendue; la situation de la France dans le nord de l'Afrique avait changé; les faits s'étaient développés et avaient amené leurs conséquences; la conquête effective de toute l'Algérie était devenue la condition de notre établissement à Alger et sur la côte."

(*d*) 2 *Miltitz*, *Manuel des Consuls*, p. 1571.

Sultan and other Powers was then, and had been for a long time, upon a much stricter footing of legality, than had subsisted between those powers and the African or Barbary States.

Long before the Treaty of Vienna (1815) the Crescent had ceased to be an object of terror to Christendom; and a principle of International Policy with respect to the Ottoman Power, directly the reverse of that which had formerly prevailed, had taken root in Europe—namely, the principle that the preservation and independence of the Ottoman Power was necessary for the safety of European Communities (*e*).

LXVI. The Treaties affecting the relations of Russia with the Porte are the following:—

Adrianople	1681
Carlowitz	1699
Constantinople	1700
Constantinople	1709
Peace of Pruth	1711
Constantinople	1712
Adrianople	1713
Constantinople	1720
(By this treaty a Russian Minister was permitted to *reside* at Constantinople.)	
Belgrade	1739
Kaynardgi	1774
Explained	1779
Constantinople	1783-4
Szistowe, Gallacz, Yassy	1790-1-2
Constantinople	1809
Bucharest	1812
Ackerman	1826
Adrianople	1829
Unkiar Skelessi	1833
London	1840
Dardanelles	1841
Balta Liman	1846
Balta Liman	1849

LXVII. But the general Treaties between the Ottoman

(*e*) The question of the Religious Protectorate claimed by Christian Powers with respect to the Christian subjects of the Sultan, both in Europe and Asia, will be discussed hereafter.

Vide antè, ch. vi. TREATIES.

Porte and the European States appear to be best arranged as follows:—

1. From the conquest of Constantinople to the Treaty of Carlowitz, 1699.
2. From the Treaty of Carlowitz, 1699, to the Treaty of Belgrade, 1739.
3. From the Treaty of Belgrade, 1739, to the Treaty of Bucharest, 1812.
4. From the Treaty of Bucharest, 1812, to the Treaty of the Dardanelles in 1841.
5. From the Treaty of the Dardanelles, 1841, to the present time.
6. The Treaty of Paris, 1856.

LXVIII. By the Treaty of Vienna in 1731 Great Britain made common cause with Austria against every enemy but the Turk (*f*).

The Peace of Szistowe (1791), between Austria and the Porte, and the Peace of Jassy (1792), between Russia and the Porte, were concluded under the mediation of the triple alliance of Great Britain, Prussia, and Holland.

In 1798, when Napoleon invaded Egypt, Russia and the Porte concluded an alliance confirming the Treaty of Jassy, and mutually guaranteeing the integrity of their dominions. To this Treaty Great Britain acceded in 1799: it expired in 1806, and was renewed in 1809 by the Treaty of Constantinople, by the eleventh article of which Great Britain acknowledged that the strait of the Dardanelles was *mare clausum* under the dominion of the Porte.

The Treaty of Bucharest, in 1812, put an end to the hostilities which had raged between Russia and the Porte since 1809. This Treaty greatly advanced the boundary of Russia. It contained stipulations confirming those of former Treaties in favour of the national privileges of Moldavia and Wallachia, and it contained some conditions in favour of the Christian Servians, which, in 1813, were violated with circumstances of great barbarity; but the Servians applied in vain to the Congress of Vienna for mediation or succour.

In 1819 the Porte recognized the Protectorate of Great Britain over the Ionian Islands (*g*).

(*f*) *Mably, Droit public de l'Europe*, ii. 226.

(*g*) The subsequent surrender of this Protectorate in 1863 is considered in the next chapter. *Martens, Nouv. Rec. de Traités*, xiii. (5 Supp.)

In 1828 the Great Powers interfered with the Porte on behalf of the Greeks, whose independence they established after the battle of Navarino.

In 1829 the Treaty of Adrianople was concluded between Russia and the Porte, by which the power of the latter was much increased, especially with regard to the mouths of the Danube, in a manner scarcely consistent with the Public Law of Europe (*h*). In 1833, the Treaty of Unkiar Skelessi was concluded between Russia and the Porte, the avowed object of which was to protect the Porte against the rebellion of the

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386. The Treaty containing this recognition sets forth the titles of the Sultan, and the style of the Porte's negotiations with Christian States:—"Nous, par la grâce du souverain maître des empires et du fondateur immuable de l'édifice solide du califat, par l'influence merveilleuse du modèle des saints, du soleil des deux mondes, notre grand prophète Mahomet Mustapha, ainsi que par la coopération de ses disciples et successeurs, et de toute la suite des saints, sultan, fils de sultan, empereur, fils d'empereur, Mahmoud-Han, vainqueur, fils d'Ahmed-Han, vainqueur, dont les nobles diplômes sont décorés du titre souverain de sultan des deux hémisphères; dont les ordonnances portent le nom éclatant d'empereur des deux mers, et dont les devoirs attachés à notre dignité impériale consistent dans l'administration de la justice, les soins d'un bon gouvernement, et l'assurance de la tranquillité de nos peuples; seigneur et gardien des plus nobles villes du monde, vers lesquelles se dirigent les vœux de tous les peuples, des deux saintes villes de la Mecque et de Médine, du sanctuaire intérieur du pays saint; calife suprême des contrées et provinces situées dans l'Anatolie et la Romélie, sur la mer Noire et sur la mer Blanche, dans l'Arabie et la Chaldée; enfin, glorieux souverain de nombreuses forteresses, châteaux, places et villes, nous déclarons:—

"Que, vu la parfaite union et l'éternelle amitié qui règnent entre notre Sublime Porte, d'éternelle durée, et le plus glorieux de tous les grands princes qui croient en Jésus-Christ, le modèle de tous les personnages d'un rang élevé *de la nation du Messie*, le médiateur des intérêts politiques des peuples, revêtu des ornemens de la majesté et de la gloire, et couvert des marques de la grandeur et de la célébrité, Sa Majesté notre très-estimable, ancien, intime, sincère, et constant ami, le roi (padischah) des royaumes unis d'Angleterre, d'Écosse, et d'Irlande, et d'une grande partie des pays qui en dépendent, George III (dont la fin puisse être heureuse!),

"L'une et l'autre cour ont le désir et l'intention la plus sincère d'affermir les bases de leur amitié, et de resserrer de plus en plus les liens de la bonne intelligence et de l'intimité qui les unit."

(*h*) *Vide post.*

Pasha of Egypt. The *casus fœderis* contemplated by this Treaty having arisen, the other European Powers interposed, on the double ground of protecting the Porte against Egypt, and of preventing the protectorate of the Porte from being exclusively vested in and exercised by Russia.

A convention between all the European Powers, except France, took place in London, July 15, 1840, for the pacification of the East, to which the Porte also was a party. The maintenance of the integrity and independence of the Ottoman Empire as a security for the Peace of Europe was the avowed principle of this convention.

The language of the preamble of the Treaty is as follows:

" In the name of the most merciful God.

" His Highness the Sultan having addressed himself to " their Majesties the Queen of the United Kingdom of Great " Britain and Ireland, the Emperor of Austria, King of " Hungary and Bohemia, the King of Prussia, and the " Emperor of all the Russias, to ask their support and assist- " ance in the difficulties in which he finds himself placed by " reason of the hostile proceedings of Mehemet Ali, Pacha of " Egypt;—difficulties which threaten with danger the " integrity of the Ottoman Empire, and the independence of " the Sultan's throne; their said Majesties, moved by the " sincere friendship which subsists between them and the " Sultan; animated by the desire of maintaining the integrity " and independence of the Ottoman Empire as a security for " the peace of Europe; faithful to the engagement which they " contracted by the collective note presented to the Porte by " their representatives at Constantinople, on the 27th of July, " 1839; and desirous, moreover, to prevent the effusion of " blood, which would be occasioned by a continuance of " the hostilities which have recently broken out in Syria " between the authorities of the Pacha of Egypt and the " subjects of the Sultan; their said Majesties and his " Highness the Sultan have resolved, for the aforesaid pur- " poses, to conclude together a Convention " (*i*).

(*i*) *Hertslet's Treaties*, vol. v. p. 544.

By the Treaty of the Dardanelles (July 10th, 1841) the five great European Powers admitted the exclusive authority of the Porte over these straits, and incorporated this principle of Law into the written Law (*jus pacticium*) of Europe (*k*).

Lastly, the important Treaty of Paris, 1856 (as has been mentioned in a former chapter), placed the independence and integrity of the Ottoman Empire under the guarantee of England, Austria, and France.

Some of these Treaties, and the events which led to them, will be noticed more at length hereafter. But it is clear, even from this slight and cursory notice, that the Porte must now be considered as subject, with only such exceptions as the reason of the thing may dictate, not only to the principles of general International Law, but to the particular provisions of the European Code (*l*). The *Hatti-Sherif* of 1856, relative to the Hierarchy of the Greek Church and non-Mussulman subjects generally, will be considered hereafter (*m*). The peculiar relations which subsist between the Porte and Egypt will be considered in the next chapter.

(*k*) *Wheaton's Hist.* 289, 555–585.

(*l*) *Speech of the Earl of Clarendon* (*Secretary of State for Foreign Affairs*), in the House of Lords, April 1853, on the interference of the Continental Powers in the relations subsisting between the Porte and Montenegro. See also the Debates in both Houses of Parliament upon the subject of Russian intervention in Turkey on the ground of an alleged Religious Protectorate of the Greek Church.—*Hansard's Parl. Deb.* 1853; *Koch.* iv. 349. *Vide post*, chapter on "Intervention." I say this *non obstante* the opinion expressed by M. Guizot, *Mém.* vi. ch. xxxvii. pp. 257, 8.

(*m*) *Ann. Reg.* 1856; *State Papers*, 337. *Vide post*, chapters on "Intervention," and on "International Status of Foreign Spiritual Powers."

CHAPTER II.

DIFFERENT KINDS OF STATES.

LXIX. Having considered the general attributes and characteristics required by International Law for the constitution of a State, it becomes necessary to apply these tests to the different forms of States which are found to exist, in order to fix the position of each in the Commonwealth of Nations. This part of the subject appears to admit of the following principal division :—

First. One or more States under One Sovereign.

Secondly. Several States under a Federal Union.

LXX. I.—As to one or more States under one Sovereign. It is proposed to consider this first branch of the principal division under the following heads :—

1. Single States, under one Sovereign.
2. Several States perpetually united (*reali unione*) under one Sovereign.
3. The peculiar case of Poland.
4. Several States temporarily united under one Sovereign (*personali unione*).
5. A State under the Protectorate of another, or of others, but retaining its International personality.
6. A State under such Protectorate so as to have forfeited its International personality.—The Ionian Islands.
7. The European Free Towns or Republics.
8. The peculiar case of Belgium.
9. The peculiar case of Greece.
10. States paying tribute, as standing in a Feudal relation to other States.—The Turkish Provinces.
11. The peculiar case of Egypt.

LXXI. First.—With respect to a Single State, under One Sovereign, like Spain or Portugal as at present constituted,

no doubt can be raised as to such a State being the proper subject of International Law.

LXXII. Secondly.—Where several States, perpetually under one Sovereign (*reali unione*), have retained certain (*a*) rights and privileges as far as their International Relations are concerned, but have lost all separate and distinct existence as far as their External Relations are concerned, they are not, properly and strictly speaking, subjects of International Law—at least, they can only be so mediately and indirectly, and not directly and immediately. For instance, a State which entered into any negotiations with Hungary or Ireland as independent States (even while they possessed a separate legislature) would have been guilty of a gross violation of International Law towards Austria or Great Britain.

LXXIII. Thirdly.—The particular State of Poland requires a distinct and separate consideration. The various partitions of that unhappy country are not now under discussion; it is with the condition of Poland under the Treaty of Vienna, and the Russian manifesto of 1832, that we are at present concerned. The union established between Russia and Poland by the Congress of Vienna was of an wholly anomalous kind. By the first act of that Congress the Duchy of Warsaw, with the exception of certain districts, was united to the Russian Empire, and was irrevocably bound by its constitution to belong to the Emperor of Russia, and his heirs in all perpetuity. The Emperor undertook to confer on this State, which was to be under a separate and distinct government,

(*a*) *Grotius, De J. B. et P.* lib. i. c. iii. s. 21; lib. ii. c. ix. s. 9:—"Quod si quando uniantur duo populi non amittentur jura sed communicabuntur. . . . . . Idemque censendum est de regnis quæ non fœdere, aut eo duntaxat quod regem communem habeant sed vera unitate junguntur."

Vattel, I. liv. i. c. i.

Oppenheim, System des Völkerrechts, zweiter Theil, kap. vi. s. 4.

Wheaton, Éléments du Droit international, p. 20.

Klüber, Europäisches Völkerrecht (ed. 1851), erster Theil, kap. i. s. 27.

Heffter, Europ. Völkerrecht, s. 20.

such powers of internal administration as he might think fit. The Emperor was to take the title of King of Poland. The Poles, whether subjects of Austria, Prussia, or Russia, were to obtain representative institutions, regulated according to the manner which might seem expedient to the respective Governments. In conformity with these stipulations, the Emperor Alexander granted a constitutional charter to the Kingdom of Poland, November 15 (27), 1815. This charter declared that *The Kingdom of Poland* was united to Russia by its constitution—that the sovereign authority in Poland was to be exercised in conformity therewith—that the coronation of the King of Poland was to take place in the Polish capital, where he was bound to take an oath to observe the charter. Poland was to have a perpetual representation, composed of the King and the two chambers forming the Diet, in which body the power of legislation and taxation was to be vested. A distinct Polish army, coinage, military orders, were to be preserved in the kingdom. But in 1832, the Emperor Nicholas established what was called an *organic statute* for Poland, the principal features of which were, that the Kingdom of Poland was henceforth to be perpetually united to, and form an integral part of, the Russian Empire; the Polish Diet was to be abolished; the Polish army absorbed into the Russian; the administration of Poland carried on under a Russian Council of State, called the Section for the Offices of Poland. The Governments of England and France protested against this act as a violation of the spirit, if not of the letter, of the Treaty of Vienna (*b*). It seems, however, impossible at the present time to consider Poland as retaining any of those characteristics which would entitle it to be considered as an independent kingdom, according to the principles of International Law (*c*).

(*b*) *Annuaire historique*, 1832, *Documens historiques*, p. 184. *Wheaton's History*, 433, 441. *Wheaton, Élém. du Droit inter.* i. pp. 53–55. *Hansard's Parliamentary Debates*, vol. xiii. p. 1115.

(*c*) In 1865 this question was again brought before the English

LXXIV. Fourthly.—In the cases which have been mentioned the several States are *really* and *perpetually* (*unione reali*) united under one Sovereign; but there may be cases in which the union is of a *personal* character (*unio personalis*), depending upon the continuance of a certain dynasty (*d*).

Hanover and Great Britain, while under the same crown, Prussia and Neufchâtel in Swizerland, at the time when Vattel wrote, afforded examples of this kind (*e*). Norway and Sweden, since the Treaty of Vienna, have presented a similar instance. In these cases the individuality of the State as to her external relations remains in abeyance, and is not lost, though it be merged in the union; and therefore, emerging when that union is dissolved, she is entitled to the rank and consideration of an independent kingdom.

LXXV. Fifthly.—A State may place itself under the

Parliament. Lord Palmerston, then Prime Minister, admitted that Russia had not executed faithfully her Treaty engagements to Poland, said that diplomatic action had been tried in vain, that war was inexpedient, and with respect to the proposal that the payment of the annual sum on account of the Russo-Dutch loan should be suspended, observed, "That engagement having no reference whatever to Poland, to say that, because Russia had misconducted herself in Poland, and broken her engagement under the Treaty of June 1815, we were therefore to break our engagements founded on a different treaty, and relating to a different transaction, was a lame and impotent conclusion. Any such course the House and the Government should be ashamed even to contemplate adopting, as it would be equally unworthy of Parliament and unbecoming to the country."—*Ann. Reg.* 1865, p. 70.

See also vol. ii. s. xc. &c. of these Commentaries.

(*d*) "Rursum accidit, ut plurium populorum idem sit caput, qui tamen populi singuli perfectum cœtum constituunt: neque enim ut in naturali corpore non potest caput unum esse plurium corporum, ita in morali quoque corpore; nam ibi eadem persona, diversa ratione considerata, caput potest esse plurium ac distinctorum corporum. Cujus rei certum indicium esse potest, quod extincta domo regnatrice imperium ad quemque populum seorsim revertitur."—*Grot. De J. B. et P.* lib. i. c. iii. s. 7, § 2.

(*e*) The King of Prussia by Treaty (1857) renounced his right of sovereignty in the Principality of Neufchâtel and the Comté of Valengin. Neufchâtel became a member of the Helvetic Confederation.—*Ann. Reg.* 1857, pp. 232–437.

protection of another State with or without losing its International existence. It may well be, as Grotius, translating Appian, says, "*Sub patrocinio non sub ditione*" (*f*); or, according to his own expression in another part of his work, it may be "*Cum imminutione imperii*;" or, "*Sine imminutione imperii*" (*g*).

The proper and strict test to apply will be the capacity of the protected State to negotiate, to make peace or war with other States, irrespectively of the will of its protector. If it retain that capacity, whatever may be the influence of the protector, the protected State must be considered as an independent member of the European commonwealth.

It must, however, retain this capacity *de facto* as well as *de jure* (*h*); and it is necessary to make this observation, because, at no distant period of history, an attempt was made to evade the application of this principle of law, by retaining theoretically the name when the substance was practically and notoriously lost. The Swiss Cantons and the States forming the Confederation of the Rhine, to say nothing of other countries, were nominally free and independent when their armies were under French officers, their cabinets under French ministers, and their whole constitution entirely subject and subservient to their French ruler and protector Napoleon. They were, therefore, justly considered by International Law as provinces of France, and were denied the rights of independent States during the continuance of this state of subserviency. It was on this ground that the capture of the

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(*f*) Lib. i. c. iii. s. 21, § 3.

(*g*) Lib. ii. c. xv. s. 7, § 1.

(*h*) "Interim verum est accidere plerumque, ut qui superior est in fœdere, si is potentia multum antecellat, paulatim imperium propriè dictum usurpet: præsertim si fœdus perpetuum sit, et cum jure præsidia inducendi in oppida, &c. . . . . Hæc cum fiunt, et ita fiunt *ut potentia in jus transeat*, qua de re alibi erit disputandi locus, tunc aut qui socii fuerant fiunt subditi, aut certè partitio fit summi imperii, qualem accidere posse supra diximus."—*Grotius*, lib. i. c. iii. s. 21, pp. 126, 127.

Danish fleet, in 1806, by Great Britain was justified—namely, that it was *de facto* a fleet in the power and under the orders of France.

On the other hand (*i*), while this capacity remains, no mere inequality of alliance is destructive of the personality (*persona standi*) of a State among nations. The parties to such alliance are not the less sovereign because they have consented of their own accord to disadvantageous terms in their Treaties with other nations; it belongs, as Grotius says, to unequal alliances, "Ut potentiori plus "honoris, infirmiori plus auxilii deferatur" (*j*); or because they rely upon the arm of those nations for succour and defence when attacked: "Si ergo populus tali fœdere obli-"gatus liber manet, si alterius potestati subjectus non est, "sequitur ut summum imperium retineat. Atque idem de "rege pronunciandum est enim populi liberi, et regis qui "verè rex sit, eadem ratio" (*k*).

LXXVI. Sixthly.—States which cannot stand this test, which cannot negotiate, nor declare peace or war with other countries without the consent of their protector, are only mediately and in a subordinate degree considered as subjects

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(*i*) "*Proculus, Libro Epistolarum* viii. Non dubito, quin fœderati et liberi nobis externi non sint, neque inter nos atque eos postliminium sit; etenim quid inter nos atque eos postliminio opus est, quum et illi apud nos et libertatem suam, et dominium rerum suarum æque atque apud se retineant, et eadem nobis apud eos contingant?" Sec. 1. "Liber autem populus est is, qui nullius alterius populi potestati est subjectus, sive qui fœderatus est, item sive æquo fœdere in amicitiam venit, sive fœdere comprehensum est, *ut is populus alterius populi majestatem comiter conservaret*; hoc enim adjicitur, ut intelligatur, alterum non esse liberum; et quemadmodum clientes nostros intelligimus liberos esse, etiam si neque auctoritate, neque dignitate, neque jure omni nobis pares sunt, sic eos, *qui majestatem nostram comiter conservare debent*, liberos esse intelligendum est."—*Dig.* xlix. tit. xv.

De Captivis et de Postliminio, &c. *Grotius* incorporates this reasoning into International Law.—Lib. i. c. iii. 21, 22; *De J. B. et P.* p. 119.

See the reason of the exception in the case of the *Santa Anna*, *Edwards' Adm. Rep.* 181.

(*j*) *Grotius, ubi suprà.*

(*k*) *Grotius, ubi suprà.*

Adherbal's Speech to the Roman Senate describes a protected king-

of International Law (*l*). In war they share the fortunes of their protectors (*m*); but they are for certain purposes, and under certain limitations, dealt with as independent, moral persons, especially in questions of Comity, touching the persons and property of their own subjects in a foreign country, or of strangers in their own territory, and with respect to other matters of the like kind.

States of this description are sometimes, but with admitted impropriety of expression, called semi-sovereign (*demi-souverain—halbsouveran*). Such appears to be or have been the lordship of Kniphausen, in North Germany, which exercised independent jurisdiction over the inhabitants of a territory enjoying maritime traffic and a (*n*) flag of its own, under the protection of the German Confederation and the *Suzeraineté* (*Hoheit, Oberhoheit*) of Oldenburg (*o*). Such is the Republic of Polizza (*p*), in Dalmatia, under the protection of Austria. Such, it should seem, are the provinces of Montenegro, Moldavia, and Wallachia (*q*), and the hereditary principality of Servia, under the *Suzeraineté* of Turkey; but the International *status* of these tributary provinces of Turkey will be presently considered. Such was the little State of Monaco, from 1641 till the Revolution, under the Pro-

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dom in these words: "P. C. Micipsa pater meus moriens mihi præcepit, uti regni Numidiæ tantummodo procurationem existimarem meam; *ceterum jus, et imperium penes vos esse*: simul eniterer domi militiæque quam maximo usui esse populo Romano. Vos mihi cognatorum, vos in locum affinium ducerem: si ea fecissem, in vestra amicitia exercitum, divitias, munimenta regni me habiturum."—*Sallust, Bellum Jugurth.* 14.

(*l*) Though *Grotius* (c. xxi. p. 118) would seem to think otherwise; but *Barbeyrac's* note (vol. i. 161, 25) supports the view in the text.

(*m*) *Vattel,* l. xvi.; *Wolff,* c. iv. 437–439.

(*n*) Under this ancient German Empire, there were a variety of petty Principalities exercising a territorial supremacy (*Landeshoheit*), but, nevertheless, subject to the legislative and judicial authority of the Emperor and the Empire. These were absorbed in the German Confederation, except *Kniphausen.*

(*o*) *Heffters, das Europäische Völkerrecht,* 1. Buch, xxxviii. s. 19.

(*p*) *Martens, Droit des Gens,* liv. i. c. ii. s. 20.

(*q*) *Wheaton, Élém. de Dr. int.* i. 49.

tectorate of France; replaced under it by the Treaty of Paris in 1814; and, bý a Treaty in 1815, it was placed under the Protectorate of Sardinia. Nice was given up by Italy to France in 1860, and in the next year the greater part of Monaco was ceded to that country, while a fragment was placed under its protection.

LXXVII. The Ionian Islands, placed by the Treaty of Paris under the Protection of Great Britain, are cited by Klüber as a perfect specimen of a semi-sovereign State (*r*).

By a convention between Great Britain and Austria, and Russia and Prussia, signed at Paris, November 5th, 1815, it is provided, that—

"I. The Islands of Corfu, Cephalonia, Zante, Santa Maura, Ithaca, Cerigo, and Paxo, with their dependencies, such as they are described in the Treaty between his Majesty the Emperor of all the Russias and the Ottoman Porte, of the 21st of March, 1800, shall form a *single, free, and independent State*, under the denomination of the United States of the Ionian Islands.

"II. This State shall be placed under the *immediate and exclusive protection* of his Majesty the King of the United Kingdom of Great Britain and Ireland, his heirs and successors. The other contracting Powers do consequently renounce every right or particular pretension which they might have formed in respect to them, and formally guarantee all the dispositions of the present Treaty.

"III. The United States of the Ionian Islands shall, with the approbation of the protecting Power, regulate their internal organization; and, in order to give to all the parts of this organization the necessary consistency and action, his Britannic Majesty will employ a particular solicitude with regard to the legislation and the general administration of those States. His Majesty will therefore apoint a Lord

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(*r*) "Einen wahren halbsouveranen Staat bilden, seit 1815, die Vereinigten Staaten der Ionischen Inseln wegen der Schutz- und Souverainetäts-Rechte, welche Grossbritannien über sie auszuüben hat." —*Klüber*, § 33.

High Commissioner to reside there, invested with all the necessary power and authorities for this purpose.

"IV. In order to carry into execution without delay the stipulations mentioned in the articles preceding, and to ground the political re-organization of the United Ionian States upon that organization which is actually in force, the Lord High Commissioner of the protecting Power shall regulate the forms of convocation of a legislative assembly, of which he shall direct the proceedings, in order to draw up a new Constitutional Charter for the States, which his Majesty the King of the United Kingdom of Great Britain and Ireland shall be requested to ratify.

"Until such Constitutional Charter shall have been so drawn up and duly ratified, the existing Constitutions shall remain in force in the different Islands, and no alteration shall be made in them, except by his Britannic Majesty in council.

"V. In order to ensure, without restriction, to the inhabitants of the United States of the Ionian Islands the advantages resulting from the high protection under which these States are placed, as well as for the exercise of the rights inherent in the said protection, his Britannic Majesty shall have the right to occupy the fortresses and places of those States, and to maintain garrisons in the same. The military force of the said United States shall also be under the orders of the Commander-in-Chief of the troops of his Britannic Majesty.

"VI. His Britannic Majesty consents that a particular Convention with the Government of the said United States shall regulate, according to the revenues of those States, everything which may relate to the maintenance of the fortresses already existing, as well as to the subsistence and payment of the British garrisons, and to the number of men of which they shall be composed in time of peace.

"The same Convention shall likewise fix the relations which are to exist between the said armed force and the Ionian Government.

"VII. The trading flag of the United States of the Ionian Islands shall be acknowledged by all the contracting Parties as *the flag of a free and independent State.* It shall carry with the colours, and above the armorial bearings thereon displayed before the year 1807, such other as his Britannic Majesty may think proper to grant, as *a mark of the protection* under which the said United Ionian States are placed; and for the more effectual furtherance of this protection, all the ports and harbours of the said States are hereby declared to be, with respect to honorary and military rights, within British jurisdiction. The commerce between the United Ionian States, and the dominions of his Imperial and Royal Apostolic Majesty, shall enjoy the same advantages and facilities as that of Great Britain with the said United States. None but *commercial agents,* or *Consuls,* charged solely with the carrying on commercial relations, and subject to the regulations to which commercial agents or Consuls are subject in other independent States, shall be accredited to the United States of the Ionian Islands" (*s*).

By the Constitutional Chart of the United States of the Ionian Islands, as agreed on and passed unanimously by the legislative assembly on the 2nd of May, 1817, it is provided as follows (s. 4) as to their *Foreign Relations*:—

"I. Whereas, in the latter part of the seventh article of the Treaty of Paris, it is agreed, 'That no person, from any Power whatsoever, shall be admitted within these States, possessing or pretending to possess any powers beyond those which are defined in the aforesaid article;' it is hereby declared, that any person who shall assume to himself any authority as an agent for a foreign Power, except as therein directed, shall be amenable to be tried before the Supreme Council of Justice, and be liable, if found guilty, to punishment, as in cases of high treason against the State.

"II. No native, or subject, of the United States of the

(*s*) Extracted from *Hertslet's Treaties*, vol. i. p. 47. *Martens, Rec. de Tr. N. R.* ii. 663.

Ionian Islands shall be held competent to act as Consul or Vice-Consul for any foreign Power within the same.

"III. The British Consuls, in all ports whatsoever, shall be considered to be the Consuls and Vice-Consuls of the United States of the Ionian Islands, and the subjects of the same shall be entitled to their fullest protection.

"IV. All applications necessary to be made by these States to any foreign Power, shall be transmitted by the Senate to his Excellency the Lord High Commissioner of the protecting Sovereign, who shall forward the same to the Ambassador or Minister of the protecting Sovereign, resident at the court of the said foreign Power, for the purpose of submitting them in due form to the said Power.

"V. The approval of the appointments of all foreign agents or Consuls in the United States of the Ionian Islands shall be by the Senate, through the medium of his Highness the President thereof, with the concurrence of his Excellency the Lord High Commissioner of the protecting Sovereign.

"VI. With a view to ensure the most perfect protection to the commerce of these Islands, every vessel, navigating under the Ionian flag, shall be bound, before leaving the port of the Ionian States to which she belongs, to provide herself with a pass, signed by his Excellency the Lord High Commissioner of the protecting Sovereign, and no vessel, sailing without such pass, shall be considered as navigating according to law. But it is reserved to his Majesty the protecting Sovereign to decide how far it may be necessary that, independent of such pass, they should further be bound to supply themselves with Mediterranean passes."

The sixth section relates to the National Colours and Armorial Bearings:—

"I. The National Commercial Flag of the United States of the Ionian Islands, as directed by the seventh article of the Treaty of Paris, shall be the original flag of the States, with the addition of the British union, to be placed in the upper corner next to the flag-staff.

"II. On usual days the British colours shall be hoisted on all the forts within the United States of the Ionian Islands; but a standard shall be made, to be hoisted on days of public rejoicing and festivity, according to the model of the armorial bearings of the said States.

"III. The arms, or armorial bearings, of the United States of the Ionian Islands shall hereafter consist of the British arms in the centre, surrounded by the arms of each of the Islands composing the said States.

"IV. The armorial bearings of each of the Islands shall consist of the individual arms of the Island, and such emblem, denoting the sovereign protection, as may be deemed advisable."

In the seventh section are the following General Clauses:—

"III. In the instance of all maritime transactions and the collection of the customs, it shall be competent for the proper authorities to employ either British or Ionian subjects.

"V. A specific law shall settle the terms, time, and mode for the *naturalization of foreign subjects* in the States; but *the subjects of the protecting Power* shall, in all instances, be entitled to naturalization in half the time that is required for those of any foreign Power; and a subject of the protecting Power, or of any other Power, may be at once naturalized by a Bill to that effect, without reference to any fixed time of residence in these States, which shall be laid down in the law itself" (*t*).

The Protectorate of Great Britain over the seven Ionian Islands was ratified by the Porte in 1819 (*u*).

During the last Russian war an Ionian vessel was seized by a British cruiser, and brought into the Prize Court, where her condemnation was asked for. It was not denied

(*t*) Extracted from *Hertslet's Treaties*, vol. i. p. 53.

(*u*) *Martens, N. R.* (*Suppl.*) v. 387. Acte de Ratification de la Porte Ottomane relativement à la cession des Iles Ioniennes à la Grande-Bretagne, et de Parga à la Turquie, du 24 avril 1819.

that she was destined to a belligerent or Russian port. The learned judge (Dr. Lushington) said,—

"The vessel proceeded against was an Ionian vessel, "destined, for the purpose of the present inquiry, to Ta-"rangos, a Russian port. The captors said that such a "voyage by an Ionian ship subjected her to condemnation. "The claimants said that neither by the law of nations, nor "any other law, were they liable to condemnation; that the "port of Tarangos was not blockaded; that they did not "carry contraband; that the expedition in which they "were engaged was lawful; and that they were entitled to "restitution. He must now endeavour to set forth as "clearly as he could the reasons and principles on which "the prayers for condemnation and restitution were founded. "The counsel for the captors alleged that all Ionian vessels "were to be considered as British vessels; that, as British "vessels were prohibited from trading with Russia during "war, so, for the same reason, were Ionian vessels; in "other words, that British and Ionian vessels were to be "placed in the same category; that, as regarded a Power "hostile to Great Britain, the Ionians stood in the same "position as British subjects. If that proposition were true, "it necessarily followed as a corollary from it that all trade "with the enemy of Great Britain not allowed to British "subjects was prohibited to the inhabitants of the Ionian "Islands. There was no doubt that a British vessel could "not trade with Tarangos; therefore if British and Ionian "vessels were *in eadem conditione*, this vessel could not "lawfully prosecute her enterprise and must be condemned. "The claimants denied all those propositions. They said "they were not British subjects, that they were not at war "with Russia, and had a right to carry on with Russia any "trade that the subjects of a neutral nation could be law-"fully engaged in."

The learned judge, after a careful examination of the facts and the law, concluded as follows:—

"Did the subjects of the Ionian States stand *in eadem* "*conditione*? It was admitted on all hands they were not

" British subjects in the proper sense of the term. They
" did not participate with British subjects in the advantages
" of commercial intercourse in virtue of the treaty. Were
" they to suffer the inconveniences, and have none of the
" benefits? Did they owe any allegiance to the Crown of
" Great Britain which they violated by such trade? Perhaps
" that was the nicest and most difficult point. Allegiance,
" in the proper sense of the term, undoubtedly they did not
" owe. A limited obedience, according to the treaty, they
" did owe, as a sort of equivalent for protection. There
" might be cases in which it would be competent to Great
" Britain to declare that abstinence from trade with the
" enemy was due for such protection; but was it to be in-
" ferred without such declaration? He thought not. But,
" again, was that presumed illegality of trade a principle to
" be enforced beyond all precedent? On what ground was
" it to be based? Not of advantage to the Ionian Islands,
" which had no interest in the quarrel. Without a possi-
" bility of advantage to themselves, they might be deprived
" of a lucrative trade, and that, too, without any formal act
" done by the protecting Power. He had mentioned some
" of the reasons which had induced him to come to this con-
" clusion; but there were others. He would restore, because
" the property was not the property of allies in war; for
" neither by the treaty nor by the law of nations could he
" impose upon the subjects of the Ionian States that cha-
" racter. He would restore, because if Great Britain had
" the right by treaty of declaring war between the Ionian
" States and Russia, she had not done so; because, in the
" absence of all such declaration or solemn act in whatever
" form, he was of opinion that the Ionian subjects were not
" placed in a state of war; because he held it to be the duty
" of every court professing to administer the law of nations to
" carry into effect and operation the plain terms of a treaty,
" though the consequences might not have been foreseen"(*x*).

(*x*) See also 1 *Jur.* N.S. p. 549.

This judgment was not appealed from. But the evil was remedied by taking the proper formal steps for prohibiting commerce between the Ionian Islands and Russia during the continuance of the war. This account of the peculiar *status* of these Islands while under the Protectorate of Great Britain, and the application of International Law to them, has seemed to me proper to be preserved in this work. But the recent cession of these Islands by Great Britain to the Kingdom of Greece has deprived the statement of the practical importance which formerly attached to it. In December 1862, after the abdication of King Otho, a memorandum from the British Government was delivered to the Provisional Government of Greece, in which were these passages:—

"It is her Majesty's earnest desire to contribute to the "welfare and prosperity of Greece.

"The Treaties of 1827 and 1832 bear evidence of this "desire on the part of the British Crown.

"The Provisional Government of Greece declared, upon "the withdrawal of King Otho from Greece, that their "mission is to maintain for Greece constitutional monarchy, "and the relations of peace with all other States.

"If the new assembly of the representatives of the Greek "nation should prove faithful to this declaration, should "maintain constitutional monarchy, and should refrain from "all aggression against neighbouring States, and if they "should choose a sovereign against whom no well-founded "objection could be raised, her Majesty would see in this "course of conduct a promise of future freedom and happi-"ness for Greece. In such a case, her Majesty, with a "view to strengthen the Greek Monarchy, would be ready "to announce to the Senate and representatives of the "Ionian Islands her Majesty's wish to see them united to "the Monarchy of Greece, and to form with Greece one "united State; and if this wish should be expressed also by "the Ionian Legislature, her Majesty would then take "steps with the concurrence of the Powers who were "parties to the Treaty by which the seven Ionian Islands

" and their dependencies were placed as a separate State " under the Protectorate of the British Crown."

The offer of Great Britain was received with much joy and gratitude by the Ionians. Prince George of Denmark was elected King of Greece.

A conference as to the cession of the Ionian Islands was holden in London on the 26th of June, 1863, at which the Plenipotentiaries of Great Britain, France, and Russia were present. A protocol was drawn up which declared,—

(1) " With regard to the guarantee of the political ex- " istence and of the frontiers of the Kingdom of Greece, " the three Protecting Powers maintain simply the terms " in which it is expressed by Article IV. of the Convention " of May 7th, 1832.

" It is agreed that the Ionian Islands shall be included in " that guarantee, when their union to the Hellenic Kingdom " shall have obtained the consent of the parties concerned.

(2) " With regard to the financial obligations which " Greece has contracted towards the three Protecting " Powers, on account of the loan, in virtue of Article XII. " of the Convention of May 7th, 1832, it is understood that " the Courts of France, Great Britain, and Russia will in " concert watch over the strict execution of the engagement " proposed at Athens by the representatives of the three " Powers, and accepted by the Greek Government, with " the concurrence of the Chambers, in the month of June, " 1860" (*y*).

The Lord High Commissioner dissolved the Ionian Parliament, " with a view to consult in the most formal and " authentic manner the wishes of the inhabitants of the " Ionian Islands as to their future destiny."

The new Parliament unanimously resolved in favour of the union of the Ionian Islands with Greece. " A Treaty " was concluded between her Majesty, the Emperor of

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(*y*) *Ann. Reg.* 1863, pp. 296-7.

" Austria, the Emperor of the French, the King of Prussia, " and the Emperor of Russia, which was signed at London " on the 14th of November, and by it her Majesty renounced " the protectorate over 'the islands of Corfu, Cephalonia, " 'Zante, Santa Maura, Ithaca, Cerigo, and Paro, with " 'their dependencies.' It was also provided that the Ionian " Islands, after their union to the Kingdom of Greece, " 'shall enjoy the advantages of a perpetual neutrality; " 'consequently no armed force, either naval or military, " 'shall at any time be assembled or stationed upon the ter- " 'ritory or in the water of those Islands, beyond the number " 'that may be strictly necessary for the maintenance of " 'public order, and to secure the collection of the public " 'revenue. The high contracting parties engage to respect " 'the principle of neutrality stipulated by the present " 'article'" (*z*).

It was further provided that the fortifications of Corfu and its immediate dependencies should be demolished previously to the withdrawal of the British troops.

LXXVIII. In all the foregoing instances, though they may exhibit a greater or a less derogation from the rights of independent Sovereignty (excepting perhaps in the case of Servia), the attribute of free and uncontrolled agency in their external relations with foreign States is wanting.

LXXIX. Seventhly.—There are in Europe some few States which are Free Republics, to which Consuls are accredited, and which, strictly speaking, are capable of entering into treaties (*a*) with Foreign Powers.

(*z*) *Ann. Reg.* 1863, pp. 293-7.

(*a*) For example, see the Treaty, in 1841, between Mexico and these cities, entitled "Traité d'Amitié, de Navigation et de Commerce, conclu entre la République du Mexique et les Villes anséatiques de Brême, Lubeck, et Hambourg; signé à Londres le 7 avril 1832, ratifié à Londres le 8 novembre 1841."—*De M. et De. C.* v. 155.

Convention between the Hanseatic States and United States of North America, London, Sept. 29, 1825.—*Elliot's American Diplomatic Code*, ii. 202.

Convention with the Porte, May 1839.—*Martens, Nouv. Rec.* ii. 183.

Bremen, Hamburg, and Lubeck (*b*) were a few years ago, and still appear to be, Free cities of Germany—the only remains of that once formidable and celebrated Hanseatic League, the last general Diet of which was held at Lubeck in 1630. These three towns were Cities of the German Empire, and since 1814 had been admitted as members of the German Confederation, and had, in conjunction with Frankfort, a vote in the Diet.

LXXX. *Frankfort-on-the-Maine* (*c*) was the most important free town of Germany, and, as has been mentioned, the seat of the German Diet. The constitution of this free city was established in 1816. It consisted of a Senate in which the Executive Power is lodged, and a Legislative body chosen by Electors of the city and suburbs. In 1866 it was forcibly seized by Prussia.

LXXXI. *Andorra or Andorre*(*d*) is a small independent State composed of three valleys on the southern side of the Central Pyrenees. It is considered as a neutral and independent Province, though to a certain extent connected both with France and Spain. This little Republic has preserved for a long series of years the institutions which it now enjoys.

LXXXII. *San Marino* is also a very small but independent Republic in the north-east of Italy. The military force of the Republic is said to consist of 80 men, and the

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(*b*) *Miltitz, Manuel des Consuls,* l. i. c. iii. s. 9; l. ii. c. i. s. 3, Art. 6.
Waltershausen, Urkundliche Geschichte des Ursprungs der Deutschen Hanse.

Gazeteer of the World, vol. vi., "Hanse Towns."

(*c*) Treaties between Great Britain and Frankfort :—

Treaty, Commerce and Navigation, London, May 13, 1832.—*Hertslet's Treat.* vol. iv. 147, 153, 548.

Ib. Dec. 29, 1835.—*Ib.* vol. v. 97, 98, 625.

Convention, Commerce and Navigation, March 2, 1841.—*Ib.* vol. vi. 751, 755, 996.

Traité de Commerce et de Navigation entre la Grèce et les Villes Anséatiques, mai 1843.—*Vide De M. et C.* 311.

(*d*) *Gazeteer of the World,* "Andorra."

whole population to be about 7600. In 1739, Cardinal Alberoni subjected it to the Pope, who, however, restored the Republic. It declined the offer of an increase of territory made to it by Napoleon in 1797.

LXXXIII. Eighthly.—The Constitution and Territory of BELGIUM have been also definitively established by Treaty, and are therefore matter of International Law. It will be seen that a perpetual neutrality (*e*), in questions arising between other Powers, is the most remarkable condition of the national existence of Belgium. The articles of the Treaty which establish the kingdom of Belgium are as follows:—

"1. The Belgian territory shall be composed of the provinces of *South Brabant, Liége, Namur, Hainault, West Flanders, East Flanders, Antwerp, and Limbourg*; such as they formed part of the United Kingdom of the Netherlands constituted in 1815, with the exception of those districts of the province of Limbourg which are designated in Art. 4.

"The Belgian territory shall, moreover, comprise that part of the Grand Duchy of Luxembourg which is specified in Art. 2.

"2. In the Grand Duchy of Luxembourg, the limits of the Belgian territory shall be such as will be hereinafter described; viz., commencing from the frontier of France, between *Rodange*, which shall remain to the Grand Duchy of Luxembourg, and *Athus*, which shall belong to Belgium, there shall be drawn, according to the annexed map, a line which—leaving to Belgium the road from *Arlon* to *Longwy*, the town of *Arlon* with its district, and the road from *Arlon* to *Bastogne*—shall pass between *Mesancy*, which shall be on the Belgian territory, and *Clémancy*, which shall remain to the Grand Duchy of Luxembourg, terminating at *Steinfort*, which place shall also remain to the Grand Duchy. From *Steinfort* this line shall be continued in the direction

(*e*) *Vide post*, Arts. 7-26.

of *Eischen*, *Hecbus*, *Guirsch*, *Oberpalen*, *Grende*, *Nothomb*, *Parette*, and *Perlé*, as far as *Martelange*; *Hecbus*, *Guirsch*, *Grende*, *Nothomb*, and *Parette* being to belong to Belgium; and *Eischen*, *Oberpalen*, *Perlé*, and *Martelange* to the Grand Duchy.

"From *Martelange* the said line shall follow the course of the *Sure*, the waterway (*thalweg*) of which river shall serve as the limit betweeen the two States as far as opposite to *Tintange*, from whence it shall be continued, as directly as possible, towards the present frontier of the *Arrondissement* of *Diekirch*, and shall pass between *Surret*, *Harlange*, and *Tarchamps*, which places shall be left to the Grand Duchy of Luxembourg, and *Honville*, *Liverchamp*, and *Loutremange*, which places shall form part of the Belgian territory. Then having—in the vicinity of *Doncols* and *Soulez*, which shall remain to the Grand Duchy—reached the present boundary of the *Arrondissement* of *Diekirch*, the line in question shall follow the said boundary to the frontier of the Prussian territory. All the territories, towns, fortresses, and places situated to the west of this line, shall belong to Belgium; and all the territories, towns, fortresses, and places situated to the east of the said line shall continue to belong to the Grand Duchy of Luxembourg.

"It is understood that, in marking out this line, and in conforming as closely as possible to the description of it given above, as well as to the delineation of it on the map, which, for the sake of greater clearness, is annexed to the present article, the Commissioners of demarcation, mentioned in Art. 6, shall pay due attention to the localities, as well as to the mutual necessity for accommodation which may result therefrom.

"3. In return for the cessions made in the preceding article, there shall be assigned to his Majesty the King of the Netherlands, Grand Duke of Luxembourg, a territorial indemnity in the province of Limbourg.

"4. In execution of that part of Art. 1 which relates to the province of Limbourg, and in consequence of the cessions

specified in Art. 2, there shall be assigned to his Majesty the King of the Netherlands, either to be held by him in his character of Grand Duke of Luxembourg, or for the purpose of being united to Holland, those territories the limits of which are hereinafter described:—

" First. *On the right bank of the Meuse*: to the old Dutch *enclaves* upon the said bank in the province of Limbourg, shall be united those districts of the said province upon the same bank, which did not belong to the States General in 1790; in such wise that the whole of that part of the present province of Limbourg, situated upon the right bank of the Meuse, and comprised between that river on the west, the frontier of the Prussian territory on the east, the present frontier of the province of Liége on the south, and Dutch Guelderland on the north, shall henceforth belong to his Majesty the King of the Netherlands, either to be held by him in his character of Grand Duke of Luxembourg, or in order to be united to Holland.

" Secondly. *On the left bank of the Meuse*: commencing from the southernmost point of the Dutch province of North Brabant, there shall be drawn, according to the annexed map, a line which shall terminate on the Meuse below *Wessem*, between that place and *Stevenswaardt*, at the point where the frontiers of the present *Arrondissement* of *Ruremond* and *Maestricht* meet, on the left bank of the Meuse; in such manner that *Bergerot*, *Stamproy*, *Neer Itteren*, *Ittervoord*, and *Thorne*, with their districts, as well as all the other places situated to the north of this line, shall form part of the Dutch territory.

" The old Dutch *enclaves* in the province of Limbourg, upon the left bank of the Meuse, shall belong to Belgium, with the exception of the town of Maestricht, which, together with a radius of territory, extending 1200 *toises* from the outer glacis of the fortress on the said bank of this river, shall continue to be possessed in full sovereignty and property by his Majesty the King of the Netherlands.

" 5. It shall be reserved to his Majesty the King of the

Netherlands, Grand Duke of Luxembourg, to come to an agreement with the Germanic Confederation, and with the Agnates of the House of Nassau, as to the application of the stipulations contained in Arts. 3 and 4, as well as upon all the arrangements which the said articles may render necessary, either with the above-mentioned Agnates of the House of Nassau or with the Germanic Confederation.

" 6. In consideration of the territorial arrangements above stated, each of the two parties renounces reciprocally, and for ever, all pretensions to the territories, towns, fortresses, and places situated within the limits of the possessions of the other party, such as those limits are described in Arts. 1, 2, and 4.

" The said limits shall be marked out in conformity with those Articles by Belgian and Dutch Commissioners of demarcation, who shall meet as soon as possible in the town of Maestricht.

" 7. Belgium, within the limits specified in Arts. 1, 2, and 4, shall form an *independent and perpetually neutral State.* It shall be bound to observe such neutrality towards all other States.

" 8. The drainage of the waters of the two Flanders shall be regulated between Holland and Belgium, according to the stipulations on this subject, contained in Art. 6 of the definitive Treaty, concluded between his Majesty the Emperor of Germany and the States General on the 8th of November, 1785; and in conformity with the said article, Commissioners, to be named on either side, shall make arrangements for the application of the provisions contained in it.

" 9. The provisions of Arts. 108–117, inclusive of the General Act of the Congress of Vienna, relative to the free navigation of navigable rivers, shall be applied to those navigable rivers which separate the Belgian and the Dutch territories, or which traverse them both.

" So far as regards specially the navigation of the Scheldt, it shall be agreed that the pilotage and the buoying of its channel, as well as the conservation of the channels of the Scheldt below Antwerp, shall be subject to a joint superintendence; that this joint superintendence shall be exercised

by Commissioners; to be appointed on both sides for this purpose; that moderate pilotage dues shall be fixed by mutual agreement, and that such dues shall be the same for the Dutch as for the Belgian commerce.

"It is also agreed that the navigation of the intermediate channels between the Scheldt and the Rhine, in order to proceed from Antwerp to the Rhine, and *vice versa*, shall continue reciprocally free, and that it shall be subject only to moderate tolls, which shall provisionally be the same for the commerce of the two countries.

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"25. The Courts of Great Britain, Austria, France, Prussia, and Russia guarantee to his Majesty the King of the Belgians the execution of all the preceding articles.

"26. In consequence of the stipulations of the present Treaty, there shall be peace and friendship between their Majesties the King of the United Kingdom of Great Britain and Ireland, the Emperor of Austria, the King of the French, the King of Prussia, and the Emperor of all the Russias, on the one part, and his Majesty the King of the Belgians, on the other part, their heirs and successors, their respective States and subjects, for ever" (*f*).

In 1870, Great Britain entered into separate Treaties with France and Prussia, then at war, with respect to the neutrality of Belgium. The ratifications were exchanged in London on the 9th, and with France on the 26th of August. The following is the document, which is the same, *mutatis mutandis*, in both cases:—

"Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, and his Majesty the Emperor of the French, being desirous at the present time of recording in a solemn act their fixed determination to maintain the independence and neutrality of Belgium, as provided by the 7th Article of the Treaty signed at London on the 19th of April, 1839, between Belgium and the Netherlands, which

(*f*) *Hertslet's Treaties*, vol. iv. pp. 27–31, 37.

article was declared by the Quintuple Treaty of 1839 to be considered as having the same force and value as if textually inserted in the said Quintuple Treaty, their said Majesties have determined to conclude between themselves a separate treaty, which, without impairing or invalidating the conditions of the said Quintuple Treaty, shall be subsidiary and accessory to it; and they have accordingly named as their plenipotentiaries for that purpose, that is to say, &c.

" ' ARTICLE I.

" ' His Majesty the Emperor of the French having declared that, notwithstanding the hostilities in which France is now engaged with the North German Confederation and its allies, it is his fixed determination to respect the neutrality of Belgium so long as the same shall be respected by the North German Confederation and its allies, her Majesty the Queen of the United Kingdom of Great Britain and Ireland on her part declares that, if during the said hostilities the armies of the North German Confederation and its allies should violate that neutrality she will be prepared to cooperate with his Imperial Majesty for the defence of the same in such manner as may be mutually agreed upon, employing for that purpose her naval and military forces to ensure its observance, and to maintain, in conjunction with his Imperial Majesty, then and thereafter, the independence and neutrality of Belgium.

" ' It is clearly understood that her Majesty the Queen of the United Kingdom of Great Britain and Ireland does not engage herself by this treaty to take part in any of the general operations of the war now carried on between France and the North German Confederation and its allies, beyond the limits of Belgium as defined in the treaty between Belgium and the Netherlands of April 19, 1839.

" ' ARTICLE II.

" ' His Majesty the Emperor of the French agrees on his part, in the event provided for in the foregoing article, to

co-operate with her Majesty the Queen of the United Kingdom of Great Britain and Ireland, employing his naval and military forces for the purpose aforesaid; and, the case arising, to concert with her Majesty the measures which shall be taken, separately or in common, to secure the neutrality and independence of Belgium.

" 'ARTICLE III.

" 'This Treaty shall be binding on the high contracting parties during the continuance of the present war between France and the North German Confederation and its allies, and for twelve months after the ratification of any treaty of peace concluded between those parties; and on the expiration of that time the independence and neutrality of Belgium will, so far as the high contracting parties are respectively concerned, continue to rest, as heretofore, on the 1st Article of the Quintuple Treaty of the 19th of April, 1869.

" 'ARTICLE IV.

" 'The present Treaty shall be ratified, and the ratifications shall be exchanged at London as soon as possible.

" 'In witness whereof the respective plenipotentiaries have signed the same, and have affixed thereto the seal of their arms.

" 'Done at London the 11th day of August, in the year of our Lord 1870.

" '(L.S.) GRANVILLE.
" '(L.S.) LA VALETTE' " (*g*).

LXXXIV. Ninthly.—The Constitution and Territory of GREECE are the subject of Treaty and guarantee, and under the protection of International Law. The articles which principally affect the International *Status* of Greece are as follows:—

"1. The Courts of Great Britain, France, and Russia, duly authorized for this purpose by the Greek nation, offer the hereditary Sovereignty of Greece to the Prince

(*g*) See debate in the House of Lords on this Treaty.

Frederick Otho of Bavaria, second son of his Majesty the King of Bavaria.

"2. His Majesty the King of Bavaria, acting in the name of his said son, a minor, accepts, on his behalf, the hereditary Sovereignty of Greece, on the conditions hereinafter settled.

"3. The Prince Otho of Bavaria shall bear the title of King of Greece.

"4. Greece, under the Sovereignty of the Prince Otho of Bavaria, and under the guarantee of the three Courts, shall form a monarchical and independent State, according to the terms of the Protocol, signed between the said Courts on the 3rd of February, 1830, and accepted both by Greece and by the Ottoman Porte.

"5. The limits of the Greek State shall be such as shall be definitively settled by the negotiations which the Courts of Great Britain, France, and Russia have recently opened with the Ottoman Porte, in execution of the Protocol of the 26th of September, 1831.

"6. The three Courts having beforehand determined to convert the Protocol of the 3rd of February, 1830, into a definitive Treaty, as soon as the negotiations relative to the limits of Greece shall have terminated, and to communicate such Treaty to all the States with which they have relations, it is hereby agreed, that they shall fulfil this engagement, and that his Majesty the King of Greece shall become a contracting party to the Treaty in question.

"7. The three Courts shall, from the present moment, use their influence to procure the recognition of the Prince Otho of Bavaria as King of Greece by all the Sovereigns and States with whom they have relations.

"8. The Royal Crown and dignity shall be hereditary in Greece; and shall pass to the direct and lawful descendants and heirs of the Prince Otho of Bavaria, in the order of primogeniture. In the event of the decease of the Prince Otho of Bavaria, without direct and lawful issue, the Crown of Greece shall pass to his younger brother, and to his direct and lawful descendants and heirs, in the order of primo-

geniture. In the event of the decease of the last-mentioned Prince also, without direct and lawful issue, the Crown of Greece shall pass to his younger brother, and to his direct and lawful descendants and heirs, in the order of primogeniture. In no case shall the Crown of Greece and the Crown of Bavaria be united upon the same head.

"9. The majority of the Prince Otho of Bavaria, as King of Greece, is fixed at the period when he shall have completed his twentieth year; that is to say, on the 1st of June, 1835.

"10. During the minority of the Prince Otho of Bavaria, King of Greece, his rights of Sovereignty shall be exercised in their full extent by a Regency composed of three Counsellors, who shall be appointed by his Majesty the King of Bavaria.

"11. The Prince Otho of Bavaria shall retain the full possession of his appanages in Bavaria. His Majesty the King of Bavaria, moreover, engages to assist, as far as may be in his power, the Prince Otho in his position in Greece, until a revenue shall have been set apart for the Crown in that State" (*h*).

The union of the Ionian Islands with Greece has been already mentioned.

LXXXV. Tenthly.—As to States standing in a Feudal Relation to other States. These may be said to be now confined to the province of Turkey.

The existing independent Regencies tributary to the Sublime Porte are:—

I. In North Africa:
1. Tunis. 2. Tripoli.

II. In Europe:
1. Montenegro. 2. Moldavia.
3. Wallachia. 4. Servia (*i*).

III. Egypt.

(*h*) *Hertslet's Treaties*, vol. iv. pp. 320, 322.

(*i*) *Vide post.* Tripoli is not exactly in this category. See *Koch, Hist. des Tr.* iv. 388, 424, 438.

LXXXVI. The relations subsisting between the Porte and these tributary States is of an anomalous and perplexing character; nor have the great Powers of Europe been always agreed as to the light in which all these Regencies are to be considered.

LXXXVII. First, with respect to the Barbary States, which are tributary to the Porte. These have been almost of necessity treated to a certain extent, and for certain purposes, as *de facto* independent States, though their *de jure* subordination to the Porte was undisputed.

The course (*k*) which the European Powers have adopted has been such as, on the one hand, would recognize the Supremacy (*Suzeraineté*) of the Porte over its dependencies; while, on the other hand, these Powers have often demanded and enforced redress in vindication of the injuries done to their subjects, immediately and in the first instance from these dependencies themselves.

The necessity of the cases, and the reason of the thing, have rendered this irregular mode of International proceeding unavoidable.

"Nature" (Mr. Burke (*l*) observes, with his usual sagacity) "has said it, that the Turk cannot govern Egypt, "Arabia, and Curdistan as he governs Thrace. Nor has he "the same dominion in Crimea which he has at Brusa and "Smyrna. . . . . The Sultan gets such obedience as he can. "He governs with a loose rein that he may govern at all; "and the whole force and vigour of his authority in his

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(*k*) *Mably, Le Droit public de l'Europe*, t. i. c. v. "Le commerce ne seroit point en sûreté contre les Puissances de la côte de l'Afrique, si l'on se contentoit de prendre à ce sujet des engagemens avec la Porte. . . . . Aussi la France, l'Angleterre, les Provinces-Unies, etc., traitent-elles *directement* avec Tunis, Tripoli, Alger, etc. Cependant ces Barbaresques, n'observant leurs traités qu'autant qu'ils y sont forcés, s'exposent souvent à être châtiés avec vigueur; et dans ces occasions il est très-avantageux d'avoir contracté de telle façon avec le Grand Seigneur qu'il ne puisse prendre leur défense."—*Ib.* p. 396.

Wheaton's Élém. de Droit inter. p. 49; *Wheaton's Hist.* p. 536.

(*l*) *Speech on Conciliation with America.—Burke's Works*, vol. iii. pp. 56, 57.

"centre is derived from a prudent relaxation in all his "borders."

LXXXVIII. Since the conquest of Algiers by France (1830), *Tripoli* and *Tunis* are the only Barbary States (*Régences barbaresques*) tributary to the Porte. Indeed, *Tripoli* is, properly speaking, not a Barbary State under the protection of the Porte, but a province of the Porte, in the same condition and category as Bagdad or any other province of the Ottoman Power. The Bey is appointed and removed at the pleasure of the Sultan: nevertheless, European Powers have entered into Treaties with the Bey (*m*) as an independent Power, and have sought redress from him, in the first instance, for injuries inflicted on their subjects.

LXXXIX. *Tunis*, at the present time, stands in a different and more independent category. The Bey is Hereditary Regent, and practically, if not theoretically, also irremovable by the Sultan, though, like Egypt, tributary to the Porte.

In 1803 (*n*), nevertheless, the Porte addressed a Firman equally to Tunis and Tripoli, commanding both Regencies to obey the conditions of a Treaty of navigation and commerce which the Porte had entered into with Prussia, and which related to both Tripoli and Tunis.

In 1813 a Treaty was entered into between Great Britain and Tunis (*o*), by which this Regency agreed to accord to the inhabitants of the Ionian Islands the privileges of British subjects, provided Algiers and Tripoli adopted the same course.

XC. The principal circumstances which mark the recognition by the European Powers of the *Suzeraineté* of the Porte over these Regencies appear to be these:—

(*m*) The Bey styles himself, in these Treaties, "Bey, Gouverneur et Capitaine-Général de la cité et royaume (*or* régence) de Tripoli." See Treaties of 1762 and 1818 (last Treaty) between Tripoli and Great Britain; Treaty of 1830 (last Treaty) between France and Tripoli.

The Appendix to this volume will contain a chronological catalogue of the Treaties between European Powers and the *Régences barbaresques*—Algiers, Tripoli, Tunis.

(*n*) *De Martens et De Cussy*, *Rec. de Tr.* ii. 311.

(*o*) *Ib.* 401.

1. That they do not accredit *Public Ministers* to the Courts of these Regencies, but send *Consuls* only (*p*).

2. That when the Beys, Pachas, or Governors of these Regencies visit the European Courts, they are *presented* there by the Ambassador of the Porte, and are not received as the representatives of an independent State. France, it is believed, has not always been so particular as Great Britain in the observance of this not insignificant point of etiquette.

3. That they have recognized the rule, however departed from in emergencies, either of negotiating through the Porte with respect to these Regencies, or of obtaining the subsequent confirmation of the Porte for arrangements entered into with these Regencies.

XCI. *Morocco*, it may be observed in passing, is unquestionably an Independent State, of which the Emperor is the International Representative. Various Treaties between him and European Powers have been from time to time concluded, without any reference direct or indirect to the Porte (*q*).

XCII. The mountainous province of *Montenegro*, which is a district of Western Turkey, consists of an elevated plain, separated by a narrow strip of Austrian territory from the Adriatic, bounded on the north-west and north by the Bosnian Herzegovina, on the east and south by the Albanian Paschalic of Scutari, and on the south-west by the Austrian frontier of Dalmatia, at the Bocca di Cattaro (*r*).

This singular region of mountain fortresses, which was

(*p*) *Vide post*, the important distinction in International Law between the Public Minister and the Consul.

(*q*) For the Treaty settling the frontiers between French Algeria and Morocco see *Guizot's Mém.* vii. ch. xli. (1841-7).

(*r*) *Gazetteer of the World*; *Fullarton*, 1853, vol. ix.—"Montenegro."
Wilkinson, Dalmatia and Montenegro, 2 vols. 1848.
Treaty of Carlowitz, 1691; *Schmauss*, ii. 1131.
Treaty of Passarowitz, 1718; *Schmauss*, ii. 1705.
Treaty of Belgrade, 1739; *Wenck, Cod. J. Gent.* i. 316.
Treaty of Sistowa, 1791; *Martens, Rec. de Tr.* vol. v. p. 246.

occupied by Ivan Czernojewich, who left his paternal domains near the Lake Scutari towards the end of the fifteenth century, has ever since that period been in a semi-independent condition.

At first, the Montenegrins, having adopted the Greek religion, were placed under the Protectorate of Venice; but in 1623, after a desperate resistance, they were compelled to pay a capitation tax (*haratsch*) to the Sultan.

The Montenegrins have been till lately governed by a Prince Bishop of the Greek Church, called a *Vladika*. For a century and a half this dignitary appears to have been hereditary in the *Petrovitsck* family; but the present *Vladika*, who succeeded in 1830, refused the episcopal dignity, and is a lay Chief.

By the Treaty of Carlowitz in 1699 between the Republic of Venice and the Ottoman Porte, Montenegro appears to have been left under the Protectorate of Venice; but by the Treaty of Passarowitz in 1718 it became again subject to the Porte; in 1791 it was still a part of the Turkish Empire; for it is a provision of the Treaty of Sistowa (*s*), concluded

(*s*) *Traité de Paix entre sa Majesté Impériale Royale Apostolique et la Sublime Porte Ottomane. Fait à Sistow, le 4me août* 1791. (*En langue françoise et turque*) :—

Art. 1. Il y aura désormais une paix perpétuelle et universelle, par terre, sur mer, et sur les rivières, entre les deux empires, leurs sujets et vassaux, une amitié vraie et sincère, une union parfaite et étroite, une abolition et amnistie pleine et générale de toutes les hostilités, violences, et injures commises dans le cours de cette guerre, par les deux puissances, ou par les sujets et vassaux de l'une, qui ont suivi le parti de l'autre; et spécialement les habitans de toute condition du *Montenègre*, de la Bosnie, la Servie, la Valachie, et Moldavie, qui, en vertu de cette amnistie, pourront tous rentrer dans leurs anciennes demeures, possessions et droits quelconques, et en jouir paisiblement, sans être jamais inquiétés, molestés, ni punis pour s'être déclarés contre leur propre souverain, ou pour avoir prêté hommage à la cour impériale et royale.

Art. 12. Et quant à l'exercice de la religion catholique chrétienne dans l'Empire Ottoman, ses prêtres, ses sectateurs, ses églises à entretenir, ou à réparer, la liberté du culte et des personnes, la fréquentation et la protection des lieux saints de Jérusalem et d'autres endroits, la Sublime Porte Ottomane renouvelle et confirme, d'après la règle du *status*

in that year between Austria and the Porte, that the Montenegrins shall not be molested or punished for having declared against their proper Sovereign.

In 1766 the Montenegrins placed themselves under the Protectorate of Russia; and ever since that period a relation of an undefined kind has subsisted between them.

Since 1815 the Venetian possessions on the Illyrian coast, including the Bocca di Cattaro and the Ragusan territory, have been annexed to Austria. Nevertheless, two small points on the coast—the Leck and the Sutorina, which had been secured by the Treaties of Carlowitz and Passarowitz to Turkey—remained in her possession till 1852. In that year the Prince of Montenegro attacked and carried a fortress at the head of the Lake Scutari: this act of aggression provoked Turkey to attempt the subjugation of Montenegro. Austria, and, more tardily, Russia interfered on behalf of the Montenegrins; while England and France advised Turkey, without abandoning her *de jure* title over Montenegro, to respect the *quasi* independence of that territory, and on this basis a dangerous quarrel, which might have embroiled all Europe, was adjusted. But Austria obtained the establishment of Consulates in Bosnia, Servia, and Herzegovina, and other parts of Roumelia; and though she did not possess herself of Leck and Sutorina—the strips of territory whereby Turkish Herzegovina touches the Adriatic—she obtained a stipulation that Turkey should make no use of them as ports, and that no Turkish vessels should approach them.

XCIII. The districts of Eastern Europe called Moldavia and Wallachia are two Principalities situated between the Carpathian mountains and the Danube and the Pruth.

These Principalities, as well as those of Servia and Bulgaria, before the conquest of Gallipoli in 1358, by which Solyman opened to the Turks an entrance into Europe, had

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quo strict, non-seulement les privilèges assurés par l'article IX du Traité de Belgrade à cette religion, mais aussi ceux qui ont été postérieurement concédés par ses firmans, et autres actes émanés de son autorité."—*Martens, Rec. de Tr.* (1791), vol. v. p. 246.

been governed by Princes of their own, tributary, sometimes to Hungary, and sometimes to Poland (*t*).

In 1529 these Principalities submitted to the Porte, on condition of obtaining security for their religion (which, like that of Montenegro and Servia, is of the Greek Church) and their laws, and of being exempt from all taxes save that of a yearly tribute to the Sultan.

These conditions were never rigidly adhered to, and the Principalities were always in a state of chronic revolt from Turkey; but they suffered more especially from being the battle-field on which Russia and the Porte contended for the mastery.

This is not the occasion on which to enter into the history of the various fortunes of these Principalities. When these pages were first preparing for the press, a most grave matter of International Law had become involved in the proposition, that these Christian Principalities are Provinces (with whatsoever privileges) of the Turkish Empire. It had become of great importance to the welfare of Europe to ascertain in what light Russia, the most powerful neighbour of Turkey, is bound to consider them, and what she has herself declared to be the limits of the Russian and Ottoman Empires. To answer the last question first: Russia dictated her own terms in the Treaty referred to by Count Nesselrode, as sustaining her present demand, the Treaty of Adrianople, 1829; for, by the 3rd Article of that Treaty, it is provided *that the Pruth shall continue to be the limit of the two Empires.* The same Treaty provided, both by the 5th Article, and by supplemental annexed provisions, for the constitution of the Principalities. They are placed under the *Suzeraineté* of the Porte, with the *guarantee* of Russia for their liberties and privileges.

The next question was, In what light has Russia bound

(*t*) *Koch, Hist. abrég. des Tr. Traités entre la Porte Ottomane et les Puissances Chrétiennes depuis la Paix de Carlowitz en* 1699 *jusqu'au Traité de Bucharest en* 1812, t. iv. pp. 342, 410, ed. Bruxelles, 1838.

herself to consider these provinces? The Treaty of Adrianople answers—*as part of the Turkish Empire.* The *commercial* Treaty between Russia and the Porte in 1846 makes the same reply still more distinctly. The 16th Article says, "*Les* "*deux cours contractantes, prenant en considération que parmi* "*les provinces qui font partie des États de la Sublime Porte* "*les principautés de Valachie, de Moldavie,* et de Servie "jouissent d'une administration distincte, sont convenues "que les marchandises," &c. &c. (*u*).

The yet more recent Treaty of Balta-Liman, of the 1st of May, 1849, does not annul the previous stipulations on this subject between Russia and the Porte, but, on the contrary, by the 7th Article, provides that they shall not be set aside (*x*).

XCIV. The executive government of these provinces is that of a Hospodar or Woivode, elected by the inhabitants. This right of election, and that of administrative and legislative independence and inviolability of territory, constitute the principal privileges acquired by capitulation from the Porte.

By the Treaty of Bucharest, in 1812, the third part of Moldavia was ceded by the Porte to Russia. The rest of Moldavia and Wallachia was restored to Turkey, with a special provision for the privileges of the inhabitants of Moldavia (*y*).

By the Treaty of Ackermann, in 1826, it was stipulated that the Hospodars should be nominated for seven years, and be liable to be deposed by the Suzerain or by the Protecting Power.

But by the Treaty of *Adrianople,* signed three years later,

(*u*) *De M. et De C.* p. 637, Treaty of Balta-Liman in 1846.

(*x*) *Russia and Turkey: Armed Intervention on the ground of Religion considered as a Question of International Law*; with Appendix of Documents. By *Robert Phillimore.* London: Ridgway, 1853. *Vide post,* INTERVENTION.

(*y*) The Treaty of Sistowa secured Moldavia to the Porte in the same condition as formerly.

it was stipulated that the Hospodars should be appointed for life. By the Treaty of *Balta-Liman*, of the 1st of May, 1849, it is agreed that the Hospodars should be appointed by the Sultan for a term not exceeding seven years; that two Commissioners should be appointed for the reformation of abuses, whose proposed alterations were to be submitted to the cabinets of St. Petersburg and the Porte; and that the consent of both of them should be obtained previous to their promulgation, by a *Hatti-Sheriff* of the Sultan. The effect of the Treaty of Paris, 1856, placing these Principalities under the *Suzeraineté* of the Porte and the guarantee of the Protecting Powers, has been already discussed (*z*).

XCV. Servia is not exactly in the same category as the provinces which have been first mentioned.

Servia Proper contains about a million of inhabitants; but the Servian race is said to amount to above five millions in number, and to occupy one-third of the European territories of Turkey, and all the south of Hungary.

In the middle ages the Chief of this people assumed the title of Emperor of the East, and was only subdued by the united forces of the adjoining nations.

The Servian empire was at last divided between Austria and the Porte. By the Treaty of Passarowitz, in 1718, the Porte ceded the north of Servia, with the capital Belgrade, to Austria, but regained this territory by the Treaty of Belgrade in 1739. In 1801 the struggle of the Servians for liberty began to be aided—at first secretly, and after 1809 openly—by Russia; and the Treaty of Bucharest, in 1812, between Russia and the Porte, contained in its eighth article a provision securing, among other things, to the natives the internal administration of their affairs, on the payment of a moderate contribution to Turkey. In 1813 the Servian insurrection broke out again, but, no longer assisted by Russia, was put down with circumstances of horrible barbarity. The Servians applied in vain to the Congress of

(*z*) *Vide antè*, p. 48, and Preface to this vol.

Vienna for the mediation of Christendom in their favour. But the Greek insurrection in 1821, and the subsequent independence of Greece, operated favourably upon the condition of Servia; and it is now recognized by the European Powers as a distinct and independent nation, governed by a native Prince. Foreign Powers send Consuls to Servia, whose *exæquatur* emanates from the Sovereign of the country.

Beside the Treaty of Bucharest, already mentioned, between Russia and the Porte, the Treaties of Ackermann in 1826 (*a*), and of Adrianople in 1829, are to be consulted for the national *Status* of Servia, as well as for that of the Danubian Principalities of Moldavia and Wallachia (*b*).

(*a*) *Extract from Convention between the Ottoman Porte and Russia, signed at Ackermann, September 25th,* 1826.—*Acte séparé relatif à la Servie:*—

"La Sublime Porte, dans l'unique intention de remplir fidèlement les stipulations de l'Article VIII du Traité de Bucharest, ayant précédemment permis aux députés serviens à Constantinople de lui présenter les demandes de leur nation, sur les objets les plus convenables pour consolider la sûreté et le bien-être du pays, ces députés avaient précédemment exposé dans leur requête le vœu de la nation relativement à quelques-uns de ces objets, tel que la liberté du culte, le choix de ses chefs, l'indépendance de son administration intérieure, la réunion des districts détachés de la Servie, la réunion des différents impôts en un seul, l'abandon aux Serviens de la régie des biens appartenant à des Musulmans, à charge d'en payer le revenu ensemble avec le tribut, la liberté de commerce, la permission aux négociants serviens de voyager dans les États Ottomans avec leurs propres passeports, l'établissement d'hôpitaux, écoles et imprimeries, et enfin la défense aux Musulmans, autres que ceux appartenant aux garnisons, de s'établir en Servie. Tandis que l'on s'occupait à vérifier et à régler les articles ci-dessus spécifiés, certains empêchements survenus en motivèrent l'ajournement. Mais la Sublime Porte persistant aujourd'hui encore dans la ferme résolution d'accorder à la nation servienne les avantages stipulés dans l'Article VIII du Traité de Bucharest, elle réglera, de concert avec les députés serviens à Constantinople, les demandes ci-dessus mentionnées de cette nation fidèle et soumise, comme aussi toutes les autres qui lui seraient présentées par la députation servienne, et qui ne seront point contraires à la qualité de sujets de l'Empire Ottoman."—*De Martens et De Cussy*, *Rec. de Traités et Conventions*, vol. iv. pp. 40, 41.

(*b*) *De Martens et De Cussy*, *Rec. de Tr.* *Treaty of Bucharest*, t. ii.

The effect of the Treaty of Paris, 1856, upon Servia has been already considered (*c*).

XCVI. With respect to Montenegro, the Danubian Principalities, and Servia, an International question of some delicacy and difficulty arises—namely, To what extent the Protectorate of Austria or Russia over the Christian subjects of the Porte, in matters relating to their religion, has been allowed by custom or by treaty to extend?

This point will receive further discussion in a later part of this work, when the Right of Intervention is considered.

XCVII. In all the foregoing instances, though they may exhibit a greater or a less derogation from the rights of independent Sovereignty (excepting perhaps the case of Servia), the attribute of free and uncontrolled agency in their external relations with Foreign States is wanting.

XCVIII. States that pay tribute, or stand in a feudal relation towards other States, are, nevertheless, sometimes considered as Independent Sovereignties. It was not till 1818 that the King of Naples ceased to be a nominal vassal of the Papal See; but this feudal relation was never considered as affecting his position in the Commonwealth of States. Of the same kind some German Jurists appear to consider the subsisting relation between Kniphausen and Oldenburg; but, in fact, it is a relation which can hardly be said to exist in these days, except where, as in the instances of the Barbary States, there is a direct and practical acknowledgment of a superior Sovereignty.

XCIX. Eleventhly.—The *Status* of Egypt with respect to its International relations is very peculiar.

Under the rule of the Mamelukes, Egypt had assumed the shape of an Independent State, though owing an allegiance of a feudal character, and being tributary to the Porte.

After the destruction of the Mamelukes, the then Pacha of

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p. 393. *Treaty of Ackermann*, t. iv. p. 40. *Treaty of Adrianople*, ib. p. 223. *Wheaton's History*, p. 558.

(*c*) *Vide antè*, p. 48.

Egypt, *Mehemet Ali*, endeavoured to establish an *entirely* independent kingdom. This endeavour led to the Intervention—which will be more fully considered hereafter—of the principal European Powers in the conflict between the Sultan and the Pacha, and the Convention of July 1840 (*d*).

On November 3, 1839, the Porte published an Ordinance for the regulation of its provinces and of its vassal States, called *Hatti-Sheriff of Gulhané* (*e*). This *Hatti-Sheriff* was followed by the promulgation of a collection of Laws called the *Tanzimat*, and this, with certain modifications, has been applied to Egypt by a *Firman décoré d'un Hatti-Sheriff* (*f*), of July 1852. This Firman appears to overrule the *Code d'Abbas*, which the present Pacha had established in Egypt.

This Firman can hardly be said to affect the International relations of the Pacha; the principal derogation from the Sovereignty of the latter consisting in the reservation to the Sultan of the power as to life and death over the subjects of the Pacha (*g*).

(*d*) See the *Acte de Soumission*, in the *Firman du* 13 *février* 1841; *Correspondence relative to the Affairs of the Levant*, vol. ii. 735 (London, 1841).

(*e*) See the *Morning Chronicle*, 27 November, 1839; the *Times*, 24 October, 1839.

(*f*) This has not yet been published, but it describes itself as—"Firman adressé à mon illustre et judicieux Vizir Abbas Halmi Pachà, actuellement et héréditairement Gouverneur de l'Égypte, avec le rang éminent de Grand Vizir."

(*g*) The following are extracts from this Firman:—"Comme résultat salutaire de ces sentimens, les Tanzimati-Hairiyé, qui renferment les principes d'équité et de justice que la Loi Sainte, dont les bases sont inébranlables, préscrit, out été institués, j'ai réussi à faire exécuter ces Tanzimat, qui conformément à mon Hatti-Sheriff qui a été lu, il y a quelque temps, sur la Place de Ghiulkaneh, assurent complètement la vie, la propriété, et l'honneur de toutes les classes des sujets de ma Sublime Porte établis dans mes états.

"D'après les lois générales de ma Sublime Porte, l'exécution des criminels qui doivent être mis à la Porte, soit en vertu de la loi du talion, soit par mesure d'administration, après les formalités nécessaires d'une enquête juridique et conforme aux lois réglementaires, dépend absolument de mes ordres souverains.

"Lorsque tu auras pris connaissance de mes ordres souverains, tu

In the *Separate Act* annexed to the *Convention,* concluded at London on the 15th of July, 1840, between the Courts of Great Britain, Austria, Prussia, and Russia on the one part, and the Sublime Ottoman Porte on the other, the International *Status* of Egypt is described in the following articles:—

"1. His Highness promises to grant to Mehemet Ali, for himself and for his descendants in the direct line, the administration of the Pachalic of Egypt; and his Highness promises, moreover, to grant to Mehemet Ali for his life, with the title of Pacha of Acre, and with the command of the fortress of Saint John of Acre, the administration of the southern part of Syria, the limits of which shall be determined by the following line of demarcation:—

"This line, beginning at Cape Ras-el-Nakhora, on the coast of the Mediterranean, shall extend direct from thence as far as the mouth of the River Seizaban, at the northern extremity of the Lake of Tiberias. It shall pass along the western shore of that lake. It shall follow the right of the River Jordan and the western shore of the Dead Sea. From thence it shall extend straight to the Red Sea, which it shall strike at the northern point of the gulph of Akaba; and from thence it shall follow the western shore of the gulph of Akaba, and the eastern shore of the gulph of Suez, as far as Suez.

"3. The annual tribute to be paid to the Sultan by Mehemet Ali shall be proportioned to the greater or less amount of territory of which the latter may obtain the administration, according as he accepts the first or the second alternative.

"5. All the Treaties and all the Laws of the Ottoman Empire shall be applicable to Egypt and to the Pachalic of

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auras, etc., soin que désormais aucune autorité, aucun employé n'ait à contrevenir en la moindre chose aux Tanzimat-Hairiyé, et tu mettras en pratique toutes les dispositions et tous les règlemens qui sont contenus dans le statut sus-mentionné. . . .

"Aie-le pour entendu et ajoute foi au noble chiffre dont est orné le présent commandement impérial, donné dans la dernière dizaine du mois Ramazan, l'an mil deux cent soixante-huit (vers la mi-juillet 1852)."

Acre, such as it has been above defined, in the same manner as to every other part of the Ottoman Empire. But the Sultan consents, that on condition of the regular payment of the tribute above mentioned, Mehemet Ali and his descendants shall collect—in the name of the Sultan, and as the delegate of his Highness, within the provinces the administration of which shall be confided to them—the taxes and imposts legally established. It is moreover understood that, in consideration of the receipt of the aforesaid taxes and imposts, Mehemet Ali and his descendants shall defray all the expenses of the civil and military administration of the said provinces.

"6. The military and naval forces which may be maintained by the Pacha of Egypt and Acre, forming part of the forces of the Ottoman Empire, shall always be considered as maintained for the service of the State" (*h*).

Recently the Sultan and the Turkish Government were alarmed and offended by what they conceived to be conduct on the part of the Viceroy or Khedive, indicating a claim on his part to be treated as an independent Sovereign. This alarm, it is supposed, was partly founded on the reception of the Viceroy, by the different Courts of Europe, on his visits to them; on his invitation to foreign Powers to be present at the opening of the Suez Canal; on certain steps which he had taken to attract strangers, and to found commercial establishments in Egypt, and on certain regulations with respect to the institution of schools; and also on account of the purchase of vessels and ammunition of war.

The Turkish Minister addressed a letter of complaint upon these and other subjects to the Viceroy, in reply to which he denied that he had ever gone "beyond the limits of the "rights and duties prescribed by the Imperial Firmans." The Porte however insisted upon certain conditions, which after diplomatic intervention the Viceroy accepted (*i*).

(*h*) *Hertslet's Treaties*, vol. v. pp. 547–549.

(*i*) See the Viceroy's defence at length, *Ann. Reg.* 1869, p. 273.

CHAPTER III.

STATES UNDER A FEDERAL UNION.

C. We now arrive at the second branch of this part of our subject—namely, the consideration of several States under a Federal Union. The examples in modern times of this description of States are the following:—

1. The Germanic Confederation (*Der Deutsche Bund*) (*a*), or the North German Confederation since 1866.
2. The Confederated Cantons of Switzerland.
3. The United Republics of North America.
4. The United Republics of Central and South America:—namely, first, The United Provinces of Guatemala, or the Republic of Central America; secondly, The United Provinces of Rio de la Plata, or the Argentine Republic.

CI. States under a Federal Union may be classed under two principal heads:—First. Those which have retained their Independent and Individual Sovereignty, especially as to the adjustment of their *external* relations with other Nations, and belong to a system of Confederated States only for purposes of domestic and *internal* policy, and of mutual assistance and defence (*Staatenbund*) (*b*).

But the Laws of this Federal Body have only effect and force in the separate members of the system through the agency and application of the particular laws and jurisdiction

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(*a*) *Deutsches Staats- und Bundesrecht von Zachariä*, erster Theil, kap. i. s. 21 (*Göttingen*, 1841): "Von dem zusammengesetzten Staate, der Union, und dem völkerrechtlichem Staatenvereine."

(*b*) *Zachariä*, ib. b. i. kap. i. s. 21. The other class is aptly designated *Bundesstaat*.

of each individual Government; therefore, as far as Foreign Power is concerned, these Confederated States must be considered as individually responsible for their conduct, and as separate Independent States. In this class must be ranked the existing Germanic Confederation.

Secondly. The Federal Union may be so adjusted that the management of the external relations of the respective members of the Union be absolutely vested in a Supreme Federal Power.

CHAPTER IV.

GERMAN CONFEDERATION.

CII. The history of the Germanic Confederation has had an important bearing on the general system of International Law, and of the public law of Europe. It has undergone a complete revolution since the first publication of this volume. Nevertheless it has seemed to me for various reasons expedient to add to rather than omit what had been then written.

The complete study of this subject requires a division of it into at least four epochs—

1. The original institution of the Confederation.

2. The remodelling of it in the year 1806.

3. The change effected by the Treaties of Vienna, 1815, 1820.

4. The entire destruction of this Confederation by Prussia, and the erection of a new Confederation united to Northern Germany in 1866.

CIII. (1) The ancient Germanic Empire (*a*), august and venerable for many reasons to the student of International Jurisprudence and Public Law, was virtually destroyed by Napoleon's Confederation of the Rhine, and must be considered as formally extinguished by the Act (*b*) of Abdication

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(*a*) *Deutsches Staats- und Bundesrecht, Zachariä*, band i. kap. ii. "Die Zeit des Deutschen Reichs." *Von dem Gesandschaftsrechte des Deutschen Bundes, Miruss*, i. p. 523. *Vattel*, ii. p. 338, s. 59.

(*b*) See the Act, *Martens' Rec. des Traités*, viii. p. 498; *Wheaton's History*, p. 70; *Hallam's Middle Ages*, vol. ii. c. 5; *Koch, Histoire des Traités*, c. i. s. 1 (par *Schoell*). The Germanic Constitution, and still more the Medieval Councils of the Church, are the institutions which have, in theory, made the nearest approach which perhaps the world has ever seen to an Universal International Tribunal.

of the Emperor Francis, in August 1806. (2) By this Act the Electors were absolved from their duty to him as head of the Empire, and his own German dominions were incorporated into the Austrian States, over which he henceforth ruled as Emperor of Austria.

CIV. The Germanic Confederation is to be distinguished from those confederated States which have indeed an Independent National Government, but have also a Central Federative Government which conducts the International relations of the Confederacy.

The deliberations of the Germanic Confederacy are conducted by a Diet, which sits at Frankfort-on-the-Maine, and is the established organ of the Confederacy, and the permanent congress of the plenipotentiaries of the States which are members of it (*c*).

It does not interfere with the internal arrangements of the individual members of the Confederacy, except in so far as they affect the general interests of the whole body; and each of these members communicates directly, and not through the medium of a central Government, with the Governments of Foreign Nations (*d*).

CV. (3) The Treaties which must be consulted upon this subject are—The Treaty of Vienna, 1815—the *Annexes* to that Treaty; the *Acte final* (*Wiener Schlussacte*) signed at Vienna May 15, 1820; the *Loi organique*, which settles the military constitution of the Confederation; the Act of the Diet of the 28th of June, 1832, and of the 30th of October, 1834.

By the fourth, fifth, and sixth articles of the Act which settled the Constitution of the German Confederation at the Congress of Vienna, it was provided, That, in the Federative Diet, all the members vote by their plenipotentiaries, either individually or collectively:—

(*c*) *Zachariä*, ib. iii. ss. 223, 11; ss. 261, 1.

(*d*) The Diplomatic intercourse of the German Confederation, as such, with other nations, will be considered hereafter.—*Zachar*. ib. s. 262.

	Votes
Austria	1
Prussia	1
Bavaria	1
Saxony	1
Hanover	1
Wurtemburg	1
Baden	1
Electoral Hesse	1
The Grand Duchy of Hesse	1
Denmark (for Holstein)	1
The Netherlands (for Luxemburg)	1
The Grand Ducal, and Ducal Houses of Saxony	1
Brunswick and Nassau	1
Mecklenburg, Schwerin, and Strelitz	1
Oldenburg, Anhalt, and Schwartzburg	1
Hohenzollern, Lichtenstein, Reuss, Schaumburg, Lippe, Waldeck, and Hesse Homburg	1
The Free Cities of Lubeck, Frankfort, Bremen, and Hamburg	1
(e) Total	17

Austria presides over the Diet. Each State has a right to make propositions, under limitations as to time fixed by the President. Whenever Fundamental Laws are to be proposed or altered, when Organic Institutions or other arrangements of a common interest are to be adopted, the Diet resolves itself into a General Assembly, and the votes are taken as follows:

	Votes
Austria	4
Prussia	4
Saxony	4
Bavaria	4
Hanover	4
Wurtemburg	4
Baden	3
Electoral Hesse	3
The Grand Duchy of Hesse	3
Holstein	3
Luxemburg	3

(e) *De Martens et De Cussy, Rec. de Tr.* tom. iii. p. 145. *Wheaton on International Law*, vol. i. pp. 70, 71.

	Votes
Brunswick	2
Mecklenburg Schwerin	2
Nassau	2
Saxe-Weimar	1
Saxe-Gotha	1
Saxe-Coburg	1
Saxe-Meiningen	1
Saxe-Hilburghausen	1
Mecklenburg-Strelitz	1
Oldenburg	1
Anhalt-Dessau	1
Anhalt-Bernburg	1
Anhalt-Coethen	1
Schwartzburg-Sondershausen	1
Schwartzburg-Rudolstadt	1
Hohenzollern-Hechingen	1
Lichtenstein	1
Hohenzollern-Sigmaringen	1
Waldeck	1
Reuss (elder branch)	1
Reuss (younger branch)	1
Schaumburg-Lippe	1
Lippe	1
Hesse-Homburg	1
The Free City of Lubeck	1
,, ,, Frankfort	1
,, ,, Bremen	1
,, ,, Hamburg	1
(*f*) Total	70

CVI. By the sixth article of the Treaty of Paris (1814), it was stipulated that "the States of Germany should be "independent, and united by a Federal League."

By the Federal Act (*g*) of 1815, the possessions of those Sovereigns and Free Towns "which had anciently apper-"tained to the German Empire" were anew incorporated into a League, entitled "The German Confederation" (*h*).

By the eleventh article of the *Annexe* to the Treaty, it was provided, that—

(*f*) *De Martens et De Cussy, Rec. de Tr.* tom. iii. pp. 146, 147. *Wheaton on International Law*, vol. i. pp. 71, 72.

(*g*) See *Annexe* 9 of the Final Act of the Congress of Vienna.

(*h*) *Martens, Nouv. Rec.* ii. p. 516.

"(Art. 11.) The States of the Confederation bind themselves to defend, not only the whole of Germany, but also each individual State of the Union, in case it should be attacked, and mutually guarantee all their possessions included in this Union.

"When war is declared by the Confederation, no member can engage in separate negotiations with the enemy, nor make peace, or a truce, without the consent of the others.

"The members of the Confederation, whilst reserving to themselves the right of forming alliances, bind themselves not to contract any engagement which shall be directed against the security of the Confederation, or of the individual States of which it is composed (*i*).

"The Confederated States bind themselves not to make war against each other under any pretext, and not to prosecute their controversies by force of arms, but to submit them to the Diet, which shall endeavour to mediate through the medium of a Commission; and if this fail, and a judicial sentence be necessary, it shall be obtained by an *Austregal Tribunal* (*Austregal Instanz*) properly constituted, from which there shall be no appeal" (*k*).

The Act of 1815, so incorporated in the Treaty of Vienna, was completed by the First Act of 1820 (May 15). This Act contains the following articles as to their *Mutual* International Relations (*l*):—

"Art. 1. The Germanic Confederation is an *International union* (völkerrechtlicher Verein) of sovereign princes and free cities of Germany, for the preservation of the independence and inviolability of the States comprised in the Confederation, and for the maintenance of the internal and external security of Germany.

"Art. 2. This union is, in its relations, a self-subsisting

(*i*) This clause is not in the body of the Treaty; see s. 63.

(*k*) *Annexe* to the Treaty, *De M. et De C.* i. p. 145.

(*l*) Confédération germanique.—*De Martens et De Cussy, Rec. de Traités*, &c., vol. iii. pp. 463, 464. *Wheaton's History*, p. 445.

Association of States, mutually independent of one another, with equal reciprocal rights and obligations; but, in its external relations, a collective power combined in political unity.

"Art. 3. The extent and limits which the Confederation has marked out for its operation are defined by the Federal Act, which is the original compact and first groundwork of this union: whilst it announces the object of the Confederation, it provides and determines at the same time its powers and obligations.

"Art. 4. The power of developing and perfecting the Federal Act, so far as the completion of the object therein set forth may require, belongs to the assembly of the members of the Confederation. The resolutions, however, to be adopted for this purpose may not contravene the spirit of the Federal Act, nor deviate from the fundamental character of the Confederation."

CVII. The following articles respect the International relations of the Confederation with other States, both with respect to its corporate capacity, and with respect to the individual members under its protection. And, first, it should be observed, that by the fiftieth article of the *Acte Final* (*Wiener Schlussacte*) of 1820, it is provided:

"That, with respect to Foreign Affairs in general, it is the duty of the Diet—

"1. As the organ of the Confederation, to watch over the maintenance of peace and amicable relations with Foreign States.

"2. To receive the Envoys accredited by Foreign States to the Confederation, and to nominate, *if it should be thought necessary*, ministers to represent the Confederation at Foreign Courts.

"3. To conduct, when it may be necessary, negotiations, and conclude treaties on behalf of the Confederation.

"4. To interpose with Foreign States good offices on behalf of those members of the Confederation who desire them, and to employ the same agency with the

separate States, members of the Confederation, on behalf of Foreign Governments who ask for such intervention."

By the thirty-fifth article it is declared, that "The Germanic Confederation has the right, as a collective body, to declare war, make peace, and contract alliances, and negotiate treaties of every kind; nevertheless, according to the object of its institution, as declared in the second article of the Federal Act, the Confederation can only exercise these rights for its own defence, for the maintenance of the external security of Germany, and the independence and inviolability of each of the States of which it is composed.

"Art. 36. The Confederated States having engaged, by the eleventh article of the Federal Act, to defend against every attack Germany in its entire extent, and each of its Co-States in particular, and reciprocally to guarantee the integrity of their possessions, comprised in the union, no one of the Confederated States can be injured by a Foreign Power, without at the same time, and in the same degree, affecting the entire Confederation.

"On the other hand, the Confederated States bind themselves not to give cause for any provocation on the part of Foreign Powers, or to exercise any towards them. In case any Foreign State shall make a well-grounded complaint to the Diet of an alleged wrong committed on the part of any member of the Confederation, the Diet shall require such member to make prompt and satisfactory reparation, and take other necessary measures to prevent the disturbance of the public peace.

"Art. 37. Where differences arise between a Foreign Power and any State of the Confederation, and the intervention of the Diet is claimed by the latter, that body shall examine the origin of the controversy, and the real state of the question. If it results from this examination that such State has not a just cause of complaint, the Diet shall engage such State, by the most earnest representations, to desist from its

pretensions, shall refuse its intervention, and, in case of necessity, take all proper means for preserving peace. Should the examination prove the contrary, the Diet shall employ its good offices in the most efficacious manner, in order to secure to the complaining party complete satisfaction and security.

" Art. 38. Where notice received from any member of the Confederation, or other authentic information renders it probable that any of its States, or the entire Confederation, are menaced with a hostile attack, the Diet shall examine into and pronounce without delay upon the question whether such danger really exists; and if determined in the affirmative, shall adopt the necessary measures of defence.

" This resolution and the consequent measures are determined in the permanent council by a plurality of votes.

" Art. 39. When the territory of the Confederation is actually invaded by a Foreign Power, the state of war is established by the fact of invasion; and whatever may be the ultimate decision of the Diet, measures of defence, proportioned to the extent of the danger, are to be immediately adopted.

" Art. 40. In case the Confederation is obliged to declare war in form, this declaration must proceed from the general assembly determining by a majority of two-thirds of the votes.

" Art. 41. The resolution of the permanent council declaring the reality of the danger of a hostile attack renders it the duty of all the Confederated States to contribute to the measures of defence ordained by the Diet. In like manner, the declaration of war, pronounced in the general assembly of the Diet, constitutes all the Confederated States active parties to the common war.

" Art. 42. If the previous question concerning the existence of the danger is decided in the negative by a majority of votes, those of the Confederated States who do not concur in the decision of the majority, preserve the right of concerting between themselves measures of common defence.

" Art. 43. Where the danger and the necessary measures

of defence are restricted to certain States only of the Confederation, and either of the litigating parties demands the mediation of the Diet, the latter body may, if it deems the proposition consistent with the actual state of things, and with its own position, and if the other party consents, accept the mediation; provided that no prejudice shall result to the prosecution of the general measures for the security of the territory of the Confederation, and still less any delay in the execution of those already adopted for that purpose.

"Art. 44. War being declared, each Confederated State is at liberty to furnish for the common defence a greater amount of forces than is required as its legal contingent; but this augmentation shall not form the ground of any claim for indemnity against the Confederation.

"Art. 45. Where in case of war between Foreign Powers, or other circumstances, there is reason to apprehend a violation of the neutral territory of the Confederation, the Diet shall adopt without delay, in the permanent council, such extraordinary measures as it may deem necessary to maintain this neutrality.

"Art. 46. Where a Confederated State, having possessions without the limit of the Confederation, undertakes a war in its character of a European Power, the Confederation, whose relations and obligations are unaffected by such war, remains a stranger thereto.

"Art. 47. Where such State finds itself menaced, or attacked, in its possessions not included in the Confederation, the latter is not bound to adopt defensive measures, or to take any active part in the war, until the Diet has recognized in the permanent council, by a plurality of votes, the existence of a danger threatening the territory of the Confederation. In this last case, all the provisions of the preceding articles are equally applicable.

"Art. 48. The provision of the Federal Act, according to which, when war is declared by the Confederation, none of its members can commence separate negotiations with the enemy, nor sign a treaty of peace or armistice, is equally

applicable to all the Confederated States, whether they possess or not dominions without the territories of the Confederation.

"Art. 49. In case of negotiations for the conclusion of a peace or armistice, the Diet shall confide the special direction thereof to a select committee named by that body, and shall appoint plenipotentiaries to conduct the negotiations according to instructions, with which they shall be furnished. The acceptance and confirmation of a treaty of peace can only be pronounced in the general assembly" (*m*).

CVIII. The Federal Constitution was modified by a decree of the Diet at Frankfort (30th October) 1832, and still further by an act of 1834; but these modifications, whether desirable or not, were pronounced by the British Minister for Foreign Affairs to involve no point which concerned the foreign relations of the different States with other States, and, therefore, not to found any just ground for their interference (*n*). But in 1834 the British Minister at the Germanic Diet protested against the occupation of Frankfort by Austrian and Russian troops as a violation of the Treaty of Vienna, and said, "The Germanic Confederation has been "created by the Treaty of Vienna; and, as to its relations "with other States, the rights of the Confederation, its "powers, and its obligations, are to be sought for in the "stipulations alone" (*o*).

It would not be within the limits of this work to describe

(*m*) *Martens, Nouveau Recueil,* tom. v. pp. 467–501; *De M. et De C.* i. p. 463; *Wheaton's Law of Nations,* pp. 457–460; *Relations of the Duchies of Schleswig and Holstein.—Twiss,* p. 111; *Zachar.* ib. 111, s. 261.

(*n*) *Wheaton's History,* 460, 468, 470, 472, 483. *Mr. Bulwer's Speech in the House of Commons,* August 2, 1832; and *Lord Palmerston's Reply.—Hansard's Parliamentary Debates* (third series), vol. xiv. pp. 1020–1049.

(*o*) *Zachariä,* ib. b. iii.; kap. iii. s. 256: "Streitigkeiten über Auslegung und Anwendung der Verfassung."—*Bundesschiedsgericht von* 1834. *The Relation of Schleswig and Holstein,* by Dr. *Twiss,* p. 119; 1 *Wheaton, Elém.* p. 65.

the various attempts made to remodel the Germanic Confederation, extending from the month of February 1848, to the 15th of May 1851. The end of the revolutionary agitation which distracted Germany during this period is the restoration of the Frankfort Diet as it had existed since 1815 (*p*).

CIX. From what has been stated, the following propositions appear to be legitimately deduced:—

First. That the Germanic Confederation maintains with those who are members of that league relations of a special International character, resting entirely upon the Federal Act of 1815, and further explained by that of 1820, as their sole foundation; but that all the members of this league are governed in their relations with other Independent States by the general International Law.

Secondly. That the mutual rights and duties of the members of this Confederation are wholly distinct from those which exist between them and other States, not members of the Confederation.

Thirdly. That the operation of the duties and rights growing out of the constitution of the Confederation is not only exclusively confined to the Independent Sovereigns who are members of it, but also to the territories which belong to them, by virtue of which they were originally incorporated into the Germanic Empire (*q*).

Fourthly. That the admission of new States, *not being German*, into the Confederation, or the admission of States *not sovereignties*, would conflict with the principle and the objects of the Confederation (*r*).

If these propositions be sound in point of law and reason, it follows that neither territories belonging to these sovereigns at that time, nor subsequently acquired territories, can be engrafted into this Confederation without the consent of

(*p*) *Annual Register*, vol. xciii. p. 277.

(*q*) *Zachariä*, ib. band iii. s. 219: "Begriff und Zweck des Deutschen Bundes."

(*r*) *Zachariä*, ib. s. 222.

other nations, especially of those who were parties to the Treaty of Vienna.

CX. The events of our own day have called for very important practical applications of these principles: first, in the case of the Duchies of Schleswig and Holstein (*s*), as to the relation in which they stood to the Crown of Denmark on the one hand, and to the Germanic Confederation on the other: Schleswig having been a fief of the Danish Crown from the period of its first creation as a Duchy up to the year 1658, and having since that time been annexed to the Gottorp Duchy, and having been afterwards re-annexed with Gottorp to Denmark, and never having been directly connected with the German Empire; Holstein, on the contrary, having been a German fief.

Those who argued for the German side (as it was called) of the question, contended, that because the King of Denmark was subject, as Duke of Holstein, to the laws of the Confederation with respect to that Duchy, therefore his Duchy of Schleswig was also subject to the same condition. It was answered irresistibly, it would seem, so far as justice, practice, and the reason of the thing are concerned, that it might as well be said that his province of Jutland was subject to the Confederation; that the King of Holland, by reason of his Duchy of Luxemburg, had not subjected Belgium to the Confederation; and that the members of it had not pretended to interfere as to the separation of Belgium from Holland, though they had done so as to the arrangements with respect to the Duchy of Luxemburg. On the establishment of the kingdom of Belgium, Luxemburg was divided, half being given to Belgium, and half remaining to Holland; the German Confederation being compensated by the admission into its membership of the newly-created Duchy of

(*s*) *The Relations of the Duchies of Schleswig and Holstein to the Crown of Denmark and the Germanic Confederation*, by Dr. *Twiss*, chap. v. p. 103.

Limburg (*t*). Another case which gave rise to a discussion as to the practical application of the principles of the German Confederation was the alleged attempt or desire of Austria to incorporate her Hungarian, Croatian, and Italian Dominions into the German Confederation; to which attempt the Powers who guaranteed the Treaty of Vienna had an unquestionable right to refuse their consent, and which right they might hold themselves bound by their obligations, both with respect to themselves and to the general peace of the world, to exert (*u*).

CXI. (4) We have now arrived at the last, but, in spite of present appearances, perhaps not the final resolution of the Germanic Confederation. In its relation to Foreign States, it had been of little practical importance since the Treaty of Vienna. This was owing to the constant rivalry between the two greatest members of it, Austria and Prussia —a rivalry which was terminated in 1866, in a manner which had not been foreseen or expected by the European Powers, although the outbreak of democracy, in the years 1848 and 1849, had ended in greatly strengthening the power and authority of Prussia. In 1863 the Emperor of Austria convened the German Sovereigns at Frankfort to consider the form of the Federal Union. Prussia refused to take any part in this convention, and at that time probably began to prepare, in secret, the first steps for obtaining the supremacy for herself over the German Confederacy, and for excluding Austria from all future participation therein. After the death of the King of Denmark, the claims of the German people with respect to the Duchies of Holstein and Schleswig ought to have been enforced, if they were founded upon justice, by the intervention (*x*) of the Diet; but Austria was induced by Prussia, under the pretext of restraining

(*t*) *Zachariä*, ib. s. 221. II. D.

(*u*) See the note on this subject of the French and English to the Austrian Government in the Appendix to the second volume of the *Annuaire* 1852–3, by the editors of the *Revue des Deux Mondes*.

(*x*) By what was technically termed "a Federal execution."

democracy, to participate with her in the invasion of Denmark. From that moment, Prussia saw her way to expel Austria from the supremacy in Germany, which she intended to obtain for herself.

In 1864 "much-wronged Denmark" (*y*), left alone without allies, was compelled, by the overwhelming military forces of Austria and Prussia, to cede to them the Duchies of Schleswig, Holstein, and Lauenburg (*z*).

A dispute rapidly arose between Austria and Prussia with respect to the right of succession to the Duchies of Schleswig and Holstein. This right they had both previously recognized as being vested in the hereditary Prince of Augustenburg. Prussia soon showed the determination, which she afterwards executed, of annexing to her own territories the Elbe Duchies. The other Powers of Europe did not interfere, otherwise than by diplomatic remonstrance, to maintain the public law of Europe, as contained in the Treaties of 1815 upon this question. The Diet attempted to intervene, but Prussia denied its competence, and refused to be bound by its jurisdiction. On the 14th of August, 1865, the Treaty of Gastein embodied a sort of compromise between Austria and Prussia, whereby the former was to take Holstein and the latter Schleswig. But this treaty did not avail to prevent an open breach between these two great Powers, which shortly afterwards took place. The Diet again, in vain, attempted to intervene. Prussia allied herself with Italy, and a war with Austria ensued. In this war the Diet endeavoured to support her rights, by bringing into the field an army composed of the troops of divers Federal States. Bavaria, Hanover, and Saxony became the allies of Austria. The result is well known. Prussia, by her superior military organization, and the important aid of Italy, obtained, in 1866, a complete victory over her rival. The Treaty of

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(*y*) *Sir A. Malet, Overthrow of the Germanic Confederation*, p. 385; see also p. 29.

(*z*) See Article iii. Treaty of Vienna, Oct. 30, 1864.

Prague was signed on the 23rd of August, 1866, between the two Powers, the exact contents of which, so far as they affect the present question, have been already mentioned (*a*); but I will state here the general conclusion in the language of the most recent, and certainly not the least competent, historian of the Germanic Confederation.

"The peace agreed on at Nicolausberg was signed at "Prague, and ratified on the 30th of July. The dissolution "of the Germanic Confederation was thereby recognized, "and Austria, engaging to abstain from all interference in "the reconstruction of Germany, gave her assent before-"hand to all such territorial changes as Prussia saw fit to "make, on the sole condition that Saxony should remain "intact. Austria likewise ceded all pretensions to con-"dominate right with Prussia in the Elbe Duchies, stipu-"lating, however, that North Schleswig should be entitled "to vote upon the question of eventual re-union with "Denmark.

"Saxony it was decided should be united to the North "German Confederation; and special arrangements as to "the army, the police, and post-office were made with that "Government, which left King John few remains of inde-"pendence or royal prerogative, excepting the right of "imposing taxes on his subjects.

"Prussia took possession of Hanover, of Electoral Hesse, "Nassau, and the formerly free city of Frankfort-on-Main, "as well as that of Schleswig and Holstein, besides the "territorial cessions made by Bavaria and Grand-Ducal "Hesse, in full sovereignty; and here it may be remarked "that, in spite of many remonstrances, the article of the "Treaty of Prague relating to the vote of North Schleswig "for re-union with Denmark remains to this day (the author "writes in 1870) unexecuted (*b*)."

(*a*) *Vide antè*, p. 49.

(*b*) *The Overthrow of the Germanic Confederation by Prussia in*

Germany now presents a new International aspect to Foreign States—a North German Confederation, diplomatically represented as such, but really under the absolute control of Prussia; and Southern States, not formed as yet into a South German Confederation, but of which Austria is the most powerful State.

With respect to Northern Germany, a treaty of confederation was entered into between the Governments of Prussia, Saxe-Weimar, Oldenburg, Brunswick, Sachsen-Altenburg, Sachsen-Coburg-Gotha, Anhalt, Schwartzburg-Sondershausen, Schwartzburg-Rudolstadt, Waldeck, Reuss (of the younger line), Schaumburg-Lippe, Lippe, Lübeck, Bremen, and Hamburg. By this treaty it was agreed that a confederate constitution should be adopted by a German Parliament, and the troops of the confederates were to be under the supreme command of the King of Prussia. They mutually agreed to maintain "the inde-"pendence and integrity" of the contracting States, and guaranteed the defence of their territories (*c*).

The enormous military preponderance which Prussia thus obtained, not only in Germany, but in Europe, and the complete disturbance of the previously existing balance of power, are obvious and indisputable facts; but the matter does not rest here, for in 1867 it was discovered that she had concluded a secret treaty, identical in its provisions, with the four States of Bavaria, Wurtemburg, Baden, and Hesse-Darmstadt. It was, in its fullest sense, an offensive and defensive alliance with each of them, with the peculiar feature of placing the whole military force of each State under the orders of the King of Prussia in case of war (*d*). The formidable use which can be made of this treaty has

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1866, p. 380, by *Sir Alexander Malet*, late H.M. Envoy Extraordinary and Minister Plenipotentiary at Frankfort.

(*c*) *Ann. Reg.* 1866, p. 247. See also *Ann. Reg.*, 1868, p. 220.

(*d*) See *Sir Alexander Malet's Overthrow of the Germanic Confederation*, pp. 376-7.

been speedily shown in the existing war between Prussia and France.

CXII. II.—The second class of Federal States embraces those which (*e*), by the terms of their confederation, vest the adjustment of their external relations in a Supreme Federal Power. (*Unio civitatum—État composé—Bundesstaat—unirte Staaten—Staaten - Vereine*). The Achæan League and the united provinces of the Netherlands furnish memorable illustrations of such a confederation (*f*).

CXIII. To this denomination belongs, at the present day, the Confederation of the Swiss Cantons (*g*). The *Thirteen* Cantons of Switzerland had for some time previous to the Treaty of Westphalia been *de facto* independent (*h*), but that Treaty formally recognized their existence as Independent

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(*e*) "In these days, their union is so entire and perfect, that they are not only joined together in bonds of friendship and alliance, but even make use of the same laws, the same weights, coins, and measures, the same magistrates, counsellors, and judges; so that *the inhabitants of this whole tract of Greece seem in all respects to form but one single city*, except only that they are not enclosed within the circuit of the same walls; in every other point, both through the whole Republic and in every separate State, we find the most exact resemblance and conformity."—*Hampton's Polybius*, vol. i. p. 224.

Polyb., Hist. l. ii. c. iii.; *Bynkershoek, Quæst. Jur. Publ.* l. ii. c. xxiv.

Burlamaqui, Principes du Droit politique, pt. ii. ch. i. s. 43.

The Federalist (*American*).

(*f*) *Manuel du Droit public de la Suisse.*

Handbuch der Schweizerischen Staaten.

Wheaton, Elém. du Droit intern. l. i. pp. 72, 73.

Wheaton, Hist. pp. 492–496.

(*g*) See *Martens, Nouv. Rec.* t. ii. p. 68; t. iv. pp. 161, 273; t. vii. p. 173; and *De M. et De C.* t. iii. pp. 14, 38, 89, 197, 242, for the following treaties relating to the Swiss Confederation: "1814. Paix de Paris, Art. vi. 3. La Suisse indépendante continuera de se gouverner par elle-même." "1814, 16 août. Les *Dix-neuf* Cantons, Traité d'alliance pour la conservation de leur liberté et indépendance." "1815, 7 août. Acte de Confédération entre les *Vingt-deux* Cantons helvétiques, signé à Zurich." "1815, 20 novembre. Acte signé à Paris par les plénipotentiaires d'Autriche, de France, de la Grande-Bretagne, de Prusse, et de Russie, par lequel la neutralité de la Suisse a été reconnue."

(*h*) *Koch, Hist. des Tr.* i. iii.

States. The effects of the French Revolution in 1789 were severely felt in Switzerland. The Cantons, in consequence of the separation of various districts, were increased, first to the number of nineteen, and finally to the number of twenty-two. Their internal dissensions brought about an Act of Mediation under Buonaparte in 1803, and subjected them to the invasion of the Allied Powers in 1813.

In 1815 the claims of the conflicting Cantons were adjusted, and the Confederation re-modelled at the Congress of Vienna; and in the same year (August 7) the number of the Cantons was increased to twenty-two by the Federal Act, signed at Zurich, and their neutrality was recognized (November 20) by an Act signed by the Allied Powers at Paris.

CXIV. According to the Federal Act of 1815, the Swiss Confederation consists of the union of twenty-two Cantons. The object of their union is declared to be the preservation of their liberty and independence, security against foreign invasion, and the maintenance of internal public tranquillity and order. They mutually guarantee their respective territories and constitutions. Their Diet is formed by a Congress of Deputies, one being delegated from each Canton, and each having equally a single voice in the deliberations of this common senate. It assembles every year, alternately, at Berne, Zurich, and Lucerne—these being the Cantons (*Vorort*) in which the executive power of the Confederation resides when the Diet is not actually sitting. The Diet has the exclusive power of declaring war, of entering into treaties of peace, commerce, and alliance with Foreign States. These negotiations, however, require the assent of three-fourths of the Diet, though in other matters a simple majority suffices for the validity of the resolution.

It is competent, however, to each Canton separately to conclude with Foreign Powers treaties which have for their object regulations of revenue and police; provided always that they do not conflict with the Federal Convention, the Existing Alliances, or the Constitutional Rights of other

Cantons. The Confederation has a common army and treasure, supported by levies of men and contributions of money, according to fixed proportions, from each Canton.

The Diet is responsible for the internal and external security of the Confederation. It appoints the commanding officers, and directs the operations of the Federal army, and moreover nominates the Federal Ministers at Foreign Courts.

CXV. Since the year 1830 the separate constitutions of each of the Cantons has received a more or less democratic modification, but the attempts to alter the principle of the Federal Act of 1815 have failed. Bâle, Unterwalden, and Appenzell have been subdivided, and the subdivisions added to the number of the Confederated Cantons, which is thereby increased to twenty-five; but the number of votes in the Diet is still limited to twenty-two, each division of these three Cantons enjoying only half a vote. Before the French Revolution, it was competent to each Canton to enter into a special alliance both with another Canton and with a Foreign State (*i*); but it is clear, from what has been stated, that no individual member of this Federal Body, since the Federal Act of 1815, has the character and position—or, as civilians say, the *persona standi*—of a separate independent nation.

CXVI. This subject should not be dismissed without the observation, that one of the Swiss Cantons, Neufchâtel, a few years ago bore the title of a Principality, and was placed in some, though it may be doubtful in what, degree under the *Suzeraineté* of the King of Prussia (*k*).

(*i*) *Merlin, Répertoire de Jurisprudence,* tit. "Ministre public."

Wheaton, Élém. i. pp. 73, 74. *Annuaire des Deux Mondes,* 1850, p. 294; 1851-2, p. 188.

(*k*) "Extrait du manifeste publié par l'Ambassadeur du Roy de Prusse au sujet des affaires de Neufchâtel, 1707."—*Schmauss,* ii. p. 1205.

"Articles généraux dressés et proposés au nom, etc., de la Principauté de Neufchâtel et de Valangin—agréés et accordés par l'Ambassadeur de S. M. le Roy de Prusse, 1707."—*Ib.* p. 1209.

"Mémoire, etc., 1707."—*Ib.* pp. 1211, 1212.

"Articles accordés par le Roy de Prusse, Frédéric I, à la ville de

After the death of Marie de Longueville, Duchess of Nemours, in 1707, the States of Neufchâtel transferred the fief of their principality to the King of Prussia, as the representative of the House of Chalons, with a reservation of their liberties and of their Treaties of Alliance with the Swiss Cantons.

The ninth article of the Treaty of Utrecht recognized this act of the States of Neufchâtel, and so the relations between Prussia and Neufchâtel continued till 1805, when Prussia ceded the Principality to Napoleon. It was restored, however, at the Peace of Paris, to Prussia, from whom, in 1814, it received a new constitutional form of government. But Neufchâtel was subsequently admitted into the new Helvetic Confederation, its relations to which were defined by the 9th article (*l*) of the *Acte* (April 7, 1815) which reunited Neufchâtel, Geneva, and Valais to the Helvetic Confederation, and declared that "The sovereign State of Neufchâtel "is received as a Canton into the Swiss Confederation. "This reception takes place under the express condition that "the fulfilment of all the duties which devolve upon the "State of Neufchâtel as a member of the Confederation, the "participation of that State in deliberations on the general "affairs of Switzerland, the ratification and performance of "the resolutions of the Diet, shall exclusively concern the "Government residing in Neufchâtel, without requiring any "further sanction or assent."

CXVII. In 1847–8, Switzerland, like the rest of Europe, was agitated by a civil war, with respect to which the States of Neufchâtel resolved to maintain a strict neutrality.

Neufchâtel, 1707."—*Schmauss*, ii. p. 1213, in which the King of Prussia is described (p. 1217) as "Prince Souverain de Neufchâtel et Valengin."

In the *Treaty of Utrecht* (1713) the authority of the King of Prussia is fully recognized.—*Ib.* p. 1361, and p. 1369, art. ix. of that part of the treaty which concerns the relations of France and Prussia. The King of Prussia is acknowledged "*pro supremo Domino Principatûs Neo-Castri et Vallengiæ.*"

(*l*) *Martens*, t. iv. pp. 168, 170. Aufnahmsurkunde des Cantons *Neuenburg.*

The King of Prussia supported them in this resolution; but the extreme party constituting the then majority in the Swiss Diet declared that this resolution was inconsistent with the terms of the stipulation by which Neufchâtel was incorporated into the union (*m*). After undergoing the evils of a revolutionary war, Neufchâtel returned to its ancient relations with Prussia (*n*). But in 1857 Prussia renounced her rights over this Principality, which became a member of the Helvetic Confederation.

(*m*) *Annuaire historique universel*, 1848–9, ch. viii. p. 515; *Suisse*, *Ib.* 1850, ch. vii. p. 487.

(*n*) "Neufchâtel ist seit dem Wiener Congress-Abschied ein souverainer (monarchischer) Schweizer Canton."—Note of *Morstadt* (1851) to his edition of *Klüber's Völkerrecht.*

Annuaire des Deux Mondes, 1850, p. 301.

Vide antè, p. 95 and note *e*.

CHAPTER V.

UNITED STATES OF NORTH AMERICA.

CXVIII. THE United States of North America (*a*) furnish the greatest example which the world has yet seen of a Federal Government.

The constitution of the United States of North America differs materially from that of the Germanic Confederation: the latter was a league of Sovereign States for their common defence against external and internal violence; the former is a Supreme Federal Government—it is, in fact, a Composite State, the constitution of which affects not only members of the union, but all its citizens, both in their individual and in their corporate capacities (*b*).

According to the language of the charter or act of the Constitution, it was established by "the people of the "United States, in order to form a more perfect union, "establish justice, ensure domestic tranquillity, provide for "the common defence, promote the general welfare, and "secure the blessings of liberty to them and their posterity." The Legislative power of the union is vested in a Congress, consisting of a Senate, the members of which are chosen by the local legislatures of the several States, and of a House of Representatives, chosen by the people in each State.

The Executive power is lodged in a President, chosen by electors appointed in each State according as the legislature thereof may direct. The powers of Congress and of the President, so far as they affect the International relations

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(*a*) *Wheaton's International Law; Story's Commentaries on the Constitution of the United States; Kent's Commentaries on American Law.*

(*b*) *Texas* v. *White*, 7 *Wallace's Reports in the Supreme Court*, 560.

of the United States with other countries, are expressed in the following articles of the Constitution, which was finally ratified by the thirteen States in 1790 (*c*):—

ART. I.—Sect. 8.

CXIX. "1. To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States.

"2. To borrow money on the credit of the United States.

"3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

"4. To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States.

"10. To define and punish piracies and felonies committed on the high seas, and offences against the law of nations.

"11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water" (*d*).

Sect. 10.

"1. No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

"2. No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the nett produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of

(*c*) The articles of the *Confederation* were finally ratified in 1781. It was superseded by the *Constitution* in 1790.

(*d*) *Story's Commentaries on the Constitution of the United States*, pp. xxi., xxii. of "The Constitution."

the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress. No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State or with a Foreign Power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay" (*e*).

ART. II.—Sect. 2.

"2. The President shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the Senate shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the Courts of Law, or in the heads of departments" (*f*).

Sect. 3.

"1. He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient. He may, on extraordinary occasions, convene both Houses, or either of them; and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper. He shall receive ambassadors and other public ministers. He shall take care that the laws be faithfully executed, and shall commission all the officers of the United States" (*g*).

ART. III.—Sect. 1.

"1. The judicial power of the United States shall be vested in one Supreme Court, and in such Inferior Courts

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(*e*) *Story*, p. xxiv. (*f*) *Ib.* p. xxvi. (*g*) *Ib.*

as the Congress may from time to time ordain and establish. The judges, both of the Supreme and Inferior Courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office" (*h*).

Sect. 2.

"1. The judicial power shall extend to all cases, in law and equity, arising under this Constitution,—the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens, or subjects (*i*).

"2. In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make" (*j*).

Art. IV.—Sect. 2.

"1. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States" (*k*).

Sect. 3.

"1. New States may be admitted by the Congress into this union, but no new State shall be formed or erected within the jurisdiction of any other State, nor any State be formed by the junction of two or more States, or parts of

(*h*) *Story*, p. xxvii. (*i*) *Ib.* (*j*) *Ib.* p. xxviii. (*k*) *Ib.*

States, without the consent of the legislatures of the States concerned, as well as of the Congress" (*l*).

It is remarkable that no provision on this subject is to be found in the Articles of the *Confederation* finally ratified in 1781. The contingency of the establishment of new States within the limits of the Union seems to have been wholly overlooked by the framers of the instrument of the Confederation. Under the provisions of the present article vast regions first organized as territories have subsequently been admitted as States into the Union, upon an equality with the original States (*m*).

With respect to a "territory" not yet admitted into the category of a State, the Supreme Court has laid down the law as follows:—

"The United States, under its present Constitution, "cannot acquire territory to be held as a colony to be "governed at its will and pleasure. But it may acquire "territory, which, at the time, has not a population that fits "it to become a State, and may govern it as a territory until "it has a population which, in the judgment of Congress, "entitles it to be admitted as a State of the Union. During "the time it remains a territory, Congress may legislate "over it within the scope of its constitutional powers in "relation to citizens of the United States, and may establish "a Territorial Government; and the form of this local "Government must be regulated by the discretion of "Congress, but with powers not exceeding those which "Congress itself, by the Constitution, is authorized to "exercise over citizens of the United States, in respect to "their rights of person or rights of property. The territory

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(*l*) *Story*, p. xxix.—See opinions of the Attorney-General of the United States (published at Washington, 1841), vol. i. p. 311, as to the conditions under which the State of Illinois entered the Union.

Résolution du Congrès des États-Unis pour l'admission du Texas au nombre des États de l'Union du 22 décembre 1845.—*Vide De M. et C.* 599.

(*m*) *Story*, b. iii. c. xxx.

The Neutrality of Great Britain during the American Civil War. M. Bernard, 1870.

"thus acquired is acquired by the people of the United "States for their common and equal benefit; and every "citizen has a right to take with him into the territory any "article of property, including his slaves, which the "Constitution recognizes as property, and pledges the "Federal Government for its protection" (*n*).

This last proposition has been much controverted; though happily, since the abolition of slavery, that controversy has ceased to be important.

"2. The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State" (*o*).

Sect. 4.

"1. The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence" (*p*).

Art. VI.

"2. This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding" (*q*).

Art. XI.—Amendments.

"The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens

(*n*) *Dred Scott* v. *Sandford*, *Howard's R.* xix. 395.
(*o*) *Story*, p. xxix. (*p*) *Ib.* (*q*) *Ib.* p. xxx.

of another State, or by citizens or subjects of any Foreign State" (*r*).

CXX. It is clear from this account of the Constitution of the United States of North America that the whole Federal Body is responsible for the International acts, so to speak, of each State, and of the individuals composing them. For example, if the government of either of the Carolinas inflict an injury upon a foreign nation, that nation must direct its complaints to, and seek its redress from, the Federal Government.

The proposition that each State of the Union is separately responsible for its own misconduct, but that the attempt by a Foreign State to enforce its claims for redress against an individual State would be resisted by the whole Federal Body, is a proposition wholly untenable in reason or law. Joint responsibility must accompany joint protection; therefore the strengthening of the hands of the American Executive has been desired by her ablest statesmen and jurists, as well as by Foreign Powers, in order that she may be the more readily able to fulfil her International obligations (*s*).

(*r*) *Story*, p. xxxiii.

(*s*) *Wheaton, Élém.* vol. i. p. 74: "Puisque les relations de ces États avec des États étrangers, en paix et en guerre, sont maintenues par le gouvernement fédéral, tandis qu'il est expressément défendu aux États isolés de l'Union d'exercer ces actes de souveraineté extérieure, il est évident que la souveraineté extérieure de la nation réside exclusivement dans le gouvernement fédéral. L'indépendance de chaque État se trouve donc sous ce rapport confondue dans la souveraineté du gouvernement fédéral, et l'on peut par suite qualifier l'Union américaine de *Bundesstaat*."

Opinions of the Attorney-General of the United States, vol. i. *Letter of the Attorney-General, dated November* 20, 1821, p. 392. "The people of the United States seem to have contemplated the National Government as the sole and exclusive organ of intercourse with foreign nations. It ought, therefore, to be armed with power to satisfy all fair and proper demands which foreign nations may make on our justice and courtesy; or, in other words, with power to reciprocate with foreign nations the fulfilment of all the moral obligations, perfect and imperfect, which the Law of Nations devolves upon us as a nation. In this respect, our system appears to be crippled and imperfect."

See the correspondence relating to the project of annexing Cuba to

This desired result seems to have been in some degree attained during the interval between the first and the present edition of these Commentaries.

The recent civil war between the Southern and Northern States, and the conquest of the latter after a fierce and desperate contest, has not so affected the permanent International relations of the Confederation with Foreign States as to require any special notice in this place. Whether a correct view of the constitution and of the facts of the case was, or was not, taken by the Southern States, who maintained that they formed part of the Union upon conditions expressed in the terms of the great Charter of the Constitution, and that the violation of them justified their secession; or by the Northern States, who maintained that this secession was unjustifiable in fact and an act of treason in law—whether the employment of armies by the Northern States to coerce the Southern States, and compel them to remain in an Union which they desired to leave, was, or was not, in accordance with the principle of freedom upon which the United States justified their secession from Great Britain (*t*), are not subjects to be discussed even indirectly in this chapter.

Many interesting and important questions of International Law were indeed discussed during the progress of the civil war, which must be considered under their proper heads in other parts of this work.

CXXI. The Central and South American Republics, since the establishment of their independences, have undergone, and will probably yet undergo, frequent divisions and subdivisions. The existing *Federal* Republics are those of Mexico (*u*), of the United States of Rio de la Plata, or the

the United States, laid before Parliament April 11, 1853, and especially the English Foreign Secretary's (*Lord John Russell's*) letter of February 16, 1853.

(*t*) President Buchanan, in the annual address of 1860, expressed his clear and strong opinion in the negative.—*Ann. Reg.* 1860, pp. 283–4. But see President Johnson's address, 1866, *Ann. Reg.* p. 293.

(*u*) I have not thought it necessary to notice the short-lived and unfortunate Empire of Mexico.

Argentine Republic, and of the United States of Guatemala, or, as it is called, the Federal Republics of Central America. In these Federal Republics there is a general Congress, which superintends the relations of the Republics with Foreign States (*x*).

The whole of America is under the government of Christians, being either Europeans or of European descent; this vast continent therefore must be presumed to recognize, not only the obligations of general International Law, but the positive maxims of the European code. This continent is at present parcelled out into the following States.

There are seven Republics in North and Central America, viz. :—

United States.
Mexico, United States of { 21 States, a Federal District of Mexico, and 3 Territories.
Guatemala.
Honduras.
St. Salvador.
Costa Rica.
Nicaragua.
} Central America.

The Republics of South America are nine in number, as follows :—

Argentine Confederation { or, United States of Rio de la Plata, 14 in number: capital, Buenos Ayres.
Peru.
New Granada.
Bolivia.
Chili.
Venezuela.
Ecuador.
Paraguay.
Uruguay; or, La Bande Orientale: capital, Monte Video.

There is one American monarchy of great territorial extent—Brazil; for Hayti (*y*) and Mosquitia, though tech-

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(*x*) *Elliot's American Diplomatic Codes*, vol. ii. part iii. Treaties with the new nations of South America.

Hertslet's commercial treaties contain nearly all the various conventions between Great Britain and the Central and South American States.

A treaty with the State *Equator*, signed at *Quito*, May 3, 1851, was laid before Parliament in that year.

Annuaire des Deux Mondes, 1850, pp. 885, 1104.

(*y*) The empire of Hayti is, or was, in the French, the republic of San

nically they are or have been monarchies, are not worthy of grave consideration.

The British American provinces are:—

Canada East.
Canada West.
New Brunswick.
Nova Scotia, with Cape Breton.
Prince Edward's Island.
Newfoundland.
British Columbia.
Vancouver Island.
Honduras.
British Guiana (*z*).

In 1864 certain resolutions were adopted at a Conference of Delegates from the British North American Colonies as the basis of a proposed Confederation (*a*); and in 1867 the Earl of Carnarvon introduced into Parliament the North American Provinces Confederation Bill. The Bill provided that there should be a Governor-General, appointed by the Crown, receiving a salary from the Colonial funds. The Lieutenant-Governors of the respective provinces were to be appointed by the Governor-General, to hold office for five years. There was to be a general or central Parliament for the united Confederation, and local Legislatures for each province: the central Parliament to consist of an Upper Chamber and Lower House; the seventy-two members of the first to be elected for life, with power to the Crown to nominate not more than six members in certain cases; the Lower Chamber to consist of 181 members, to be elected for five years. The provincial Legislatures would be left to deal with all purely local matters, while all questions common to all the Confederated Provinces would be disposed of by the central Parliament. The delegates themselves suggested

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Domingo in the Spanish part of the island. As to the claim of Spain to San Domingo, and the nominal cession, in 1861, to her of it by the Republican Presidents and the protest of Peru, see pp. 148–160, t. iv. 2e partie, *Rec. gén.* cont. of *Martens*, by *Samwer*.

(*z*) The French and the Dutch have also colonies in Guiana.

(*a*) *Ann. Reg.* 1864, p. 293.

Canada as the name for the new Confederation, and the Queen gave her assent to that designation being adopted by it. The plan did not include Prince Edward's Island, British Columbia, Newfoundland, or Vancouver's Island; but it was to be hoped that in time those colonies would join the Confederation (*b*).

The Act of the Imperial Parliament containing these provisions for the Union of the provinces of Canada, Nova Scotia, and New Brunswick passed soon afterwards, and it enacted that the Queen in Council might declare, by proclamation, within six months from the passing of the Act, that those provinces should form one Dominion under the name of Canada, and that "such persons shall be first summoned to the Senate as the Queen by warrant, under her Majesty's royal sign manual, thinks fit to approve, and their names shall be inserted in the Queen's Proclamation of Union."

A Royal Proclamation was accordingly issued on the 21st of May, in which the persons were named who were to be first summoned to the Senate of Canada. The total number of these was seventy-two, thus distributed: twenty-four for the province of Ontario, twenty-four for the province of Quebec, twelve for the province of Nova Scotia, and twelve for the province of New Brunswick. The new Canadian Parliament was opened at Ottawa, the capital of the Confederation, by the Governor-General, Lord Monck, on the 7th of November (*c*).

CXXII. It is clear that no private associations (*d*) or companies can be now considered as substantive members of the community of States. The ancient confederation of the Hanse Towns is scarcely to be classed under the category of these private companies, which had at one time, as a distinct

(*b*) *Ann. Reg.* 1867, pp. 11, 281.

(*c*) *Ib.* p. 281.

(*d*) *Heffters*, ss. 13–29. *Wheaton's Élém.* l. ii. c. i. s. 5, p. ix. *Martens*, l. viii. c. ii. ss. 260–264. *Vattel*, l. iii. c. i. s. 4. *De M. et De C.* l. i. Index: *Compagnie anglaise des Indes.*

Federal Body, a *persona standi* in International Law. No analogy, however, can be derived even from them, applicable to modern companies, associated for the purpose of trade.

The British East India Company, which has now ceased to exist, has indeed exercised sovereign rights in respect to foreign nations, has made war and concluded treaties *in its own name* with Indian princes; but this power was *delegated* to it by the Crown and Parliament of England, and therefore the responsibility for the International acts of the Company rested upon Great Britain, as much as the acts of any other of her accredited public agents; and this company had no International *status* as a substantive community (*e*). States associated, for the purposes of trade, into a commercial league (*f*) may have a sort of International, or rather Public Law regulating the intercourse between the members of the league (*g*), upon the principle of the ancient adage "*Ubi societas ibi jus est*;" but States which are not members of this league are not bound to regard those who are such as being clothed, on that account, with any peculiar privileges in their *general* International relations.

CXXIII. This observation is applicable to all associations of States which are not founded upon universal principles of International Law, but framed for the advancement of some particular object; such, for instance, as associations for the suppression of the slave trade, or the great German commercial confederation called the *Zollverein* (*h*).

(*e*) See the case of the *Nabob of the Carnatic* v. *East India Company*, 1 *Vesey, Jr.* p. 371, and 2 *Ib.* pp. 56–60, as to the former anomalous International as well as National condition of the East India Company.

(*f*) *Klüber*, ss. 150–153. *Heffters*, ss. 8, 93.

(*g*) For example: 1. Equality of rights and obligations among the members. 2. Apportionment of the common burthens according to the means and strength of each individual member. 3. That the original conditions of the association cannot be altered without the consent of *every* member, etc.—*Vide Heffters, Ib.*

(*h*) 1 *De M. et C.* Index to this title, and in *Martens, Nouv. Rec.* xlv. *Lawrence's Wheaton* (French ed.) i. 369–376.

CHAPTER VI.

EXTINCTION OF A STATE.

CXXIV. A State, like an individual, may die; its corporate capacity may be extinguished, its body politic may perish, though the individual members of it may survive.

CXXV. It ceases to exist when the physical destruction of all its members takes place, or when they all migrate into another territory—events scarcely to be contemplated as possible in the present times—or when the social bond is loosed, which may happen either by the voluntary or compulsory incorporation of the nation into another sovereignty, or by its submission, and the donation of itself, as it were, to another country. On the happening of any of these contingencies (*a*), a State becomes, instead of a distinct and substantive body, the subordinate portion of another society. The incorporation of Wales, Scotland, and Ireland into Great Britain; of Normandy, Brittany, and other provinces into France, are among the most familiar historical instances which illustrate this proposition. To these may now be added the kingdom of Italy, composed of States which have sought to be incorporated in her; and of Prussia, which has by force of arms possessed herself of her weaker neighbours' territories.

(*a*) *Vattel*, l. i. c. xvi. 194. *Heffters*, b. i. s. 24. *Klüber*, pt. i. c. i. s. 23. *Rutherforth*, b. ii. c. x. ss. 12, 13. *Wheaton's Élém.* i. 33.

CHAPTER VII.

CHANGES IN A STATE.

CXXVI. But a State may undergo most important and extensive changes without losing its personality (*a*). It may be stripped of a portion of its subjects and its territory; it may place itself under the protection of another State, and be reduced to a semi-sovereignty; thereby, indeed, as has been shown, materially affecting its external relations, though retaining, in many respects, its corporate character: it may change its form of civil constitution or government from a Republic to a limited Monarchy, from an Aristocracy to a Despotism, or to any imaginable shape; but it does not thereby lose its personality, and does not therefore forfeit its rights, or become discharged from its obligations. The nation now governed by a Despot must pay the debt which she incurred under a Republican Government; the treaty con-

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(*a*) *Grotius,* lib. ii. c. ix. iii. i. "Idem si populus. Dixit Isocrates, et post eum Julianus imperator, civitates esse immortales, id est, esse posse, quia scilicet populus est ex eo corporum genere, quod ex distantibus constat, unique nomini subjectum est, quod habet ἕξιν μίαν, ut Plutarchus; spiritum unum, ut Paulus Jurisconsultus loquitur. Is autem spiritus, sive ἕξις, in populo est vitæ civilis consociatio plena atque perfecta, cujus prima productio est summum imperium, vinculum, per quod respublica cohæret, spiritus vitalis quem tot millia trahunt, ut Seneca loquitur. Planè autem corpora hæc artificialia instar habent corporis naturalis. Corpus naturale idem esse non desinit, particulis paulatim commutatis, una manente specie, ut Alphenus ex philosophis disserit." This opinion of Alfenus is to be found in the *Digest,* l. v. t. i. 76: "De judiciis et ubi quisque agere vel conveniri potest." A tribunal had been composed originally of certain judges; some of them during the hearing of the causes had retired, and others been substituted in their place: "Quærebatur, singulorum judicum mutatio *eandem* rem an *aliud* judicium fecisse. Respondi, non modo si unus aut alter, sed et si omnes judices mutati essent, tamen et rem eandem et judicium idem, quod antea fuisset, permanere."

tracted by a nation when represented to the rest of the world by the executive of a limited Monarchy, is equally binding upon her when she has fallen under the rule of an Oligarchy.

CXXVII. This vital principle of International Law is a necessary and principal consequence flowing from the doctrine of the moral personality and actual intercommunion of States. The Legion, the Roman jurist said, is the same though the members of it are changed; the Ship is the same though the planks of it are renewed; the Individual is the same though the particles of his body may not be the same in his youth as in his old age, and so "Populum eundem hoc tempore "putari qui abhinc centum annis fuisset."

CXXVIII. The learned and wise Savigny, discussing the proper manner of cultivating and improving the municipal law of a country, expresses an opinion pregnant with true philosophy, when he observes that there is no such thing as the entirely individual and severed existence of mankind; but that, as every individual man must be considered as the member of a family, a people, and a State, so every age of a people must be regarded as the continuance and development of times that are past (*b*). Every age does not produce its own world according to its own arbitrary will and for itself only, but it does this in indissoluble intercommunion with the whole past (*c*). Every age, therefore, must acknowledge,

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(*b*) Shakspere puts this reasoning into the mouth of the Duke of York:—

> "Take Hereford's rights away, and take from Time
> His charters and his customary rights;
> Let not to-morrow then ensue to-day;
> Be not thyself; for how art thou a king
> But by fair sequence and succession?"
>
> *Rich. II.* act ii. sc. 1.

(*c*) "Our political system is placed in a just correspondence and symmetry, with the order of the world and with the mode of existence, decreed to a *permanent* body composed of *transitory* parts; wherein by the disposition of a Stupendous Wisdom, so moulding together the great mysterious incorporation of the human race, the whole at one time is never old, or middle-aged, or young, but in a condition of unchangeable constancy moves on through the varied tenour of perpetual decay, fall,

as it were, certain *data*, the inheritance of necessity, and yet not imposed upon it by force: a necessary inheritance, in so far as they are not dependent upon the arbitrary will of the particular present; not imposed upon it by force, because they are not, like the command of a master to a slave, dependent upon the arbitrary will of any particular foreign influence; but, on the contrary, are the free produce of the higher part of the nature of a people, parts of one whole continually existing and continually developing itself. Of this higher part of a people the present age is a member, which wills and acts in and with that whole; so that what is transmitted to us from that whole may be said to be freely produced by this particular member of it. History, Savigny concludes, is not therefore a mere collection of examples, but the only way to the true knowledge of our own actual *status* (*d*). Hooker had long before arrived at Savigny's conclusion: "To be commanded," he says, "we "do consent when that Society whereof we are part hath "at any time before consented, without revoking the same "after by the like universal agreement: wherefore as any "man's deed past is good as long as himself continueth; so "the act of a public society of men done five hundred "years sithence, standeth as theirs who presently are of the "same societies, because corporations are immortal: we were "then alive in our predecessors, and they in their successors "do live still" (*e*).

Applying this principle to International relations, we learn that as one generation does not constitute a State (*f*), it

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renovation, and progression."—*Burke*, vol. v. p. 79. *Thoughts on French Revolution*, *Ib.* 183, 184.

(*d*) Ueber den Zweck der Zeitschrift für die geschichtliche Rechtswissenschaft.—*Savigny*, *Vermischte Schriften*, 1–110.

(*e*) *Hooker*, *Eccles. Pol.* b. i.

(*f*) "Because a nation is not an idea only of local extent and individual momentary aggregation, but it is an idea of continuity which extends in time as well as in members and in space."—*Burke's Works*, vol. x. p. 97: *Reform of Representation in the House of Commons.*

is not merely by the obligations contracted by one generation that the *present* State is bound; the engagements of the *past,* whether arising from the implied contract of long usage, or the express letter of treaty, or the pledge of the Executive Government, howsoever plighted, are as stringent upon her as those of the present. The individual succeeds to rights and obligations which he had no share in obtaining or contracting; and still more is this condition predicable of every corporate body. Nor is the greatest of all corporations, the State, exempt from the operation of a rule which is laid in the eternal constitution of things: "Cœtus quilibet, "non minus quam personæ singulares jus habet se obligandi "per se aut per majorem sui partem. Hoc jus transferre "potest tum expressè tum per consequentiam necessariam, "puta imperium transferendo" (*g*). The rule by which an individual's duties are discovered—namely, by considering the place which he occupies in the great system of the universe; "qua parte locatus es in re"—furnishes an equally sound maxim for national as for individual conduct. "Il ne "seroit pas," says the Abbé Mably, "moins superflu de "m'arrêter à prouver qu'un prince est lié par les engage- "mens de son prédécesseur: puisqu'un Prince qui fait un "traité n'est que le délégué de sa nation, et que les traités "deviennent pour les peuples qui les ont conclus des lois "qu'il n'est jamais permis de violer." He proceeds to cite a passage from Bodinus to the effect that a King of France is not bound by the treaties of his predecessors; because each King of France is only the "*usufructuarius*" of his kingdom, and does not appoint his successor, who has an absolute right to the throne; and observes truly, "Il n'est "point de lecteur qui ne sente tous les vices de ce misérable "raisonnement" (*h*).

CXXIX. The authority of D'Aguesseau (*i*) and Montes-

(*g*) *Grotius,* l. ii. c. xiv. s. 11, p. 408.

(*h*) *Mably, du Droit public, etc.* t. i. pp. 111, 112.

(*i*) There are some striking remarks of D'Aguesseau, i. 493, s. 4, as to the observance of Treaties.

quieu further strengthens a position of such paramount importance to the peace of the globe. The latter conclusively destroys the sophistry by which it has been sometimes attempted to chicane away the binding force of Treaties, on the ground of their having been extorted by that superior force which might vitiate a civil contract between individuals (*k*).

It might, indeed, have been supposed that this truth was too firmly established, and the value of it too deeply felt and too generally recognized, to be liable to question in these days. After the overthrow of the Orleans dynasty in France, the proclamation of M. de Lamartine (1848) appeared for a moment to throw the weight of France into the opposite scale, as disavowing the obligations of the treaty of Vienna, chiefly, it would seem, because at the time it was made, France was governed by a Monarchical, and at the time it was disavowed by a Republican Government (*l*).

Now no doctrine more fatal than this to the tranquillity of the globe can well be maintained—none which it is more the duty of every upholder of International Law to denounce. Nor can any doctrine be more pernicious to the country itself, be it Monarchical or Republican, which propounds it. "Nulla res," said Cicero, with all the energy of moral wisdom, "vehementius Rempublicam continet quam fides." What becomes of national faith if it be made to depend upon a form of Government? Much what would become of individual faith if it depended upon no change happening in the condition or age of the individual who plighted it.

CXXX. The importance of the subject did not escape the notice of Grotius; and I do not know that, upon such a point, a higher authority can be appealed to: "Neque refert quomodo gubernetur, regione, an plurium, "an multitudinis imperio. Idem enim est populus Roma-"nus sub regibus, consulibus, imperatoribus. Imo etiamsi

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(*k*) *Esprit des Lois*, l. xxvi. c. xx.—"Qu'il ne faut pas décider par les principes des lois civiles les choses qui appartiennent au droit des gens."

(*l*) *Trois mois au pouvoir*, par M. de Lamartine, p. 75.

" plenissimo jure regnetur, populus idem erit qui antea erat " cum sui esset juris, dum rex ei præsit ut caput istius " populi, non ut caput alterius populi. Nam imperium " quod in rege ut in capite, in populo manet ut in toto, cujus " pars est caput: atque adeo rege, si electus est, aut regis " familia extincta, jus imperandi ad populum redit, ut supra " ostendimus" (*m*).

And in another part of this great work he expresses his free and manly opinion on this matter: "Huc et illa " frequens quæstio referenda est de pactis personalibus ac " realibus. Et siquidem cum populo libero actum sit, " dubium non est, quin quod ei promittitur sui natura reale " sit, quia subjectum est res permanens. Imo etiamsi status " civitatis in regnum mutetur, manebit fœdus, quia manet " idem corpus etsi mutato capite, et, ut supra diximus, im- " perium, quod per regem exercetur, non desinit imperium " esse populi" (*n*). With this opinion Heineccius, in his commentary upon Grotius, entirely concurs.

CXXXI. An English civilian of considerable note in his day, commenting upon this passage, recognizes and adopts the doctrine which it conveys: "All leagues and treaties are " national: and where they are not to expire within a shorter " time, though made with usurpers, will bind legal princes if " they succeed, and so *vice versa*; and a league made with a " king of any nation will oblige that nation, if they continue " free, though the Government should be changed to a " Commonwealth, because the nation is still the same " though under different Governments" (*o*).

Vattel, whom Lord Stowell pronounced to be not the least indulgent of modern professors of Public Law (*p*), speaks unhesitatingly to the same effect: "Puisque les traités publics, " même personnels, conclus par un roi, ou par tout autre

(*m*) *Grotius*, l. ii. c. ix. s. 8.

(*n*) *Ib.*, l. ii. c. xvi. s. 16.

(*o*) *An Essay concerning the Laws of Nations and the Rights of Sovereigns*, by *Matthew Tindall, LL.D.* p. 14 (London, 1734).

(*p*) *The Maria*, 1 *Rob. Adm. Rep.* p. 163.

"souverain qui en a le pouvoir, sont traités de l'État, et "obligent la nation entière, les traités réels, faits pour sub-"sister indépendamment de la personne qui les a conclus "obligent sans doute les successeurs. L'obligation qu'ils "imposent à l'État passe successivement à tous ses con-"ducteurs, à mesure qu'ils prennent en main l'autorité "publique. Il en est de même des droits acquis par ces "traités. Ils sont acquis à l'État, et passent à ses con-"ducteurs successifs" (*q*). And in another place he says: "Dès qu'une puissance légitime contracte au nom de l'État, "elle oblige la nation elle-même, et par conséquent tous les "conducteurs futurs de la société. Lors donc qu'un prince "a le pouvoir de contracter au nom de l'État, il oblige tous "ses successeurs ; et ceux-ci ne sont pas moins tenus que lui-"même à remplir ses engagements" (*r*).

CXXXII. The language of Bynkershoek is still more forcible. In one passage he observes: "Rectè dixit Grotius "jus Populi non deficere nisi deficiat ipse Populus. Forma "autem regiminis mutata non mutatur ipse populus. "Eadem utique respublica est, quamvis nunc hoc, nunc alio "modo regatur; alioquin diceres, rempublicam in statu, "quo nunc est, exsolutam videri pactis et debitis in alio "statu contractis. De debitis id dicere non licere consentit "Grotius (*s*). De pactis ut idem dicamus, eadem quæ in debitis "obtinet ratio persuaserit" (*t*). His chapter "De servanda "fide pactorum publicorum, et an quæ eorum tacitæ excep-"tiones," begins: "Pacta privatorum tuetur jus civile, "pacta principum bona fides. Hanc si tollas, tollis mutua "inter principes commercia, quæ oriuntur e pactis expressis, "quin et tollis ipsum jus gentium, quod oritur e pactis "tacitis et præsumptis, quæ ratio et usus inducunt" (*u*).

(*q*) *Vattel, Le Droit de Gens,* l. ii. c. xii. s. 191, p. 400.
(*r*) *Ib.* l. ii. c. xiv. s. 215.
(*s*) *De Jure Bel.* l. ii. c. ix. s. 8, n. 3.
(*t*) *L. J. P.* l. ii. c. xxv.—*Variæ Quæstiunculæ.*
(*u*) *Bynkershoek, Q. J. P.* l. ii. c. x. See, too, *Burke's Tracts on the*

He then proceeds to comment upon the sophistry which defends a departure from the obligations of treaties: "Hæc "pactis omnibus inesse credit clausulam salutarem, *rebus sic* "*stantibus*, atque adeo a pactis recedi posse: I. Si qua nova "causa, satis idonea, obveniat. II. Si res eo deducta sit, "unde incipere non possit. III. Si ipsa pactorum ratio "cesset. IV. Si necessitas ac utilitas Reipublicæ aliud "flagitent" (*x*).

The last pretext he denounces as a detestable machiavellism—"the beast of many heads, *Reason of State*, the bane "of Princes," and characterizes the three former excuses as "totidem ruptæ fidei velamenta:"—and again in his boldest manner, "Promissum igitur, si me audias, etiam tunc ser-"vandum, cum id servari Reipublicæ non expediat, imo "periculosum sit" (*y*).

CXXXIII. Not less emphatic and decisive is the language of the great Republican Confederation of North America: "Nations are at liberty" (says Mr. Chancellor Kent) "to "use their own resources in such manner and to apply them "to such purposes as they may deem best, provided they do "not violate the perfect rights of other nations, nor endanger "their safety, nor infringe the indispensable duties of "humanity. They may contract alliances with particular "nations, and grant or withhold particular privileges, in "their discretion. By positive engagements of this kind a "new class of rights and duties is created, which forms the "conventional law of nations, and constitutes the most "diffusive, and generally the most important branch of "public jurisprudence. And it is well to be understood, at "a period when alterations in the constitutions of Govern-"ments and revolutions in States are familiar, that it is a "clear position of the law of nations that treaties are not "affected, nor positive obligations of any kind with other

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Popery Laws, c. iii. *in fine*, as to the ratification of the Treaty of Limerick.

(*x*) *Ibid.* (*y*) See too *Cicero*, *De Off.* l. iii. c. v. 6, 11.

"Powers or with creditors weakened, by any such mutations. "A State neither loses any of its rights nor is discharged "from any of its duties by a change in the form of its civil "government. The body politic is still the same, though it "may have a different organ of communication" (*z*).

CXXXIV. Puffendorf, in his chapter "De mutatione et "interitu civitatum," adds the authority of Sweden to fortify these positions in one of the best chapters of his treatise on "De Jure Naturæ et Gentium" (*a*).

CXXXV. We have, then, this opinion of the continuity of the rights and obligations of a State confirmed by the unanimous authority of the most celebrated jurists and statesmen (*b*) of all countries. This accumulation of autho-

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(*z*) *Kent's Commentaries on American Law*, vol. i. pp. 25, 26.

Wheaton (*Élém.* i. 33) speaks fully to the same effect: "Un État est un corps changeant quant aux membres qui composent la société, mais quant à la société même, c'est le même corps dont l'existence est perpétuée par une succession constante de membres nouveaux. Cette existence continue tant qu'aucun changement fondamental n'a été introduit dans l'État."

(*a*) L. viii. c. xiv.

(*b*) "L'unité permanente qui s'établit, et le développement progressif qui s'opère par cette tradition incessante des hommes aux hommes, et des générations aux générations, c'est là le genre humain; c'est son originalité et sa grandeur; c'est un des traits qui marquent l'homme pour la souveraineté dans ce monde, et pour l'immortalité au delà de ce monde.

"C'est de là que dérivent et par là que se fondent la famille et l'État, la propriété et l'hérédité, *la patrie*, l'histoire, la gloire, tous les faits et tous les sentiments qui constituent *la vie étendue et perpétuelle de l'humanité au milieu de l'apparition si bornée et de la disparition si rapide des individus humains.*

"La République sociale supprime tout cela; elle ne voit dans les hommes que des êtres isolés et éphémères qui ne paraissent dans la vie et sur cette terre, théâtre de la vie, que pour y prendre leur subsistance et leur plaisir, chacun pour son compte seul, au même titre et sans autre fin.

"C'est précisément la condition des animaux. Parmi eux, point de lien, point d'action qui survive aux individus et s'étende à tous; point d'appropriation permanente, point *de transmission héréditaire*, point d'ensemble ni de progrès dans la vie de l'espèce; rien que des individus qui paraissent et passent, prenant en passant leur part des biens de la terre et des plaisirs de la vie, dans la mesure de leur besoin et de leur

rities must not be regarded as an idle parade of evidence, because, as has been already observed, a proposition which is maintained by the concurrent voice of eminent jurists of various civilized countries becomes *ipso facto*, as it were, a part of International law (*c*).

CXXXVI. We arrive, then, with confidence at the conclusion, that this reciprocal observance of good faith, whether it be plighted to the payment of debts or to the fulfilment of the stipulations of treaties (*d*), is binding upon all nations. This good faith is the great moral ligament which binds together the different nations of the globe (*e*). Without this, war would be, as has been sometimes asserted, the perpetual destiny of mankind, and that miserable fiction of shallow declamation and specious sophistry would be reality and truth.

CXXXVII. It remains only to add a proposition which is indeed a corollary from the foregoing statements. If a nation be divided into various distinct societies, the obligations which had accrued to the whole, before the division, are, unless they have been the subject of a special agreement, rateably binding upon the different parts (*f*): "Contra

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force qui font leur droit."—*De la Démocratie en France*, par M. Guizot, pp. 58–60.

(*c*) *Vide antè*, ch. vii. p. 62.

(*d*) "Item fœdera pacis et induciarum possunt sub hoc capite collocari, *non quatenus servanda sunt postquam sunt facta*; hoc enim potius pertinet ad jus naturale."—*Suarez, de Legibus et Deo Legislatore*, p. 109.

(*e*) "Je ne crois pas" (says Abbé Mably) "qu'il soit nécessaire de parler dans cet ouvrage de la fidélité scrupuleuse avec laquelle les États doivent remplir leurs engagemens; je ne fais pas ici un traité de droit naturel. D'ailleurs que pourrois-je ajouter à ce que tant de savans hommes ont écrit sur cette matière? Exécuter ces promesses, c'est le bien de la société générale, c'est la base de tout le bonheur de chaque société particulière; tout nous le prouve, tout nous le démontre, cette vérité dont de mauvais raisonneurs veulent douter est connue des peuples les moins policés; et les princes malheureux, qui se font un jeu de leurs sermens, feignent de la respecter, si leur ambition n'est pas stupide ou brutale."—Tome i. p. 111.

(*f*) "Das übrigens die Acten der Staatsgewalt eines früherern Herrschers, welche der Verfassung des regierten Staates entsprechen, auch für den

"evenit" (as Grotius expresses himself) "ut quæ una civitas "fuerat, dividatur, aut consensu mutuo, aut vi bellica, sicut "corpus imperii Persici divisum est in Alexandri successores. "Quod cum fit, plura pro uno existunt summa imperia, cum "suo jure in partes singulas. Si quid autem commune "fuerit, id aut communiter est administrandum, aut pro "ratis portionibus dividendum" (*g*). And "so" (says Mr. Chancellor Kent) "if a State should be divided in respect "to territory, its rights and obligations are not impaired; "and if they have not been apportioned by special agree-"ment, those rights are to be enjoyed, and those obligations "fulfilled, by all the parts in common" (*h*). So Mr. Justice Story, delivering a judgment in the Supreme Court of the United States, observed: "It has been asserted as a principle "of the common law, that the division of an empire creates "no forfeiture of previously vested rights of property; and "this principle is equally consonant with the common sense "of mankind, and the maxims of eternal justice" (*i*). Lastly, it should be observed, that this principle is *in viridi observantia* in International practice, and was incorporated into the treaty by which the modern kingdom of Belgium was established (*k*).

Nachfolger verbindlich sind, kann gewiss nach internationalem Recht in keinen Zweifel gezogen werden."—*Heffters*, s. 57, p. 111; *Zachariä*, Staats- und Bundesrecht, s. 58.

(*g*) *Grotius*, l. ii. c. ix. s. 10.

(*h*) *Kent's Commentaries*, vol. i. p. 25.

(*i*) *Terrett and Others* v. *Taylor and Others*, 9 *Cranch's* (*American*) *Reports*, 50; citing *Kelly* v. *Harrison*, 2 *John*. c. 29; *Jackson* v. *Lunn*, 5 *John*. c. 109 (*American*); *Calvin's Case*, 7 *Co*. 27.

(*k*) *Wheaton's Hist.* 546.

PART THE THIRD.

CHAPTER I.

OBJECTS OF INTERNATIONAL LAW.

CXXXVIII. THE Sources and the Subjects of International Law having been stated, it remains to consider the Objects of this system of jurisprudence; that is, the Rights which are to be ascertained, protected, and enforced by this law (*a*).

CXXXIX. These rights flow as moral and logical consequences from the positions laid down in the first chapter with regard to the Individuality and Intercommunion of States, and from the definition of a State in the second chapter. Some of these rights concern more immediately the internal and domestic, others the external and foreign, condition of a State. Moreover, the rights of nations, like the rights of individuals, admit of a general division into rights which relate to persons, to things, and to the mode of their enforcement.

CXL. These are rights properly so called—rights *stricti juris*; but the constant intercourse and increasing civilization of nations has given rise to a usage and practice which greatly mitigates the severity with which these rights,

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(*a*) "Jus gentium est sedium occupatio, ædificatio, munitio, bella, captivitates, servitutes, postliminia, fœdera, paces, induciæ, legatorum non violandorum religio, connubia inter alienigenas prohibita. Hoc inde jus gentium appellatur, quia eo jure omnes fere gentes utuntur."—*Decret.* i. *Dist.* i. c. ix.

abstractedly considered, might be exercised, both with respect to the foreign community, in its *aggregate* capacity, and with respect to the persons of the *individual* members belonging to it. This usage is called *comitas gentium*—the comity of nations—*droit de convenance.*

CXLI. With regard to the intercourse of *individual* members of different States, this COMITY has been suffered to grow up into what may be termed a *jus gentium privatum* ; and which requires, on account of its magnitude and importance, a separate and distinct notice in another part of this work.

CXLII. With regard to a State in its *aggregate* capacity, questions of Comity, being much fewer in kind, and rarer in occurrence, may be conveniently mentioned and distinguished in the general treatment of rights properly so called.

CXLIII. But with regard to both, the fundamental distinction between the *usage* of *comity* and the right *stricti juris* must never be forgotten (*b*).

(*b*) "Non minus sollicitè separavimus ea quæ juris sunt, strictè ac propriè dicti, unde restitutionis obligatio oritur, et ea quæ juris esse dicuntur, quia aliter agere cum alio aliquo rectæ rationis dictato pugnat." —*Grot. Proleg.* s. 41.

In the case of the *Maria,* Lord *Stowell* observes (speaking of Art. 12 of the Order of Council, 1664, which directs, "That when any ship, met withal by the Royal Navy or other ship commissionated, shall fight or make resist, the said ship and goods shall be adjudged lawful prize"): "I am aware that in those orders and proclamations are to be found some articles not very consistent with the law of nations as understood now, or indeed at that time, for they are expressly censured by Lord *Clarendon.* But the article I refer to is not of those he reprehends; and it is observable that Sir *Robert Wiseman,* then the King's Advocate-General, who reported upon the Articles in 1673, and expresses a disapprobation of some of them as harsh and novel, does not mark this article with any observation of censure. I am therefore warranted in saying that it was the rule, and the undisputed rule, of the British Admiralty. I will not say that that rule may not have been broken in upon in some instances by *considerations of comity* or of policy, by which it may be fit that the administration of this species of law should be tempered in the hands of those tribunals which have a right to entertain and apply them; for no man can deny that a State may recede from its extreme rights, and that its supreme

The violation of rights *stricti juris* may be redressed by forcible means, by the operation of war, which in the community of nations answers to the act of the Judicial and Executive Power in the community of individuals. But the departure from the usage of Comity cannot be legally redressed by such means. The remedy, where expostulation has failed, must be a corresponding reciprocity of practice on the part of the nations whose subjects are so treated. "Illud quoque sciendum est," observes Grotius; "si quis "quid debet, non ex justitia propria, sed ex virtute alia, "puta liberalitate, gratia, misericordia, dilectione, id sicut "in foro exigi non potest, ita nec armis deposci" (*c*). It is, however, often a question of some nicety and difficulty to ascertain to which class an asserted claim belongs, because the usage which had its origin in the precarious concession of Comity may be, and in many instances has been, transferred, through uninterrupted exercise and the lapse of time, into the certain domain of Right (*d*).

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councils are authorized to determine in what cases it may be fit to do so, the particular captor having in no case any other right and title than what the State itself would possess under the same facts of capture." —1 *Rob. Ad. Rep.* 367, 368.

And again, further on in the same case, he says: "It is lastly said, that they have proceeded only against the merchant vessels, and not against the frigate, the principal wrong-doer. On what grounds this was done—whether on that sort of *comity* and respect which is not unusually shown to the immediate property of great and august Sovereigns, or how otherwise, I am again not judicially informed; but it can be no legal bar to the right of a plaintiff to proceed, that he has for some reason or other declined to proceed against another party, against whom he had an equal or possibly a superior title."—*Ib.* p. 376.

"*De officiis innoxiæ utilitatis*, quæ, si primam illorum originem spectaveris, sunt *imperfecta*, per ea, quæ accedunt, autem *in perfecta* mutari atque transire possunt; paullo difficilior est disquisitio."—*De Necessitate et Usu Juris Gentium Dissertatio*, c. ii. s. 17.—*Pestel.*

See the part of this work which relates to COMITY for distinction between *Jus Gentium* and *Jus inter Gentes.*

(*c*) *Grotius*, l. ii. c. xxii. s. 16.

(*d*) *Vide antè*, p. 12.

CHAPTER II.

RIGHTS OF INDEPENDENCE AND EQUALITY.

CXLIV. Some of the Rights of nations appear to flow more directly from the first, and some more directly from the second of those propositions which have been laid down as together constituting the basis of International Law (*a*).

CXLV. From the first proposition—namely, that States are recognized as free moral persons—seem to be more especially derived the Rights incident to Independence, which are the following:—

1. The right to a Free Choice, Settlement, and Alteration of the Internal Constitution and Government without the intermeddling of any foreign State.

2. The right to Territorial Inviolability, and the free use and enjoyment of Property.

3. The right of Self-preservation, and this by the defence which *prevents* as well as by that which *repels* attack.

4. The right to a free development of national resources by Commerce.

5. The right of Acquisition, whether original or derivative, both of Territorial Possessions and of Rights.

6. The right to absolute and uncontrolled Jurisdiction over all persons and things *within*, and in certain exceptional cases *without*, the limits of the territory. Under this head may be considered the status of Christians in Mahometan or Infidel countries, not being subjects of those countries, and the question of Extradition of criminals.

(*a*) *Vide antè*, ch. iii.

Kaltenborn, kap. v. s. 9: Versuch einer wissenschaftlichen Systematik des Völkerrechts.

CXLVI. The limitations which the abstract Rights of one nation may receive in their practical exercise, from the existence of similar Rights in another nation, will be considered in a chapter on the doctrine of INTERVENTION.

CXLVII. From the second proposition—namely, that each State is a member of an Universal Community—seem to be more especially derived the Rights incident to EQUALITY, which are the following:—

1. The Right of a State to afford protection to her lawful subjects wheresoever commorant; and under this head may be considered the question of debts due from the Government of a State to the subjects of another State.
2. The Right to the Recognition by Foreign States of the National Government.
3. The Right to External marks of Honour and Respect.
4. The Right of entering into International Covenants or Treaties with Foreign States.

CHAPTER III.

RIGHT TO A FREE CHOICE OF GOVERNMENT.

CXLVIII. I.—We will now consider the rights which flow as necessary consequences from the Independence of States.

And, first, in the rank of internal and domestic rights, is the liberty incident to every Independent State, of adopting whatever form of government, whatever political and civil institutions, and whatever rulers she may please, without the interference or control of any foreign Power. This elementary proposition of International Law is so unquestionable that it would be superfluous to cite authorities in support of it (*a*).

CXLIX. This proposition, nevertheless, however true and however important, generally speaking, is not without some limitations in its practical application; because, rights on the part of other States, members of the same system, may control, to a certain extent, the right of unlimited liberty generally incident to a State in the establishment of its government, as the right of an individual in society to perfect liberty is, to a certain extent, limited by a similar right in his neighbour. The limitation of which this right is susceptible will be discussed hereafter in the chapter on Intervention.

(*a*) It is nowhere more faithfully enunciated than in *Günther*, i. 284, ss. 6, 7: "Keine Nation ist befügt, sich in die Handlungen der andern zu mischen, *am wenigsten* in die innere Staatsverfassung." The principle is recorded in many treaties: *e. g.*, Treaty of the *Pyrenees*, 1659 (Art. 60—France promises not to interfere in the affairs of Portugal); Peace of *Lubeck*, 1629 (Arts. 2, 3—the Emperor of Germany takes a similar engagement as to Denmark—a reciprocal one being taken by Denmark); Peace of *Neustadt*, 1721 (Art. 7—Russia makes a like promise with respect to Sweden). During the last twenty years most of the great European Powers have, on various occasions, formally, at least, promulgated the same doctrine. *Vide post*, Intervention—Balance of Power.

CHAPTER IV.

TERRITORIAL INVIOLABILITY—NATIONAL POSSESSIONS.

CL. II.—A STATE, like an Individual, is capable of possessing property. The property of a State is marked by the same characteristics relatively to other States, as the property of individuals relatively to other individuals; that is to say, it is exclusive of all foreign interference and susceptible of free disposition (*a*).

This property consists of Things (*corpora*), and of Rights to things (*jura*); or, in other words, it consists of things divided into those which are corporeal or incorporeal, movable or immovable (*res, bona, pecunia*) (*b*). As in the case of Individuals, certain things belong by their nature so equally to every person, that they are incapable of being appropriated by any one person; so in the case of States, certain things belong so equally to all communities, as to be incapable of being appropriated by any one of them (*extra commercium—extra patrimonium*).

All these Things and Rights taken together would be designated by the Roman law "*universitas*" (*c*). At present

(*a*) *Heffters*, s. 64.

(*b*) "Cum pupillus a tutore stipulatur *rem* salvam fore, non solum quæ in patrimonio habet, sed etiam quæ in nominibus sunt, ea stipulatione videntur contineri."—*Dig.* L. t. xvi. s. 49.

"In *bonis* autem nostris computari sciendum est non solum quæ dominii nostri sunt, et si bona fide a nobis possideantur vel superficiaria sint. Æquè bonis adnumerabitur, etiam si quid est in actionibus, petitionibus, persecutionibus: nam hæc omnia in *bonis* esse videntur."—*Ib.* lib. l. 50, t. xvi. 49.

"*Pecuniæ* verbum non solum numeratam pecuniam complectitur: verum omnem omnino pecuniam, hoc est omnia *corpora:* nam corpora quoque pecuniæ appellatione contineri nemo est qui ambiget."—*Ib.* 178.

"*Pecuniæ* nomine non solum numerata pecunia; sed omnes res, tam soli quam mobiles, et *tam corpora quam jura* continentur."—*Ib.* 222.

(*c*) "*Bonorum* appellatio, sicut hæreditatis, *universitatem* quandam ac jus successionis, et non singulas res demonstrat."—*Dig.* lib. l. t. xvi. 208.

we are concerned only with that portion of this collective whole which relates to real or territorial rights, and more especially with the right which flows from the above-mentioned characteristic of exclusiveness—namely, the Right of Territorial Inviolability.

CLI. A State in the lawful possession of a territory has an exclusive right of property therein, and no stranger can be entitled, without her permission, to enter within her boundaries, much less to interfere with her full exercise of all the rights incident to that supreme dominion, which has obtained from jurists the appellation of *dominium eminens.*

CLII. No individual proprietor can alienate his possessions from the State to which they belong, and confer the property of, or the sovereignty over, them to another country (*d*). Whether and to what extent it may be competent to the sovereign of a territory to alienate any portion of it will be hereafter considered.

CLIII. This general principle of *dominium eminens* is applicable to all possessions, whether acquired, 1, by recent acquisition, through the medium of discovery and lawful occupation; 2, by lawful cession or alienation; 3, by conquest in time of war, duly ratified by treaty; or, 4, by prescription.

CLIV. National Territory consists of water as well as land; and, in order to examine carefully the former species of possession, we must consider whether, and to what extent, and under what limitations, the following waters may be the objects of national property and dominion:—

1. Rivers and Lakes.
2. The Open Sea.
3. The Narrow Seas.
4. The British Seas.
5. The Straits.
6. Portions of the Sea.

(*d*) *De Garden, Traité de Diplomatie,* t. i. p. 387.

CHAPTER V.

PROPERTY OF A STATE—RIVERS.

CLV. No difficulty can arise with respect to Rivers and Lakes entirely enclosed within the limits of a State; but questions of some difficulty have arisen with respect to rivers which are not so enclosed, but which flow through more than one State (*a*). The Roman law declared all navigable rivers to be so far public property that a free passage over them was open to everybody, and the use of their banks (*jus littoris*) for anchoring vessels, lading and unlading cargo, and acts of the like kind, to be incapable of restriction by any right of private domain (*b*).

CLVI. The navigable rivers, however, were classed, according to that law, among the "*res publicæ*," and not, as might appear from a superficial view, among the "*res communes*," as the sea was. Rivers were the *public* property of the State, not *common* to the whole world like the ocean (*c*).

CLVII. It has been contended, that the principle of this law has been engrafted upon International Law, and that it is a maxim of that law that the ocean is free to all mankind, and rivers to all *riparian* inhabitants. So that the nation which possessed both banks of a river where it disembogued itself into the sea, was not at liberty to refuse the nation or nations which possessed the banks of the river

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(*a*) *Grotius*, l. ii. c. ii. ss. 12–14, p. 191; c. iii. ss. 7–12, p. 207.

(*b*) *Inst.* l. ii. tit. i. ss. 1–5; *Dig.* l. i. tit. viii. s. 5.

(*c*) "Quædam enim naturali jure communia sunt omnium, quædam publica. . . . Et quidem naturali jure *communia* sunt omnia hæc: Aër, Aqua profluens, et Mare, et per hoc littora maris. . . . Flumina autem omnia, et Portus, *publica* sunt."—*Inst.* l. ii. tit. i. ss. 1, 2.

higher up, from the use of the water, for the passage of vessels to the sea, and from the incidental use of the banks for the purposes mentioned above (*d*). The opinion of Grotius (*e*) seems to be in favour of this position; for he held that, though the property and domain over the stream belonged to the riparian States, "at idem flumen qua aqua profluens "vocatur, commune mansit" (*f*); and this upon two grounds: 1. Because this was one of the rights excepted and reserved, at the period when the right of property was introduced as a limitation upon the original community of possession, in which fiction this great man believed; but as the basis of this opinion clearly was and is now universally acknowledged to be a fiction, this reason, built upon the supposition of its being a truth, can be of no avail (*g*). 2. Because the use of rivers belonged to the class of things "*utilitatis innoxiæ*" (*h*), the value of the stream being in no way whatever diminished to the proprietors by this *innocent use* of them by others, inasmuch as the use of them is inexhaustible (*i*). Grotius, as it will be necessary to remark hereafter, appears to have considered the right of mere passage (*jus transitûs innoxii*) by one nation over the domain of another—whether that domain was an arm of the sea, or lake, or river, or even the land—to be one of *strict law*, and not of *comity*; but his opinion is not founded upon any sound or satisfactory reason, and is at variance with that of almost all other jurists (*j*). For, the reason of the thing and the opinion of other jurists, speaking generally, seem to agree in holding that the *right* can only

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(*d*) *Wheaton's History of the Law of Nations*, p. 502.

(*e*) Lib. ii. c. ii. s. 12, *et seq.* p. 191.

(*f*) *Vattel*, l. i. c. x. ss. 103, 104; l. i. c. xxiii. s. 292.

(*g*) So *Vattel*, t. i. l. ii. c. ix. s. 123: "—un reste de la communion primitive."

(*h*) *Grotius*, l. ii. c. ii. s. 11.

(*i*) *Vattel*, t. i. l. ii. c. ix. s. 126: "Des choses d'un usage inépuisable."

(*j*) *Monsieur Eugène Ortolan*, however, a modern French author, who writes with care, good sense, and perspicuity, agrees with *Grotius*. See *Des Moyens d'acquérir le Domaine international ou Propriété d'État entre les Nations*, etc., p. 30 (Paris, 1851).

be what is called (however improperly) by *Vattel* and other writers *imperfect*, and that the State, through whose domain the passage is to be made, must be the sole judge as to whether it be innocent or injurious in its character (*k*).

CLVIII. It may be conceded, however, that the right to the free navigation of a river being once granted, the innocent use of the *different waters* which unite that river with the sea follows as a matter of course, and by necessary implication. This proposition was stoutly maintained by the States who were interested in the free navigation of the Rhine, and who insisted that no other construction could be put upon the expressions in the treaties of Paris and Vienna, declaring that river to be free. "Au point où il devient "navigable jusqu'à la mer" (*l*), which expressions included, not only the course of the Rhine Proper, which lost itself in the sands, but the other channels through which this river disembogued itself into the sea (*m*).

CLIX. And it may also be admitted, that when this right of free navigation has been conceded, the maxim of Roman jurisprudence applies, and that the right of the shores is incident to the use of the water. Mr. Wheaton remarks, in his valuable "History of the Law of Nations," that the laws of every country probably intended the same provision; and he adds a remarkable instance of the practical application of the principle in the following precedent of International Law:—"This" (he says) "must have been so understood "between France and Great Britain at the Treaty of Paris, "when a right was ceded to British subjects to navigate the "whole river (the Mississippi), and expressly that part "between the island of New Orleans and the western bank, "without stipulating a word about the use of the shores,

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(*k*) *Puffendorf*, l. iii. c. iii. s. 8. *Wheaton's Elem. of International Law*, vol. i. pp. 229, 230. *History of the Law of Nations*, pp. 508–510. *Puffendorf*, l. iii. c. iii. ss. 3–6. *Wolff's Inst.* ss. 310–312. *Vattel*, l. i. s. 292; l. ii. ss. 123–139.

(*l*) *De Martens et de Cussy, Rec. de Tr.* t. iii. p. 179.

(*m*) *Annual Register for* 1826, pp. 259–263.

" though both of them belonged then to France, and were
" to belong immediately to Spain. Had not the use of the
" shores been considered as incident to that of the water, it
" would have been expressly stipulated, since its necessity
" was too obvious to have escaped either party. Accord-
" ingly, all British subjects used the shores habitually for
" the purposes necessary to the navigation of the river; and
" when a Spanish governor undertook at one time to forbid
" this, and even cut loose the vessels fastened to the shores,
" a British vessel went immediately, moored itself opposite
" the town of New Orleans, and set out guards with orders
" to fire on such as might disturb her moorings. The
" governor acquiesced, the right was constantly exercised
" afterwards, and no interruption was offered" (*n*).

CLX. These accessories, however, can of course only be demanded when the principal right has been granted; and we must return to the position, that where the free navigation of a river has not been conceded by the State possessing both banks, there is no sufficient authority for maintaining that such concession can be, irrespectively of treaty, lawfully compelled. It is true, indeed, that the United States of America, in their controversy with Spain with reference to the navigation of the Mississippi, before the Treaty of Lorenzo el Real in 1795, insisted upon a strict International right, founded, as it was alleged, upon the natural sentiments of man, to the free use of rivers from the source to the mouth by *all* riparian inhabitants. But the practice of nations was not at that time in favour of this position, and a treaty was finally resorted to in this, as it has been since in other cases, as the only certain means of placing this claim upon the footing of right, and of securely regulating its exercise.

CLXI. The general law on this head is summed up with characteristic perspicuity by Lord Stowell in the case of the *Twee Gebrœders* (*o*). This was a case of considerable

(*n*) *Hist. of the Law of Nations*, 510, 511. (*o*) 3 *Rob. Ad. Rep.* 338–340.

importance, as it respected the claim of a sovereign State to a right of territory over the spot where the capture in question was alleged to have taken place. The case arose on the capture of vessels in the *Groningen Watt*, on a suggestion that they were bound from Hamburg to Amsterdam, then under blockade, and a claim was given under the authority of the Prussian minister, averring the place in question to be within the territories of the King of Prussia. Lord Stowell said, "It is scarcely necessary to observe, that "a claim of territory is of a most sacred nature. Strictly "speaking, the nature of the claim brought forward on this "occasion is against the general inclination of the law, for "it is a claim of private and exclusive property, on a subject "where a general, or at least a common use is to be presumed. "It is a claim which can only arise on portions of the sea, "or on rivers flowing through different States: the law of "rivers flowing entirely through the provinces of one State "is perfectly clear. In the sea, out of the reach of cannon-"shot, universal use is presumed; in rivers flowing through "conterminous States, a common use of the different States "is presumed. Yet, in both of these, there may, by legal "possibility, exist a peculiar property excluding the universal "or the common use. Portions of the sea are prescribed "for, so are rivers flowing through contiguous States; the "banks on one side may have been first settled, by which "the possession and property may have been acquired, or "cessions may have taken place upon conquests, or other "events. But the general presumption certainly bears "strongly against such exclusive rights, and the title is a "matter to be established, on the part of those claiming "under it, in the same manner as all other legal demands "are to be substantiated, by clear and competent evidence. "The usual manner of establishing such a claim is, either "by the express recorded acknowledgment of the conter-"minous States, or by an ancient exercise of executive "jurisdiction, founded presumptively on an admission of "prior settlement, or of subsequent cession. One hardly

"sees a third species of evidence, unless it be, what this "case professes to exhibit, the decision of some common "superior in the case of a contested river. The sea admits "of no common sovereign; but it may happen that conter-"minous States, through which a river flows, may acknow-"ledge a common paramount sovereign, who, in virtue of "his political relation to them, may be qualified to appro-"priate exclusively and authoritatively the rights of territory "over such a river, to one or other of them."

CLXII. This *free navigation*, and this *innocent use* of rivers, have formed an important part of many treaties; and the subject has been most carefully considered in some of the principal conventions of modern times.

CLXIII. When the Seven United Provinces had obtained, after a struggle of eighty years' duration, the recognition of their independence from the crown of Spain, they were not contented with having achieved their own liberty, and with having possessed themselves of some of the richest colonies of their former sovereign in the new world; they strove, being far-sighted according to the notions of trade then prevalent, to secure to themselves, both at home and abroad, the closest commercial monopoly (*p*); and by the peace of Munster (Jan. 30, 1648) they actually compelled Philip the Fourth to deprive the Ten Provinces, which had retained their allegiance, of the commercial advantages naturally incident to their geographical situation. The fourteenth article of that Peace (*q*) contained a stipulation that the Scheldt in all its branches, and in its mouths of Sas, Zwyn (*r*), and the other openings

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(*p*) *Koch, Histoire des Traités de Paix*, tom. i. pp. 84, 483 (ed. Bruxelles, 1837).

(*q*) The stipulation was said to be only a confirmation of the ancient right of Staple (*d'étapes*) by which foreign vessels entering the Scheldt were compelled to break bulk, and put their cargo on board Dutch vessels; but by this stipulation foreign vessels were absolutely prohibited from entering the Scheldt.

(*r*) The Dutch, it should be observed, always maintained that the whole course of the two branches of the Scheldt, which passed within the dominions of Holland, was entirely *artificial*; that it owed its

into the sea, should be for ever closed to the Belgian provinces. This stipulation, to which the ruin of the once magnificent commerce of Antwerp has been ascribed, was rigidly enforced till 1783 (*s*), when Joseph the Second endeavoured to remove the unnatural obstacles to the natural prosperity of his fine Belgic provinces, by forcing, most illegally it must be confessed, the opening of the Scheldt. But the Dutch made on the whole a successful resistance to this attempt, retaining, by the Treaty of Fontainebleau (which they concluded, under the mediation of France, with Joseph in 1785), the Scheldt from Saftingen to the sea, and all the mouths of the Scheldt in the same closed condition, in which they had been placed by the Treaty of Munster. The forcible opening of this navigation by the French when they overran Belgium in 1792, and the utter disregard which they avowed for all treaties upon the matter, was one of the circumstances which brought England and Holland into the war against France.

CLXIV. The Treaty of Vienna in 1815 introduced a more liberal principle upon this subject into the public law of Europe. The final act of the Congress of Vienna provided, by what is called the *Annexe* XVI., that the navigation of all rivers separating or traversing different States should be entirely free, from the point where each river became navigable, to the point of its disemboguement in the sea (*t*). The

existence to the skill and labour of Dutchmen; that its banks had been erected and maintained by them at a great labour and expense.

(*s*) See *Martens' Causes célèbres*, t. ii. p. 203—Cause huitième: "Différends survenus en 1783 et 1784, entre l'Autriche et la République des Provinces unies des Pays-Bas, au sujet des limites de la Flandre, de la cession de Mastricht, de l'ouverture de l'Escaut, et du commerce aux Indes Orientales."

(*t*) *Hertslet's Tr.* vol. i. p. 2.—"Art. CVIII. Les puissances dont les états sont séparés ou traversés par une même rivière navigable, s'engagent à régler d'un commun accord tout ce qui a rapport à la navigation de cette rivière. Elles nommeront, à cet effet, des commissaires qui se réuniront, au plus tard, six mois après la fin du Congrès, et qui prendront pour bases de leurs travaux les principes établis dans les articles suivans.

"Art. CIX. La navigation dans tout le cours des rivières indiquées

general principles of this act of regulation (*règlement*) were founded upon a memoir of the celebrated Wilhelm Von

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dans l'article précédent, du point où chacune d'elles devient navigable jusqu'à son embouchure, sera entièrement libre, et ne pourra, sous le rapport du commerce, être interdite à personne; bien entendu que l'on se conformera aux règlemens relatifs à la police de cette navigation; lesquels seront conçus d'une manière uniforme pour tous, et aussi favorable que possible au commerce de toutes les nations.

"Art. CX. Le système qui sera établi, tant pour la perception des droits que pour le maintien de la police, sera, autant que faire se pourra, le même pour tout le cours de la rivière, et s'étendra aussi, à moins que les circonstances particulières ne s'y opposent, sur ceux de ses embranchemens et confluens qui, dans leur cours navigable, séparent ou traversent différents états.

"Art. CXI. Les droits sur la navigation seront fixés d'une manière uniforme, invariable, et assez indépendante de la qualité différente des marchandises pour ne pas rendre nécessaire un examen détaillé de la cargaison, autrement que pour cause de fraude et de contravention. La quotité de ces droits, qui, en aucun cas, ne pourront excéder ceux existant actuellement, sera déterminée d'après les circonstances locales, qui ne permettent guères d'établir une règle générale à cet égard. On partira néanmoins, en dressant le tarif, au point de vue d'encourager le commerce en facilitant la navigation, et l'octroi établi sur le Rhin pourra servir d'une norme approximative.

"Le tarif une fois réglé, il ne pourra plus être augmenté que par un arrangement commun des états riverains, ni la navigation grevée d'autres droits quelconques, outre ceux fixés dans le règlement.

"Art. CXII. Les bureaux de perception, dont on réduira autant que possible le nombre, seront fixés par le règlement, et il ne pourra s'y faire ensuite aucun changement que d'un commun accord, à moins qu'un des états riverains ne voulût diminuer le nombre de ceux qui lui appartiennent exclusivement.

"Art. CXIII. Chaque état riverain se chargera de l'entretien des chemins de hallage qui passent par son territoire, et des travaux nécessaires pour la même étendue dans le lit de la rivière, pour ne faire éprouver aucun obstacle à la navigation.

"Le règlement futur fixera la manière dont les états riverains devront concourir à ces derniers travaux, dans le cas où les deux rives appartiennent à différens gouvernemens.

"Art. CXIV. On n'établira nulle part des droits d'étape, d'échelle, ou de relâche forcée. Quant à ceux qui existent déjà, ils ne seront conservés qu'en tant que les états riverains, sans avoir égard à l'intérêt local de l'endroit ou du pays où ils sont établis, les trouveroient nécessaires ou utiles à la navigation et au commerce en général.

"Art. CXV. Les douanes des états riverains n'auront rien de commun avec les droits de navigation. On empêchera, par des dispositions réglementaires, que l'exercice des fonctions des douaniers ne mette pas

Humboldt (*u*), then the Prussian plenipotentiary; they were afterwards applied, by a series of articles, to the details of the tolls (*x*) *octroi*, police, and other matters incident to the navigation of rivers, and in particular to the Rhine, the Neckar, the Main, the Moselle, the Meuse, the Scheldt—the stipulations relating to the Meuse and the Scheldt were subsequently incorporated into the treaty of 1839, between the then independent kingdoms of Holland and Belgium.

CLXV. Arrangements made in a similar spirit with respect to the free navigation of the Vistula, entered into, in May 1815, between Austria and Russia (*y*), and between

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d'entraves à la navigation; mais on surveillera, par une police exacte sur la rive, toute tentative des habitans de faire la contrebande à l'aide des bateliers.

"Art. CXVI. Tout ce qui est indiqué dans les articles précédens sera déterminé par un règlement commun qui renfermera également tout ce qui auroit besoin d'être fixé ultérieurement. Le règlement, une fois arrêté, ne pourra être changé que du consentement de tous les états riverains, et ils auront soin de pourvoir à son exécution d'une manière convenable, et adaptée aux circonstances et aux localités.

"Art. CXVII. Les règlemens particuliers relatifs à la navigation du Rhin, du Neckar, du Mein, de la Moselle, de la Meuse et de l'Escaut, tels qu'ils se trouvent joints au présent acte, auront la même force et valeur que s'ils y avoient été textuellement insérés."

(*u*) *Wheaton's History*, p. 498.

(*x*) *Grotius*, l. ii. c. ii. xiv., observes generally upon the question of tolls: "Sed quæritur, an ita transeuntibus mercibus, terra, aut amne, aut parte maris, quæ terræ accessio dici possit, vectigalia imponi possint ab eo, qui in terra imperium habet. Certè quæcunque onera ad illas merces nullum habent respectum, ea mercibus istis imponi nulla æquitas patitur. Sic nec capitatio, civibus imposita ad sustentanda reipublicæ onera, ab exteris transeuntibus exigi potest. Sed si aut ad præstandam securitatem mercibus, aut inter cætera, etiam ob hoc onera sustinentur, ad ea compensanda vectigal aliquod imponi mercibus potest, dum modus causæ non excedatur." Upon this passage *Barbeyrac* remarks: "Cette raison et autres semblables ne font que rendre plus juste la levée des impôts. Mais indépendamment de tout cela on peut exiger quelque chose pour la *simple permission de passer*, qu'on n'étoit pas obligé d'accorder à la rigueur. Il est libre à tout propriétaire, par une suite du droit même de propriétaire, de n'accorder à autre que, moiennant un certain prix, l'usage de son bien." See also *Vattel*, l. i. c. x. pp. 103, 104, 128; l. ii. c. x. p. 362.

(*y*) Treaty between Austria and Russia as to the Dniester, March 19, 1810.

Russia and Prussia, to which Austria subsequently acceded, and with respect to the rivers and canals of ancient Poland, were confirmed by the fourteenth article of the final diet of this Congress. Similar regulations were established with respect to the navigation of the Elbe, by a convention signed at Dresden, on the 23rd of June, 1821, by the States bordering on that river (*les États riverains*), and by an additional act, signed by the same parties at Dresden, on the 13th of April, 1844; a similar act was entered into by the States bordering on the Weser on the 10th of September, 1823 (*z*). By the ninety-sixth article of the same Congress, the same general principles with respect to the free navigation of rivers were extended to the Po.

CLXVI. By a Treaty (*a*) between Spain and Portugal, signed at Lisbon on the 13th of August, 1835, the perfect freedom of navigation of the river Douro was secured to the subjects of both the contracting Powers.

CLXVII. The Treaty of Bucharest in 1812 put an end to the hostilities which had been carried on between Russia and the Ottoman Empire since 1809. By the fourth article of that Treaty it was covenanted, that the boundary of Russia on the side of Turkey in Europe should be the Pruth, from the point where it joins the Danube, and the left bank of the Danube to its mouth into Kilia in the Black Sea; that the navigation of both rivers, according to these limits, should be equally free—the latter only having been so before—to the subjects of both empires; that no fortifications should be erected on the island in it; and that the right of fishing and cutting wood should also be common to both countries (*b*). But by the Treaty of Paris, 1856 (*c*), the navigation of the noble and mighty Danube was subjected to the same public law to which other great rivers of Europe flowing through the territories of divers

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(*z*) *Martens, Nouv. Recueil*, tom. ix. p. 361.

(*a*) *Martens et De Cussy*, tom. iv. p. 123.

(*b*) *Wheaton's Hist.* p. 504.

(*c*) Arts. xv.–xix.

States have been subjected by the Treaty of Vienna (*d*). The extension of the principle of free navigation to this great artery of Europe is a fact of no light importance to the present and future welfare of mankind. By the Treaty of Adrianople (*e*) the *Sulina* channel of the Danube had been practically placed under the power of Russia. Much of the value of the navigation depends upon the state of this channel, about which great complaints had been justly made (*f*). This evil also has been remedied by the Treaty of Paris (1856), which appointed an European commission to examine and make regulations on the subject (*g*).

CLXVIII. The expressions in the Treaties of Paris and Vienna, stipulating for the free navigation of the Rhine "jusqu'à la mer," gave rise to a serious controversy between the Dutch Government and all the other Powers interested in the navigation of that river, except Baden and France; they supported the interpretation put upon these words by the Dutch. "To the sea," they contended, in the first place, did not mean "into the sea;" and, secondly, if the upper States were to insist so strictly upon words, then they must be contented with the course of the proper Rhine itself. The mass of water which forms the Rhine, dividing itself a little way above Nimeguen, is carried to the sea through three principal channels, the Waal, the Leck, and the Yssel; the first descending by Gorcum, where it changes its name for that of the Meuse; the second, farther to the north, approaching the sea at Rotterdam; and the third, taking a northerly course by Zutphen and Deventer, to disgorge itself into the Zuyder Zee. None of these channels, however,

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(*d*) "Convention conclue le 25 (13) juillet 1840, entre l'Autriche et la Russie, concernant la navigation du Danube."—*Martens, Rec. de Traités, etc.*, vol. xxx. p. 209.

(*e*) Art. 2, 1829.

(*f*) Correspondence with the Russian Government respecting obstructions to the navigation of the Sulina Channel of the Danube, in papers laid before Parliament, 1853.

(*g*) See a *règlement provisoire* made on the 9th July, 1860.—*Rec. gén. de Traités, Samwer* (cont. of *Martens*), t. iv. 2e partie, p. 118.

is called or reckoned the Rhine; that name is preserved to a small stream which leaves the Leck at Wyck, takes its course by Utrecht and Leyden, gradually losing its waters, and, dwindling away so as to be unable to reach the sea, disappears among the downs in the neighbourhood of Kulwyck. The Rhine itself, strictly speaking, being thus useless for the purposes of sea-navigation, it had been agreed between Holland and her neighbours to consider the Leck as the continuation of the Rhine; and the Government of the Netherlands afterwards consented that the Waal, as being deeper and better adapted to navigation, should be substituted for the Leck. Now the Waal, said the Government of Holland, terminates at Gorcum, to which the tide ascends; there consequently ends the Rhine; all that remains of that branch from Gorcum to Gravelingen, Helvoetsluys, and the mouth of the Meuse, is an arm of the sea, enclosed within our own territories, and therefore to be subjected to any imposts and regulations which we may think fit to establish. This interpretation, though supported, as has been remarked, by France and Baden, was strenuously opposed by all the other Powers of Germany, who denounced it as an attempt to evade by chicane the plain meaning of the Treaty of Paris. Prussia addressed a memorial to the great Powers who had been parties to the Treaty of Paris and the Congress of Vienna, calling upon them to state what had been the real meaning of that Treaty in regard to the navigation of the Rhine. The allied Powers put upon the Treaty the same interpretation as the German States; but the Government of the Netherlands having returned an unfavourable answer to their joint remonstrance, the Austrian envoy at Brussels presented a note to that Court, in February 1826, in which he argued, that, "by the Treaty of Paris, the allied Powers, "in conjunction with France, agreed that the sovereignty of "the House of Orange should receive an accession of ter-"ritory, and that the navigation of the Rhine, from the "point where it is navigable to the sea (jusqu'à la mer), "and *vice versa*, should be free. This last point was further

" confirmed in the separate article, which provides 'that the
" 'freedom of navigation in the Scheldt shall be established
" 'on the same principles as those on which the navigation of
" 'the Rhine is regulated by Article 5 of the present Treaty.'
" The allied Powers further reserved to themselves to deter-
" mine, at the next Congress, the countries which should be
" united with Holland, and declared 'that then the principles
" 'should be discussed, upon which the tolls to be levied by
" 'the States on the banks might be regulated in the most
" 'uniform manner and most advantageously to the commerce
" 'of all nations.' It appeared, from the simultaneous issuing
" of these two resolutions, that, among other conditions
" which the allies annexed to the incorporation of Belgium,
" this increase of territory was combined on their side, even
" before the establishment of the kingdom of the Netherlands,
" with the above obligation to restore the freedom of the
" navigation. There could certainly be no more express
" and positive obligation than that which is united with the
" foundation of a State, and which, in the present case, had
" been fully sanctioned by the accession of the King of the
" Netherlands to the Treaty of Paris, and the act of Congress
" at Vienna. It was inconceivable how the Government of
" the Netherlands could flatter itself with the hope of making
" a right obscure and doubtful, by prolix observations on the
" main resolution, and to do away with the principle of the
" free navigation of the Rhine, which was proclaimed in the
" face of the world in the first document of the political
" restoration of Europe, and on the same day when Holland
" was given up to the House of Orange."

The cabinet of Brussels replied by a repetition of the geographical argument, that the Rhine, properly so called, did not reach the sea; and by an assertion, that the Republic of Holland had never ceased to exist *de jure*, and had preserved its existence under a monarch *de facto*, before the act of the Congress of Vienna, and before the treaties which incorporated with it the Catholic Netherlands. The outlets of the Rhine were certainly streams belonging to Holland, and

to Holland only; but the question was, whether the opening of these streams was not a part of the condition whereby Holland had gained the accession of the Belgic provinces, —whether they were not conferred and accepted on the understanding thât the exclusive territorial right to the mouths of the Rhine should be modified and limited for the future. The reply of the Dutch cabinet does not seem to meet this objection; and it must be confessed that, to contend that the Rhine Proper is lost in a little brook, while two-thirds of its mighty volume of water are flowing on through the Waal and receiving the tributary Meuse, is a proposition which, however geographically accurate, cannot be very agreeable to the plain common sense of mankind. All that could be gained, however, at this time was a concession that the Leck should be considered as the Rhine, and that German vessels should be allowed to navigate it unmolested under no higher duties than might be imposed on other parts of the river, and that the prohibitions against the transit of goods should be abolished. Still, however, the main question—through what channel the Rhine "*jusqu'à* "*la mer*" was to be navigated—remained in uncertainty; for the Leck ends at its junction with the Meuse before it reaches Rotterdam, and the Meuse was a river purely Belgic and Dutch (*h*).

But by the Treaty (*i*) concluded at Mayence, March 31st, 1831, it was finally settled by all the riparian States of the Rhine, that this river should be free from the point where it is first navigable into the sea itself (*bis in die See*), and that the two outlets to the sea should be the *Leck* and the *Waal* —the passage through the Leck being by Rotterdam and Briel, and through the Waal by Dortrecht and Helvoetsluys —with the use of the canal between the latter place and

(*h*) *Annual Reg.* vol. lxviii., year 1826, pp. 259–263.

(*i*) "Conventions entre les Gouvernemens des États riverains du Rhin, et règlement relatif à la navigation du dit fleuve, conclus à Mayence le 31 mars 1831, et dont les ratifications ont été échangées réciproquement le 16 juin."—*Martens, Rec. de Traités,* vol. xvii. p. 252.

Voovre. Various and particular regulations were made by this Treaty concerning police and tolls; and it was especially stipulated, that, if the aforesaid outlets to the sea should be dried up, the Government of the Netherlands, in whose dominions they were, should indicate other courses to the sea equal in convenience to those used for navigation by its own subjects.

CLXIX. On no occasion were the principles of this branch of International Law more elaborately discussed than in the cases of the great American rivers, the Mississippi and the St. Lawrence. By the Peace of Paris and Hubertsburg in 1763, France ceded Canada, and Spain ceded Florida, to Great Britain. France lost by this Treaty all her possessions in North America, Louisiana having been previously ceded to Spain as an indemnity for Florida. The boundary line between the British and French possessions in North America was drawn through the middle of the Mississippi, from its source to the Iberville, and through the Iberville and the lakes of Maurepos and Pontchartrain to the sea; and the free navigation of the Mississippi was secured to British subjects upon the ground, which has since proved to be erroneous in point of fact, that the Mississippi took its rise in the British territory. Subsequently France ceded Louisiana to Spain, and to the same Power Great Britain, at the Treaty of Versailles in 1783, "*retroceded*" (to use the language of the Treaty) Florida. Spain thus became sovereign over both banks of the river for a considerable distance above and at its mouth; and on this fact she built her claim to an exclusive navigation of the river below the point of the southern boundary of the United States.

The recognition of the independence of the United States was the object of the Treaty of 1783; and by the eighth article it was provided, that "the navigation of the river "Mississippi shall for ever remain free and open to the "subjects of Great Britain and the citizens of the United "States." The United States therefore resisted the claim of Spain, taking their stand upon these articles in the treaties

of 1763 and 1783, and also upon the general principles of International Law. They insisted that by this law a river was open to all riparian inhabitants, and that the upper inhabitants of a river had a right to descend the stream, in order to find an outlet for their produce; and, even if Spain possessed an *exclusive* dominion over the river between Florida and Louisiana, that an *innocent passage* over it was not the less on that account the right of the inhabitants of its upper banks. The dispute was ended in 1795 by the Treaty of San Lorenzo el Real; the fourth article of which provided that the Mississppi should be open to the navigation of the citizens of the United States from its source to the ocean. By the twenty-second article they were permitted to deposit their goods at New Orleans, and to export them from thence on payment of warehouse hire.

The United States having acquired Louisiana, by the cession of Napoleon, on the 30th April, 1803 (*j*), and Florida by Treaty with Spain on the 22nd February, 1819, thereby included within their territory the whole of this magnificent stream the Mississippi, from its source to the Gulf of Mexico. The stipulation in favour of British subjects, in the article of the Treaty of 1783, was not renewed in the Treaty of Ghent, 24th December, 1814; and it is therefore maintained by the United States that the *right* of navigating the Mississippi is vested exclusively in their subjects (*k*).

CLXX. The case of the navigation of the St. Lawrence was as follows (*l*):—

(*j*) *Vide post.*

(*k*) *Wheaton's Hist.* p. 506-9; *Élém.* t. i. p. 185-6.

(*l*) *Wheaton's Hist.* 5, 12, 17, citing Mr. Secretary Clay's letter to Mr. Gallatin, American Minister in London, June 19th, 1826.

Congress Documents, sess. 1827, 1828, No. 43.

American Paper on the Navigation of the St. Lawrence.—Ib. sess. 1827, 1828, No. 43.

British Paper on the Navigation of the St. Lawrence.

Wheaton's Élém. i. 187.

State Papers (*English*), 1826-9.

Times Newspaper, Oct. 25, 26, 1850.

Great Britain possessed the northern shores of the lakes, and of the river in its whole extent to the sea, and also the southern bank of the river from the latitude forty-five degrees north to its mouth. The United States possessed the southern shores of the lakes, and of the St. Lawrence, to the point where their northern boundary touched the river. These two Governments were therefore placed pretty much in the same attitude towards each other, with respect to the navigation of the St. Lawrence, as the United States and Spain had been in with respect to the navigation of the Mississippi, before the acquisitions of Louisiana and Florida.

The argument on the part of the United States was much the same as that which they had employed with respect to the navigation of the Mississippi. They referred to the dispute about the opening of the Scheldt in 1784, and contended that, in the case of that river, the fact of the banks having been the creation of *artificial* labour was a much stronger reason, than could be said to exist in the case of the Mississippi, for closing the mouths of the sea adjoining the Dutch Canals of the Sas and the Swin, and that this peculiarity probably caused the insertion of the stipulation in the Treaty of Westphalia; that the case of the St. Lawrence differed materially from that of the Scheldt, and fell directly under the principle of free navigation embodied in the Treaty of Vienna respecting the Rhine, the Neckar, the Main, the Moselle, the Meuse, and the Scheldt. But especially it was urged, and with a force which it must have been difficult to parry, that the present claim of the United States with respect to the navigation of the St. Lawrence, was precisely of the same nature as that which Great Britain had put forward with respect to the navigation of the Mississippi when the mouth and lower shores of that river were in the possession of another State, and of which claim Great Britain had procured the recognition by the Treaty of Paris in 1763.

The principal argument contained in the reply of Great Britain was, that the liberty of passage by one nation

through the dominions of another was, according to the doctrine of the most eminent writers upon International Law, a qualified occasional exception to the paramount rights of property; that it was what these writers called an *imperfect*, and not a *perfect* (*m*) right; that the Treaty of Vienna did not sanction this notion of a *natural* right to the free passage over rivers, but, on the contrary, the inference was that, not being a natural right, it required to be established by a *convention*; that the right of passage once conceded must hold good for other purposes besides those of trade in peace, for hostile purposes in time of war; that the United States could not consistently urge their claim on principle without being prepared to apply that principle by way of reciprocity, in favour of British subjects, to the navigation of the Mississippi and the Hudson, to which access might be had from Canada by land carriage or by the Canals of New York and Ohio.

The United States replied, that practically the St. Lawrence was a *strait* (*n*), and was subject to the same principles of law; and that as *straits* are accessory to the seas which they unite, and therefore the right of navigating them is common to all nations, so the St. Lawrence connects with the ocean those great inland lakes, on the shores of which the subjects of the United States and Great Britain both dwell; and, on the same principle, the natural link of the *river*, like the natural link of the *strait*, must be equally available for the purposes of passage by both. The passage over land, which was always pressing upon the minds of the writers on International Law, is intrinsically different from a passage over water; in the latter instance, no detriment or inconvenience can be sustained by the country to which it belongs. The track of the ship is effaced as soon as made; the track of an army may leave serious and lasting injury behind. The

(*m*) The inaccuracy of this phrase has been already noticed. It was intended to say that the navigation was a right not *stricti juris*, but a concession of *comity*.

(*n*) *Vide post*, the law as to *Straits*.

United States would not "shrink" from the application of the analogy with respect to the navigation of the Mississippi, and whenever a connection was effected between it and Upper Canada, similar to that existing between the United States and the St. Lawrence, the same principle should be applied. It was, however, to be recollected, that the case of rivers which both rise and disembogue themselves within the limits of the same nation is very distinguishable, upon principle, from that of rivers which, having their sources and navigable portions of their streams in States above, discharge themselves within the limits of *other* States below.

Lastly, the fact, that the free navigation of rivers had been made a matter of *convention* did not disprove that this navigation was a matter of *natural right* restored to its proper position by treaty.

The result of this controversy for many years produced no effect. Great Britain maintained her exclusive right. The United States still remained debarred from the use of this great highway, and were not permitted to carry over it the produce of the vast and rich territories which border on the lakes above to the Atlantic Ocean.

It seems difficult to deny that Great Britain may have grounded her refusal upon strict Law; but it is at least equally difficult to deny, first, that in so doing she put in force an extreme and hard law; secondly, that her conduct with respect to the navigation of the St. Lawrence was inconsistent with her conduct with respect to the navigation of the Mississippi. On the ground that she possessed a small tract of domain in which the Mississippi took its rise, she insisted on her right to navigate the entire volume of its waters: on the ground that she possessed both banks of the St. Lawrence where it disembogued itself into the sea, she denied to the United States the right of navigation, though about one half of the waters of Lakes Ontario, Erie, Huron, and Superior, and the whole of Lake Michigan through which the river flows, were the property of the United States.

Any blame, however, attaching to the conduct of Great

Britain, was removed by the Reciprocity Treaty of the 5th of June, 1854, which provided by Article IV. as follows:—
"It is agreed that the citizens and inhabitants of the United
"States shall have a right to navigate the river St. Law-
"rence and the canals of Canada, used as the means of
"communicating between the great lakes and the Atlantic
"Ocean, with their vessels, boats, and crafts, as fully and
"freely as the subjects of her Britannic Majesty, subject
"only to the same tolls and other assessments as now are or
"hereafter may be exacted of her Majesty's said subjects;
"it being understood, however, that the British Government
"retains the right of suspending this privilege on giving
"due notice thereof to the Government of the United
"States; that if at any time the British Government should
"exercise the said reserved right, the Government of the
"United States shall have the right of suspending, if it
"think fit, the operation of Article III. of the present
"Treaty, in so far as the province of Canada is affected
"thereby, for so long as the suspension of the free navi-
"gation of the river St. Lawrence or the canals may con-
"tinue; that British subjects shall have the right freely to
"navigate Lake Michigan with their vessels, boats, and
"crafts, so long as the privilege of navigating the river
"St. Lawrence, secured to American citizens by the above
"clause of the present article shall continue; and the
"Government of the United States further engages to urge
"upon the State governments to secure to the subjects of
"her Britannic Majesty the use of the several State canals
"on terms of equality with the inhabitants of the United
"States; and that no export duty, or other duty, shall be
"levied on lumber or timber of any kind, cut on that portion
"of the American territory in the State of Maine, watered
"by the river St. John and its tributaries, and floated down
"that river to the sea where the same is shipped to the
"United States from the province of New Brunswick" (*o*).

(*o*) *Hertslet's Treaties*, vol. ix. 998, x. 647, xi. 898.
See Address of President Pierce, 1853, *Ann. Reg.* for that year, p. 414.
See *Lawrence's Wheaton*, *n.* 114, p. 361.

On January 18, 1865, the President of the United States put an end to this Treaty, in pursuance of a Resolution of Congress, availing himself of a provision in the Treaty, ten years having elapsed since its execution (*p*).

CLXXI. The Uruguay and Parana have been opened to all merchant vessels by a Treaty of 10th of July, 1858, between the United States and the Argentine Confederation, and by a Treaty, May 13, 1858, between the United States and Bolivia. The latter country declares "that in ac-"cordance with fixed principles of International Law, it "regards the Amazon and La Plata, with their tribu-"taries, as highways or channels opened by nature on the "commerce of all nations." Ecuador, 26th of November, 1858, has declared her rivers free. Peru appears to have still a controversy as to the Peruvian tributaries of the Amazon (*q*).

CLXXII. The question, whether the *open sea*, or *main ocean*, could be appropriated (*r*) by any State to the exclusion of others, has been the subject of celebrated controversies. Spain and Portugal, at different epochs, have claimed exclusive right, founded upon the titles of previous discovery, possession, and Papal grants, to the navigation, commerce, and fisheries of the Atlantic and Pacific Oceans. The *Mare*

(*p*) *Dana's Wheaton*, p. 181; *U. S. Laws*, xiii. 566.

(*q*) *Dana's Wheaton*, 204–5.

President Pierce's Message to United States, 1853; *Ann. Reg.* 1853, p. 323.

Lawrence's Wheaton, 360, n. 114.

See *Speech of the Earl of Clarendon, Secretary of Foreign Affairs, in the House of Lords*, June 3rd, 1853.—*Hansard's Parl. Deb.* vol. cxxvii. No. 6, pp. 1073–4.

(*r*) *Albericus Gentilis*, lib. i. c. viii. *Advocationes Hispanicæ*, maintains (in 1613) the claim of *Great Britain* to the *Narrow Seas*.

Wheaton's Law of Nations, 1, 225–9.

Vattel, lib. i. c. xxiii.

Martens, lib. ii. c. i. s. 43. *De l'Océan*, lib. iv. c. iv. s. 157. *Droits sur l'Océan et sur la Mer des Indes.*

Günther, ii. p. 28. "Das Hauptwerk hierbei kommt darauf an, das

Liberum (*s*), written by Grotius in 1609, the chief object of which was to demonstrate the injustice of the Portuguese pretensions, founded on their discovery of the Cape of Good Hope, to the exclusive navigation of the African and the Indian seas,—the *Mare Clausum*, written by our own countryman Selden, to establish the exclusive right of Great Britain to the British seas,—Puffendorf, in the fifth chapter of his fourth book "De Jure Naturale Gentium,"—and the essay of Bynkershoek in 1702, *De Dominio Maris*, have exhausted this theme (*t*). It is sufficient to say, that the reason of the thing, the preponderance of authority, and the practice of nations, have decided, that the *main ocean*, inasmuch as it is the necessary highway of all nations, and is from its nature incapable of being continuously possessed, cannot be the property of any one State. "Igitur quicquid dicat Titius, "quicquid Mævius, ex possessione jure naturali et gentium "suspenditur dominium, nisi pacta dominium, citra possessi-"onem, defendant, ut defendit jus cujusque civitatis pro-"prium" (*u*). It is possible, as is indeed apparent from this citation, that a nation may acquire exclusive right of *navigation* and *fishing* of the main ocean *as against another nation*, by virtue of the specific provisions of a treaty; for it is competent to a nation to renounce a portion of its rights; and

man die offene See, oder das grosse Weltmeer von den einzelnen Theilen desselben, die an oder zwischen die Länder der Nationen gehen, unterscheide."

(*s*) A noble work, which cannot now be read without profit to the reader and admiration for the writer. It was dedicated "Ad Principes Populosque liberos orbis Christiani."

(*t*) When the Spanish envoy, Mendoza, complained to the Queen Elizabeth that English ships presumed to trade in the Indian Seas, that queen gave for answer,—"That she saw no reason that could exclude her, or other nations, from navigating to the Indies, since she did not acknowledge any prerogative that Spain might claim to that effect, and much less any right in it to prescribe laws to those who owed it no obedience, or to debar them trade. That the English navigated on the ocean, the use of which was like that of the air, common to all men, and which, by the very nature of it, could not fall within the possession or property of any one."—*Camd. in vita Elizabeth, ad ann.* 1580, p. m. 328 *et seq.*

(*u*) *Bynkershoek, Opera*, t. vi. p. 361.

there have been instances of such renunciation, both in ancient and modern times.

CLXXIII. The treaty of peace, justly called "famous" by Demosthenes (*x*) and Plutarch (*y*), whereby the Athenians extorted from the Persians a pledge that they would not approach the Greek sea within the space of a day's journey on horseback, and that no ship of war should sail between the Cyanean and Chelidonian isles; the treaties whereby the Carthaginians bound the Romans not to navigate the Mediterranean beyond a certain point, and whereby the Romans imposed restrictions of the like kind upon the Illyrians, and on King Antiochus;—these are memorable examples of the voluntary resignation of a nation's intrinsic rights.

So, in modern times, the House of Austria (*z*) has renounced, in favour both of the English and Dutch, her right to send ships from the Belgic provinces to the East Indies: and the Dutch attempted to interdict Spanish ships, sailing to the Philippine Islands, from doubling the Cape of Good Hope.

CLXXIV. Instances of this kind, however, are far from proving that the main ocean is capable of becoming property. "Possunt enim ut singuli," (Grotius truly remarks) "ita "et populi pactis, non tantum de jure quod propriè sibi com-"petit; sed et de eo quod cum omnibus hominibus commune "habent, in gratiam ejus cujus id interest decedere" (*a*). He

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(*x*) Καλλίαν τὸν Ἱππονίκου, τὸν ταύτην τὴν ὑπὸ πάντων θρυλλουμένην εἰρήνην πρεσβεύσαντα, ἵππου μὲν δρόμον ἡμέρας πεζῇ μὴ καταβαίνειν ἐπὶ τὴν θάλατταν βασιλέα ἐντὸς δὲ Χελιδονέων καὶ Κυανέων, πλοίῳ μακρῷ μὴ πλεῖν.—*Orat. de falsa Legat., Demosth.*

(*y*) Τοῦτο τὸ ἔργον οὕτως ἐταπείνωσε τὴν γνώμην τοῦ βασιλέως, ὥστε συνθέσθαι τὴν περιβόητον εἰρήνην ἐκείνην, ἵππου μὲν δρόμον ἀεὶ τῆς Ἑλληνικῆς ἀπέχειν θαλάσσης, ἔνδον δὲ Κυανέων καὶ Χελιδονέων μακρᾷ νηῒ καὶ χαλκεμβόλῳ μὴ πλεῖν.—*Plutarch. in vita Cimon.*

Grotius, l. ii. c. iii. s. 15.

Vattel, l. i. c. xxiii. s. 284.

(*z*) *Traité de Vienne*, 16 mars 1731, Art. 5.

(*a*) *Grotius*, l. ii. c. iii. s. 15.

Vattel, l. i. c. xxiii. s. 284.

Barbeyrac remarks in a note on this passage: "Cela est vrai; mais rien

illustrates this position, according to his wont, by a reference to the Roman Law. A person sold his maritime farm with the condition that the purchaser should not fish for *thunnies* to the prejudice of another maritime farm, which the seller retained in his possession. Upon this case Ulpian gave his opinion that, although the sea belonged to the class of things which could not be subjected to a *servitus* (*b*) of this kind, yet the *bona fides* of the contract required that the restriction should be binding against the purchaser, and those who succeeded to his rights and estates.

The right of navigation, fishing, and the like, upon the open sea, being *juræ meræ facultatis,* rights which do not require a continuous exercise to maintain their validity, but which may or may not be exercised according to the free will and pleasure of those entitled to them, can neither be lost by *non-user* or *prescribed* against, nor acquired to the exclusion of others by having been immemorially exercised by one nation only. No presumption can arise that those who have not hitherto exercised such rights, have abandoned the intention of ever doing so (*c*).

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n'empêche aussi que, quand on fait des traités comme ceux dont il s'agit, on n'ait dessein de s'assurer par là la propriété de quelque mer, et d'obliger les autres à la reconnoître. M. Vitrarius, dans son Abrégé de notre auteur (l. ii. c. iii. s. 18), prétend que, si celui qui fait un tel traité étoit déjà maître de la mer dont il veut que l'autre s'éloigne, il ne seroit pas nécessaire de stipuler une telle clause. Mais il ne s'est pas souvenu de ce qu'il établit lui-même, après notre auteur (l. ii. c. xv.), qu'il y a des traités qui roulent sur des choses déjà dues, même par le Droit naturel."

(*b*) *Dig.* l. viii. t. iv. leg. 13: "Venditor fundi Geroniam fundo Batriano, quem retinebat, legem dederat, ne contra eum piscatio thynnaria exerceretur. Quamvis mari, quod natura omnibus patet, servitus imponi privata lege non potest, quia tamen bona fides contractus legem servari venditionis exposcit, personæ possidentium aut in jus eorum succedentium per stipulationis vel venditionis legem obligantur."

(*c*) *Vattel,* l. i. c. viii. s. 95: "Si les droits touchant le commerce sont sujets à la prescription."

Lib. i. c. xxiii. s. 285–6.

Puffendorf, Jur. Nat. et Gent. l. iv. c. v. s. 5.

Heffters, s. 74: "Sogar ein unvordenklicher Besitzstand, wenn er nicht ein freiwilliges Zugeständniss anderer Nationen *deutlich* erkennen lässt,

CLXXV. But though no presumption can arise, it is the opinion of Vattel—who holds most explicitly, in more than one part of his work, the doctrine which has just been laid down—that such non-user on the part of other nations may possibly, under certain circumstances, become clothed with the character of a *tacit consent and convention*, which may found a title in one nation to exercise such rights to the exclusion of others. "Qu'une nation en possession de la "navigation et de la pêche en certains parages, y prétende "un droit exclusif, et défende à d'autres d'y prendre part; si "celles-ci obéissent à cette défense, avec des marques suffi-"santes d'acquiescement, elles renoncent tacitement à leur "droit en faveur de celle-là, et lui en établissent un, qu'elle "peut légitimement soutenir contre elles dans la suite, sur-"tout lorsqu'il est confirmé par un long usage" (*d*).

CLXXVI. Mr. Wheaton does not appear to agree with the qualification of the doctrine contained in the passage just cited; but the reasoning of Vattel does not seem to be unsound: the case for its application is not often likely to occur.

CLXXVII. In 1790, May 25(*e*), Lord Grenville vindicated the British *dominium* over Nootka Sound against the Spaniards. In a message laid before both Houses of Parliament it was said that "His Majesty has received information, that two vessels belonging to his Majesty's subjects, "and navigated under the British flag; and two others, of

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vermag keine ausschliesslichen Befugnisse bei solchen *res meræ facultatis* zu ertheilen."

Wheaton's Elements, vol. i. p. 228: "The authority of Vattel would be full and explicit to the same purpose, were it not weakened by the concession, that though the exclusive right of navigation or fishery in the sea cannot be claimed by one nation on the ground of immemorial use, nor lost to others by non-user on the principle of prescription, yet it may be thus established where the non-user assumes the nature of a consent or tacit agreement, and thus becomes a title in favour of one nation against another."

(*d*) *Vattel, Le Droit des Gens*, t. i. l. i. c. xxiii. s. 286.

(*e*) *Annual Register*, vol. xxxii., 1790.

" which the description is not hitherto sufficiently ascertained,
" have been captured at Nootka Sound, on the north-western
" coast of America, by an officer commanding two Spanish
" ships of war; that the cargoes of the British vessels have
" been seized, and that their officers and crews have been
" sent as prisoners to a Spanish port.

" The capture of one of these vessels had before been
" notified by the Ambassador of his Catholic Majesty, by
" order of his Court, who, at the same time, desired that
" measures might be taken for preventing his Majesty's
" subjects from frequenting those coasts which were alleged
" to have been previously occupied and frequented by the
" subjects of Spain. Complaints were also made of the
" fisheries carried on by his Majesty's subjects in the seas
" adjoining to the Spanish continent, as being contrary to
" the rights of the Crown of Spain. In consequence of this
" communication, a demand was immediately made, by his
" Majesty's order, for adequate satisfaction, and for the
" restitution of the vessel previous to any other discussion.

" By the answer from the Court of Spain, it appears that
" this vessel and her crew had been set at liberty by the
" Viceroy of Mexico; but this is represented to have been
" done by him on the supposition that nothing but the
" ignorance of the rights of Spain encouraged the individuals
" of other nations to come to those coasts for the purpose of
" making establishments, or carrying on trade; and in con-
" formity to his previous instructions, requiring him to show
" all possible regard to the British nation.

" No satisfaction is made or offered, and a direct claim is
" asserted by the Court of Spain to the exclusive rights of
" sovereignty, navigation, and commerce in the territories,
" coasts, and seas in that part of the world.

" His Majesty has now directed his minister at Madrid to
" make a fresh representation on this subject, and to claim
" such full and adequate satisfaction as the nature of the case
" evidently requires. And, under these circumstances, his
" Majesty, having also received information that considerable

" armaments are carrying on in the ports of Spain, has " judged it indispensably necessary to give orders for making " such preparations as may put it in his Majesty's power to " act with vigour and effect in support of the honour of his " Crown and the interests of his people. And his Majesty " recommends it to his faithful Commons, on whose zeal and " public spirit he has the most perfect reliance, to enable " him to take such measures, and to make such augmentation " of his forces, as may be eventually necessary for this " purpose.

" It is his Majesty's earnest wish, that the justice of his " Majesty's demands may ensure, from the wisdom and " equity of his Catholic Majesty, the satisfaction which is " so unquestionably due; and that this affair may be ter-" minated in such a manner as to prevent any grounds of " misunderstanding in future, and to continue and confirm " that harmony and friendship which has so happily subsisted " between the two Courts, and which his Majesty will " always endeavour to maintain and improve, by all such " means as are consistent with the dignity of his Majesty's " Crown, and the essential interests of his subjects." The dispute was terminated by the Nootka Sound Convention, the importance of which was much insisted upon in the recent discussions between Great Britain and the North American United States relative to the question of the Oregon boundary (*f*).

CLXXVIII. Upon the 17th of April, 1824 (*g*), a convention was entered into at St. Petersburg, between the United States of America and Russia, respecting the navigation of the Pacific Ocean, and the forming of settlements upon the north-western shores of America. By this convention it was agreed generally, that the subjects of both countries might freely navigate the Pacific, or South Sea, occupy shores as yet unoccupied, and enter into commerce

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(*f*) *Vide post.*
(*g*) Ratified 11th January, 1825.

with the native inhabitants: and it was stipulated that for the future it should be unlawful for the subjects of the United States to make any settlement on the north-west coast of America, or of the adjacent isles, "*au nord* du cinquante-"quatrième degré et quarante minutes de latitude septentri-"onale;" and for any subjects of Russia to make any settlement "*au sud* de la même parallèle" (*h*). This convention therefore restricts the natural rights of these two countries; but it cannot extend beyond them, or have any effect, *per se*, upon other countries.

CLXXIX. Denmark (*i*) has not always confined her pretensions of sovereignty to the narrow sea of the Baltic, but has also extended them to the open north sea (*k*). Queen Elizabeth complained in a letter which she wrote to the King of Denmark, in 1600, of the manner in which British vessels were prevented from fishing in this sea, maintaining their right to do so as resting upon an undoubted principle of law (*l*).

The supremacy claimed by Denmark over the Sound and the two Belts, through which the Baltic Sea finds its way into the ocean, was founded upon the valid international title of immemorial prescription confirmed by many treaties with various Maritime States. The dues, however, which Denmark levied upon ships passing these straits had long been the object of much complaint and the cause of much irritation to foreign States, and had become in fact very injurious to trade, owing to the detention of vessels which the collection of these dues occasioned. In 1857 the whole subject was happily adjusted by Treaty with the great European Powers.

(*h*) *Martens et De Cussy, Recueil de Traités,* t. iii. p. 659.

(*i*) *Schlegel, Staatsrecht Dänemarks.*

(*k*) *Vide post,* p. 226.

(*l*) "Regiam proinde protectionem nostram implorant, atque humiliter supplicant ne ab honestissima hac vivendi ratione (cui jam inde a primis annis assueverunt) alti nempè maris piscatione, Jure Gentium omniumque Nationum moribus libera, excludi illos facile permittamus."—*Rymer, Fœd.* t. xvi. p. 395, A Regina ad Regem Daniæ; super Piscatione in Alto Mari permittenda.

The right of Denmark to levy these dues was not distinctly recognized, but compensation was made to her by payment of a capital sum (*m*) on the ground of indemnity for maintaining lights and buoys, which Denmark stipulated to maintain and to levy no further duties. The United States declined to take any part in this European convention for what President Pierce considered "the most cogent "reasons." He stated—"One is, that Denmark does not "offer to submit to the convention the question of her "right to levy the Sound dues. A second is, that if the "convention were allowed to take cognizance of that par- "ticular question, still it would not be competent to deal "with the great international principle involved, which "affects the right in other cases of navigation and com- "mercial freedom, as well as that of access to the Baltic. "Above all, by the express terms of the proposition, it is "contemplated that the consideration of the Sound dues "shall be commingled with and made subordinate to a "matter wholly extraneous—the balance of power among "the Governments of Europe. While, however, rejecting "this proposition, and insisting on the right of free transit "into and from the Baltic, I have expressed to Denmark "a willingness on the part of the United States to share "liberally with other Powers in compensating her for any "advantages which commerce shall hereafter derive from "expenditures made by her for the improvement and "safety of the navigation of the Sound or Belts" (*n*). Accordingly a separate Treaty was made between the United States and Denmark, April 11, 1857, by which Denmark declared the Baltic open to American vessels, and stipulated to maintain buoys and lights and furnish pilots, if desired, for which she received a certain sum of money.

(*m*) The sum paid by Great Britain was a million and a quarter.

(*n*) See *Ann. Reg.* for 1855, p. 291. *Hertslet's Treaties,* x. pp. 736, 742, 743. *Dana's Wheaton,* p. 185, n. 112. *Laurence's Wheaton,* p. 333, n. 110.

CHAPTER VI.

NARROW SEAS, AS DISTINGUISHED FROM THE OCEAN.

CLXXX. Claims have been preferred by different nations to the exclusive dominion over *the seas surrounding their country*: if not to every part of such seas, to an extent far beyond the limits assigned in the foregoing paragraphs.

This kind of claim is distinguished from the claim of jurisdiction over the *ocean* by being confined to what are called *the narrow or adjacent seas,* they not being (it is contended), like the ocean, the great highway of the nation. It is further distinguished from the case of the *Straits* which just has been discussed, by the fact of the claimants not possessing the opposite shore.

CLXXXI. This claim is rested upon immemorial usage, upon national records, upon concessions of other States, upon the language of treaties. Considering the nature of the claim, and of the subject over which it is to be exercised, it cannot be built securely upon a less foundation than the express provisions of positive treaty, and can be valid only against those nations who have signed such Treaty. "There "may, by legal possibility" (as Lord Stowell says (*a*)), exist "a peculiar property excluding the universal or common "use;" but the strongest presumption of law is adverse to any such pretension. The Portuguese affected at one time to prevent any foreign vessel from navigating the African seas near the Bissagos Islands: and it is known that Great Britain once laid claim to exclusive right of property and

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(*a*) *The Twee Gebrœders*, 3 *Robinson's Ad. Rep.* 339. *Das Britannische Meer, Günther*, vol. ii. s. 20, p. 39.

jurisdiction, not merely over the British Channel extending from the island of *Quessant* to the *Pas de Calais,* but over the four seas which surround her coasts (*b*). Nor was this only while the Duchy of Normandy was held with the British dominions; or even while Calais, or the *Pas de Calais,* belonged to Great Britain, a circumstance of considerable weight with respect to their claim. Albericus Gentilis, in one of his *Advocationes Hispanicæ* (*c*), published in 1613, supports these pretensions. Queen Elizabeth seized upon some Hanseatic vessels lying at anchor off Lisbon for having passed through the sea north of Scotland without her permission.

CLXXXII. In support of this doctrine, Selden (*d*) wrote his celebrated *Mare Clausum,* in which he sought to establish two propositions:—1. That the sea might be property; 2. That the *seas* which washed the shores of Great Britain and Ireland were subject to her sovereignty even as far as the northern pole.

The opinions of jurists, as well as the practice of nations, have decided, that this work did not refute the contrary positions laid down by Grotius in his *Mare Liberum,* to which it purported to be an answer. Selden dedicated his work to Charles I.; and so fully did that monarch imbibe its principles, that in 1619 he instructed Carleton, the British ambassador, to complain to the States General of the Dutch provinces of the audacity of Grotius in publishing his *Mare Liberum,* and to demand that he should be punished. Not less agreeable was this doctrine to Cromwell and the re-

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(*b*) *Wheaton's Hist.* part i. s. 18, p. 152, &c., contains a clear and valuable account.

(*c*) Lib. i. cap. viii.

(*d*) *Joh. Seldeni, Mare Clausum, sive de Dominio Maris,* lib. ii.: "*Primo,* mare ex jure naturæ sive gentium hominum non esse commune, sed dominii privati sive proprietatis capax pariter ac tellurem esse demonstratur; *Secundo,* Serenissimum Magnæ Britanniæ Regem maris circumflui ut individuæ atque perpetuæ Imperii Britannici appendicis dominum esse asseritur."

publican parliament. They made war upon the Dutch to compel them to acknowledge the British empire over these seas (*e*).

CLXXXIII. The rights occasionally claimed by Great Britain in these seas were chiefly those of exclusive fishing, and of exacting the homage of salute from all common vessels. But it is very remarkable that Sir Leoline Jenkins, who was in fact the expounder of all international law to the Government of Charles II. and James II., appears never to have insisted upon these extravagant demands, but to have confined the rights of his country within the just and moderate limits which have been already stated.

CLXXXIV. It is true that the Dutch appear to have occasionally admitted the exclusive right of fishery, by making payment and taking out licences to fish—payment and licences which were afterwards suspended by Treaties between England and the Burgundian princes. It is true that, by the fourth Article of the Treaty of Westminster, concluded in 1674, the Dutch conceded the homage of the flag in the amplest manner to the English. "It was carried" (says Sir W. Temple, the negotiator of the Treaty) "to all "the height his Majesty could wish; and thereby a claim of "the crown, the acknowledgment of its dominion in the "Narrow Seas, allowed by treaty from the most powerful "of our neighbours at sea, which had never yet been yielded "to by the weakest of them that I remember in the whole "course of our pretence; and had served hitherto but for an "occasion of quarrel, whenever we or they had a mind to it, "upon either reasons or conjectures" (*f*).

(*e*) *Comte de Garden, Traité de Diplom.* t. i. p. 402.

(*f*) "Prædicti Ordines Generales Unitarum Provinciarum debite ex parte sua agnoscentes jus supramemorati Serenissimi Domini Magnæ Britanniæ Regis, ut vexillo suo in maribus infra nominandis honos habeatur, declarabunt et declarant, concordabunt et concordant, quod quæcunque naves aut navigia ad præfatas Unitas Provincias spectantia, sive naves bellicæ, sive aliæ, eæque vel singulæ vel in classibus conjunctæ, in ullis maribus a Promontorio *Finis Terræ* dicto usque ad medium

CLXXXV. Upon this concession, so humiliating to the countrymen of Ruyter and Van Tromp, so little to be expected by those who in 1667 had demolished Sheerness and set fire to Chatham, Bynkershoek (*g*) ingeniously remarks: "Usu scilicet maris et *fructu* contenti Ordines, aliorum "ambitioni, sibi non damnosæ, haud difficulter cedunt." And in his Treatise *De Dominio Maris*, published in 1702, and before the work from which the extract just cited is taken, he observes, on this Article of the Treaty: "Sed "quod ita accipiendum est, ut omnes pactiones, quas, ut "bello abstineatur, paciscimur, nempe Anglis id competere, "quia in id convenit, per se enim nihil in eo mari habent, "præcipuum. Porro ut ita hoc accepi velim ut ne credamus "Belgas eo ipso Anglis concessisse illius maris dominium, "nam aliud est se subditum profiteri, aliud majestatem "alicujus populi *comiter* conservare (ut hæc explicat *Pro-* "*culus* in Dig. xlix. t. 15, 7, *De Captiv. et Postlim.*); fit "hoc, ut intelligamus alterum populum superiorem esse, non "ut intelligamus, alterum non esse liberum" (*h*).

CLXXXVI. France, however, as Mr. Wheaton observes, never formally acknowledged the British pretension. Louis XV. published an ordinance on the 15th of April, 1689, not only forbidding his naval officers from saluting the vessels of

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punctum terræ *van Staten* dictæ in Norwegia, quibuslibet navibus aut navigiis ad Serenissimum Dominum Magnæ Britanniæ Regem spectantibus, se obviam dederint, sive illæ naves singulæ sint, vel in numero majori, si majestatis suæ Britannicæ aplustrum sive vexillum *Jack* appellatum gerant, prædictæ Unitarum Provinciarum naves aut navigia vexillum suum e mali vertice detrahent et supremum velum demittent, eodem modo parique honoris testimonio, quo ullo unquam tempore aut in illo loco antehac usitatum fuit, versus ullas Majestatis suæ Britannicæ aut antecessorum suorum naves ab ullis Ordinum Generalium suorumve antecessorum navibus."—*Tractatus Pacis inter Carolum II. Regem Magnæ Britanniæ et Ordines Generales fœderati Belgii*, 1674, Art. 4.

Bynkershoek, *Quæst. J. P.* l. ii. c. xxi.

Temple's Memoirs, ii. p. 250.

Hume, vol. vi. c. lii.

Wheaton's Hist. pp. 155–6.

(*g*) *Quæst. J. P.* lib. i. cap. xxi.

(*h*) *De Dominio Maris*, cap. v.

other princes bearing a flag of equal rank, but, on the contrary, enjoining them to require the salute from foreign vessels in such a case, and to compel them by force, in whatever seas and on whatever coasts they might be found. This ordinance was plainly levelled at England. Accordingly, in the manifesto published by William III. on the 27th of May, 1689, he alleged this insult to the British flag as one of the motives for declaring war against France (*i*).

CLXXXVII. In another part of his very able Treatise, Bynkershoek clearly and irrefragably lays down the principles of law applicable to the occupation of the sea:—" Totum, " qua patet, mare non minus jure naturali cedebat occupanti, " quam terra quævis, aut terræ mare proximum. Sed diffi- " cilior occupatio, difficillima possessio; utraque tamen " necessaria ad asserendum dominium, jure videlicet gentium, " ad quod ea disputatio unice exigenda est. Nam ex iis, " quæ Cap. 1. enarravimus, certum est consequi, dominium " maris prima ab origine non fuisse quæsitum nisi occupa- " tione, hoc est, navigatione eo animo instituta, ut qui libera " per vacuum ponit vestigia princeps, ejus, quod navigat, " maris esse velit dominus; certum est et porro consequi, " non aliter id dominium retinere, quam possessione perpetua, " hoc est, navigatione, quæ perpetuo exercetur ad custodiam " maris, si exterum est, habendam: ea namque remissa, " remittitur dominium, et redit mare in causam pristinam, " atque ita rursus occupanti primum cedit" (*k*).

CLXXXVIII. Thus the opinion of Sir Leoline Jenkins and Bynkershoek are in harmony upon this question; and

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(*i*) *Valin, Commentaire sur l'Ordonnance de la Marine*, liv. v. tit. 1, p. 689: De la Liberté de la Pêche: " Que le droit de pavillon, qui appartient à la couronne d'Angleterre, a été disputé par son ordre (de Louis XIV); ce qui tende à la violation de notre souveraineté sur la mer, laquelle a été maintenue de tout temps par nos prédécesseurs, et que nous sommes aussi résolus de maintenir pour l'honneur de notre couronne et de la nation angloise."

Wheaton's History, pp. 155–6.

(*k*) *Bynkershoek, De Dominio Maris*, cap. iii. pp. 365–6.

in spite of the proclamation of William III. it does not appear that Great Britain has ever again insisted upon any other limits to her or to other nations.

This right, however, was alluded to by Lord Stowell in his judgment in the *Maria* (*l*), a Swedish vessel sailing under convoy of an armed ship condemned for resisting the belligerents' visitation and search: "It might likewise" (he observes) "be improper for me to pass entirely without notice, as "another preliminary observation (though without meaning "to lay any particular stress upon it), that the transaction in "question took place in the *British Channel* close upon the "*British coast*, a station over which the Crown of England "has, from pretty remote antiquity, always asserted something of that special jurisdiction which the sovereigns of "other countries have claimed and exercised over certain "parts of the seas adjoining to their coasts."

(*l*) 1 *Rob. Ad. Rep.* p. 352.

CHAPTER VII.

NARROW SEAS—STRAITS.

CLXXXIX. WITH respect to Straits (*détroits de mer, Meerenge, freta*), where there is, as Grotius says in the passage already cited, *supra et infra fretum*, both the shores of which belong to one nation, these may be subject to the proprietary rights of that nation. Or if the shores belong to several nations, then, according to Puffendorf (*a*), the dominion is

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(*a*) Lib. iv. c. v. s. 7: "Aquandi ergo et lavandi usus nec magni est, nec nisi littorum accolis patet, et revera inexhaustus est. Inservit quoque aqua marina sali excoquendo; sed quo usu accolæ littorum duntaxat gaudent. Inexhaustum quoque et innoxiæ utilitatis est mare quantum ad navigationem. (Vid. l. xxiii. s. 1. D. *de Servit. præd. rust.*) Verum sunt præter hos alii quoque usus maris, qui partim non penitus sunt inexhausti; partim populo maris accolæ occasionem damni præbere possunt, ut ex re ipsius non sit, omnes maris partes cuivis promiscue patere. Prioris generis est piscatio, et collectio rerum in mari nascentium. Piscatio etsi in mari fere sit uberior, quam in fluminibus aut lacubus: patet tamen ex parte eam exhauriri posse, et accolis maris maligniorem fieri, si omnes promiscue gentes propter littora alicujus regionis velint piscari; præsertim cum frequenter certum piscis, aut rei pretiosæ genus, puta, margaritæ, corallia, succinum, in uno tantum maris loco, eoque non valde spatioso inveniantur. Hic nihil obstat, quo minus felicitatem littoris aut vicini maris ipsorum accolæ potius, quam remotiores sibi propriam queant asserere; quibus cæteri non magis jure irasci aut invidere possunt, quam quod *non omnis fert omnia tellus; India mittit ebur, molles sua thura Sabæi.* Ex posteriori genere est, quod mare regionibus maritimis vicem munimenti præbet." And at the close of s. viii. he observes—"Ex hisce patet, hodie post rem navalem ad summum perductam fastigium præsumi, quemvis populum maritimum, et cui ullus navigandi usus, esse dominum maris littoribus suis prætensi quousque illud munimenti rationem habere censetur: imprimis autem portuum, aut ubi alias commoda in terram exscensio fieri potest. (*Bodinus de Rep.* l. i. c. ult. Baldi fide asserit; *jure quodammodo principum omnium maris accolarum communi receptum esse, ut sexaginta milliaribus à littore Princeps legem ad littus accedentibus*

distributed amongst them, upon the same principle as it would be among the several proprietors of the banks of a river: "*eorum imperia, pro latitudine terrarum, ad medium* "*usque ejusdem pertinere intelligentur.*"

The exclusive right of the British Crown to the Bristol Channel, to the channel between Ireland and Great Britain (*Mare Hibernicum, Canal de Saint-George*), and to the channel between Scotland and Ireland, is uncontested. Pretty much in the same category are the three straits, forming the entrance to the Baltic, the Great and the Little Belt, and the Sound, which belong to the Crown of Denmark (*b*); the straits of Messina (*il Faro di Messina, fretum Siculum*), once belonging to the kingdom of the Two Sicilies: the straits leading to the Black Sea, the Dardanelles and Hellespont; the Thracian Bosporus, belonging to the Turkish empire (*c*). To narrow seas which flow between separate portions of the same kingdom, like the Danish and Turkish straits, or to other seas common to all nations, like the straits of Messina, and perhaps the St. George's Channel, the doctrine of *innocent*

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dicere possit.) "Sinus quoque maris regulariter pertinere ad eum populum, cujus terris iste ambitur; neque minus freta. Quod si autem diversi populi fretum, aut sinum accolant, eorum imperia pro latitudine terrarum ad medium usque ejusdem pertinere intelligentur; nisi vel per conventionem indivisim id imperium contra exteros exercere, ipsos autem promiscue inter se isto æquore uti placuerit; vel alicui soli in totum istum sinum aut fretum sit dominium quæsitum ex pacto, reliquorum concessione tacita, jure victoriæ, aut quia is prior ad id mare sedes fixerat, idque statim totum occupaverat, et contra adversi littoris accolam actus imperii exercuerat. Quo casu tamen nihilominus reliqui sinus aut freti accolæ suorum quisque portuum, tractusque littoralis domini esse intelligentur."—*Puffendorf, De Jure Nat. et Gent.* l. iv. c. v. s. 8.

(*b*) *Schlegel, Staatsrecht Dänemarks*, p. 359.

(*c*) *Martens*, l. ii. c. i. s. 41, *Des Mers adjacentes*.

Grotius, l. ii. c. iii. s. 13, 2: "Videtur autem imperium in maris portionem eadem ratione acquiri qua imperia alia, id est, ut supra diximus, ratione personarum et ratione territorii. Ratione personarum, ut si classis, qui maritimus est exercitus, aliquo in loco maris se habeat: ratione territorii quatenus ex terra cogi possunt qui in proxima maris parte versantur, nec minus quam si in ipsa terra reperirentur."

Wheaton's Hist. pp. 577, 583, 585, 587.

use is, according to Vattel, strictly applicable (*d*). How far this doctrine is sound to the extent to which it is carried by this jurist has been already considered in the matter of *Rivers*.

In 1602, Queen Elizabeth sent a special embassy to Denmark, having for its object the general adjustment of the relations between the two countries.

In the instructions given to the ambassadors, the principles of International Law, with respect to the subjects treated of in this Chapter, are laid down with the perspicuity and precision which might be expected from the learning and ability, both of the monarch and her counsellors:—

" And you shall further declare that the Lawe of Nations " alloweth of fishing in the sea everywhere; as also of using " ports and coasts of princes in amitie for traffique and " avoidinge danger of tempests; so that if our men be barred " thereof, it should be by some contract. We acknowledge " none of that nature; but rather, of conformity with the " Lawe of Nations in these respects, as declaring the same " for the removing of all clayme and doubt; so that it is " manifest, by denying of this Fishing, and much more, for " spoyling our subjects for this respect, we have been injured

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(*d*) *Vattel, des Détroits en particulier*, l. i. c. xxiii. s. 292: "Il faut remarquer en particulier, à l'égard des détroits, que quand ils servent à la communication de deux mers dont la navigation est commune à toutes les nations, ou à plusieurs, celle qui possède le détroit ne peut y refuser passage aux autres, pourvu que ce passage soit innocent et sans danger pour elle. En le refusant sans juste raison, elle priverait cette nation d'un avantage qui leur est accordé par la nature; et encore un coup, le droit d'un tel passage est un reste de la communion primitive. Seulement le soin de sa propre sûreté autorise le maître du détroit à user de certaines précautions, à exiger des formalités, établies d'ordinaire par la coutume des nations. Il est encore fondé à lever un droit modique sur les vaisseaux qui passent, soit pour l'incommodité qu'ils lui causent en l'obligeant d'être sur ses gardes, soit pour la sûreté qu'il leur procure en les protégeant contre leurs ennemis, en éloignant les pirates, et en se chargeant d'entretenir des fanaux, des balises et autres choses nécessaires au salut des navigateurs. C'est ainsi que le roi de Danemark exige un péage au détroit du *Sund*. Pareils droits doivent être fondés sur les mêmes raisons et soumis aux mêmes règles que les péages établis sur terre, ou sur une rivière."

" against the Lawe of Nations, expresslie declared by con-
" tract, as in the aforesaid Treaties, and *the King's* own
" letters of '85.

" And for the asking of licence, if our predecessors
" yelded thereunto, it was more than by Lawe of Nations
" was due;—yelded, perhaps, upon some special consideration,
" yet, growing out of use, it remained due by the Lawe of
" Nations, what was otherwise due before all contract;
" wherefore, by omitting licence, it cannot be concluded, in
" any case, that the right of Fishing, due by the Lawe of
" Nations, faileth; but rather, that the omitting to require
" Licence might be contrarie to the contract, yf any such
" had been in force.

" Sometime, in speech, *Denmark* claymeth propertie in
" that Sea, as lying between *Norway* and *Island*,—both
" sides in the dominions of oure loving brother *the king*;
" supposing thereby that for the propertie of a whole sea,
" it is sufficient to have the banks on both sides, as in rivers.
" Whereunto you may answere, that though property of sea,
" in some small distance from the coast, maie yeild some
" oversight and jurisdiction, yet use not princes to forbid
" passage or fishing, as is well seen in our Seas of England,
" and Ireland, and in the Adriaticke Sea of the *Venetians*,
" where we in ours, and they in theirs, have propertie of
" command; and yet neither we in ours, nor they in theirs,
" offer to forbid fishing, much lesse passage to ships of mer-
" chandize; the which, by Lawe of Nations, cannot be
" forbidden ordinarilie; neither is it to be allowed that
" propertie of sea in whatsoever distance is consequent to
" the banks, as it hapneth in small rivers. For then, by
" like reason, the half of every sea should be appropriated to
" the next bank, as it hapneth in small rivers, where the
" banks are proper to divers men; whereby it would follow
" that noe sea were common, the banks on every side being
" in the propertie of one or other; wherfore there re-
" maineth no colour that *Denmarke* may claim any propertie
" in those seas, to forbid passage or fishing therein.

"You may therefore declare that we cannot, with our "dignitie, yeld that our subjects be absolutelie forbidden "those seas, ports, or coasts, for the use of fishing negotia-"tion and safetie; neither did we ever yeld anie such right "to *Spaine* and *Portugall*, for the *Indian* Seas or Havens; "yet, yf our good brother *the king*, upon speciall reason, "maie desire that we yeld to some renuinge of licence, or "that some speciall place, upon some speciall occasion, be "reserved to his particular use, in your discretion, for amitie "sake, you may yeld therunto; but then to define the "manner of seking licence, in such sort as it be not prejudi-"ciall to our subjects, nor to the effect of some sufficient "fishing, and to be rather caried in the subject's name, than "in ours, or the king's" (*e*).

CXC. The alliances contracted between the United Provinces of the Netherlands with the city of Lubeck in 1613, with Sweden in 1614 and 1640, and with the Hanseatic towns in 1615 and 1616, were all directed against the extraordinary pretensions of the Danish Crown.

But in more modern times these pretensions, though extravagant enough, have been limited to the right of excluding foreigners, not only from all commerce with Iceland and the Danish portion of Greenland, but from fishing within fifteen miles of the coast of Iceland.

The first ordinance of the kind was put forth by Denmark on the 16th of April, 1636, and pointed at Great Britain; in 1682, it was renewed and confirmed; again on the 30th of May, 1691; again on the 3rd of May, 1723; and again on the 1st of April, 1776.

With respect to Greenland, the first prohibition to fish appears to have been issued on the 16th of February, 1691. This was pointed against the Hanseatic towns. By a Treaty concluded on the 16th of August, 1692, the city of Hamburg obtained the right of navigation and fishing in Davis's Straits.

By Royal Edicts in 1751, in 1758, and in 1776, the

(*e*) *Rymer, Fœd.* t. xvi. pp. 433–4.

commerce of *unprivileged* foreigners with Greenland was strictly forbidden.

CXCI. In these prohibitions there was no violation of the strict law, however they might offend the usual comity of nations. But the validity of the prohibition to fish within fifteen German miles of the shore of Greenland and Iceland was strictly denied by England and Holland, who adhered to the usual limit of cannon-shot from the shore.

CXCII. In the year 1740, a Danish man-of-war seized upon several Dutch vessels, alleged to be found navigating and fishing within the forbidden limits. They were taken to Copenhagen, tried and condemned in the Court of Admiralty of that capital. This act led to a vehement remonstrance on the part of the Dutch (*f*).

The States General, in a Resolution of the 17th April, 1741, laid down three distinct propositions, of which the substance was,—

1. That the sea was free; and that it was competent to every one to fish in it in a proper manner, "*pourvu qu'il* "*ne fasse pas d'une manière indue,*" which they maintained could not be predicated of fishing within four German miles of the coast, inasmuch as Denmark might make such a *Municipal* prohibition binding on her own subjects, but could not convert it into an *International* obligation.

2. That this right was fortified, in the case of Holland, by several Treaties with Denmark.

3. That they were in possession, and had long been so, of the right in question.

The Danish Government denied all these positions, with reference to the particular sea.

1. "Les rois de Danemark," they said, "Norvége, etc., "ont joui depuis un temps immémorial des pleins effets "d'une juste possession dans la mer du Nord" (*g*). That, possessing this "*domination juste et immémoriale,*" they

(*f*) *Martens, Causes célèbres,* t. i. p. 359.
(*g*) *Ibid.* t. i. p. 392.

were, on the authority of Grotius, entitled to the exclusive fishery (*h*).

2. They went at length into the alleged Treaties, and drew from them a contrary inference.

3. They denied the possession of the right by the Dutch; alleging that clandestine acts, punished as soon as discovered, could not be construed as possession, and that none others could be shown.

The dispute came to no legal termination. The crews of the seized ships were given up, but neither the ships nor their cargoes. In 1748 the Dutch sent ships of war to protect their merchantmen. Denmark threatened to make war, but did not.

CXCIII. In 1776 the strict provisions of the Danish Government, for prohibiting all foreign nations from carrying on any commerce with Greenland, gave rise to disputes between Denmark and Great Britain, and between Denmark and Holland, with respect to the seizure of an English brigantine and two Dutch vessels for alleged violation of these provisions, and their condemnation in the Danish Court of Admiralty. In both cases the vessels were, at the application of their respective Governments, restored; but all claims for compensation by way of damage were steadily refused, as it was said that the vessels had been legally condemned by a proper tribunal (*i*). The Dutch on this occasion protested

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(*h*) *Martens, Causes célèbres*, t. i. pp. 393-4.

(*i*) Extract from letter of Danish Government to the British Minister at Copenhagen:—

"Réponse du comte de Bernstorff à la note précédente, du 10 octobre 1776."—"On a l'honneur de répondre à la note remise par M. de Laval en date du 7 octobre 1776, que la demande du dédommagement du S. Kidder, menant le vaisseau le *Windsor*, pouvait avoir lieu, tant qu'il était douteux si sa saisie était légale, ou si elle ne l'était pas; mais qu'elle n'est plus admissible selon la nature de la chose et les usages généralement reçus de toutes les puissances de l'Europe, dès qu'une sentence a été prononcée par un tribunal compétent à décider ce point, et dès qu'un vaisseau a été légalement condamné et déclaré confiscable avec sa cargaison. S. M. est sûre d'avoir donné la preuve la moins équivoque et

against the Danish pretensions with respect to Davis's Straits and the Greenland fisheries (*k*).

CXCIV. Great Britain has never been remiss in maintaining the rights of her fisheries. The Newfoundland fisheries were the subject of careful provisions in the Treaties of Utrecht and Paris, 1763 (*l*); and were in 1818 regulated by a Convention between Great Britain and the United States of North America (*m*).

CXCV. The language of the Article of the Convention was, that " Whereas differences have arisen respecting the " liberty claimed by the United States, for the inhabitants " thereof to take, dry, and cure fish on certain coasts, bays, " harbours, and creeks of his Britannic Majesty's dominions " in America, it is agreed between the high contracting " parties, that the inhabitants of the said United States shall

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la moins ordinaire de son amitié pour S. M. Britannique, en arrêtant l'exécution et l'effet d'un arrêt donné en faveur de la compagnie de Groënland."—*Martens*, *Causes célèbres*, t. ii. pp. 131–2.

(*k*) Extract from the letter of the Dutch Minister at Copenhagen to Danish Government:—

" Mais comme véritablement cette affaire est d'une importance générale pour toutes les puissances intéressées dans la pêche de Groënland et du détroit de Davis, LL. HH. PP. se verraient obligées d'en faire une cause commune avec ses puissances, et de défendre et protéger le droit indisputable de toutes les nations de pouvoir naviguer et pêcher librement par toutes les mers ouvertes, les détroits, et les bayes, et en particulier celui de leurs sujets, qui de temps immémorial ont été en possession d'user de ce droit sur les côtes de Groënland, dans le détroit de Davis, et nommément aussi dans la baye de Disco."—*Ibid.* pp. 139–40.

See, too, disputes between England, Denmark, and Holland, 1776; as to the Iceland fisheries, 1790, between Denmark and Holland, *ib.* t. i.; as to Finland, *Heffters*, 140, n. 3; *Ortolan*, *Dipl. de la Mer*, i. 176; as to the Zuyder Zee, *The Twee Gebrœders* (Lord Stowell), 3 *Robinson's Adm. Rep.* p. 339.

(*l*) *Koch*, *Hist. des Tr.* i. 209, 362.

Art. 13 of *the Treaty of Utrecht.*

Art. 5 of the *Treaty of Paris.*

(*m*) The line of demarcation between the rights of fishing of English and French subjects in the British Channel was elaborately defined by the recent Treaty of 2nd August, 1839.—*De Martens et De C.* iv. 601.

De Martens et De C. iii. 391.

"have for ever, in common with the subjects of his Britannic "Majesty, the liberty to take fish of every kind on that part "of the southern coast of Newfoundland which extends from "Cape Ray to the Ramean Islands, on the western and "northern coasts of the said Newfoundland, from the said "Cape Ray to the Quirpon Islands, on the shores of the "Magdalen Islands, and also on the coasts, bays, harbours, "and creeks, from Mount Joly, on the southern coast of the "Labrador, to and through the Straits of Belle Isle, and "thence northwardly indefinitely along the coast, without "prejudice, however, to any of the exclusive rights of the "Hudson's Bay Company; and that the American fishermen "shall also have liberty for ever to dry and cure fish in any "of the unsettled bays, harbours, and creeks of the southern "part of the Coast of Newfoundland, here above described, "and off the Coast of Labrador; but so soon as the same, or "any portion thereof, shall be settled, it shall not be lawful "for the said fishermen to dry or cure fish at such portion "so settled, without previous agreement for such purpose "with the inhabitants, proprietors, or possessors of the "ground.

"And the United States hereby renounce for ever any "liberty heretofore enjoyed or claimed by the inhabitants "thereof to take, dry, or cure fish on or within three marine "miles of any of the coasts, bays, creeks, or harbours of his "Britannic Majesty's dominions in America not included "within the above-mentioned limits. Provided, however, "that the American fishermen shall be admitted to enter "such bays or harbours for the purpose of shelter and of "repairing damages therein, of purchasing wood, and of "obtaining water, and for no other purpose whatever. But "they shall be under such restrictions as may be necessary "to prevent their taking, drying, or curing fish therein, or in "any other manner whatever abusing the privileges hereby "reserved them" (*n*).

(*n*) *Annual Reg.* vol. xciv. (1852) pp. 295–6.

CXCVI. It appears that these provisions had not been strictly observed by the subjects of the United States, and that in 1849 complaints were made by the Legislature of Nova Scotia to the British Crown, who took the opinion of the Law officers as to the true construction of the Article. This opinion was, that, "by the terms of the convention, "American citizens were excluded from any right of fishing "within three miles from the coast of British America, and "that the prescribed distance of three miles is to be measured "from the headlands, or extreme points of land, next the "sea or the coast, or of the entrance of bays or indents of the "coast, and that consequently no right exists on the part of "American citizens to enter the bays of Nova Scotia, there "to take fish, although the fishing, being within the bay, "may be at a greater distance than three miles from the "shore of the bay, as we are of opinion that the term 'head-"'land' (*o*) is used in the Treaty to express the part of the "land we have before mentioned, including the interior of "the bays and the indents of the coasts" (*p*).

The neglect of these provisions by the subjects of the United States still continued, and in 1852 British men-of-war were sent to protect the fisheries and seize the boats which violated the Treaty. This act of the British Government created a great excitement in the United States, though it does not appear that the legality of the construction of the Article was impugned; but Mr. Webster insisted on the inconvenience to the subjects of the United States, and in the want of *comity* shown in its sudden enforcement after many years (*q*) of an opposite practice (*r*). A temporary

(*o*) The term "*headland*," however, does *not* occur in the Treaty. The Law officers probably gave their opinion on a statement of the Colonists in which the word did occur. My attention was drawn to this strange fact by Mr. Addison Thomas in 1854, after the publication of the first edition of this work.

(*p*) *Annual Reg.* vol. xciv. (1852) pp. 296–7. See too President Fillmore's Annual Message, 299.

(*q*) Twenty-five it is said by President Fillmore.

(*r*) *Annual Reg.* for 1852, vol. xciv. pp. 295–300.

adjustment was effected by a Treaty of June 5, 1854—the Reciprocity Treaty already mentioned. It gave to citizens of the United States, in addition to their rights under the Treaty of 1818, the right to take fish, except shell fish, "on "the sea coasts and shores, and in the bays, harbours, and "creeks of Canada, New Brunswick, Nova Scotia, and Prince "Edward's Island, and of the several islands thereunto ad-"jacent, without being restricted to any distance from the "shore," with permission to land for the purpose of drying nets and curing fish. Corresponding rights were given to British subjects to take sea fish and to land and dry nets on the coast of the United States north of latitude 36 deg. N. The Treaty did not embrace the salmon and shad fisheries, or the fisheries at the mouths of rivers. But we have already observed that the United States, using the power given them by the Treaty, put an end to it in 1865 (*s*).

(*s*) See *Dana's Wheaton*, n. 110, p. 206; *Lawrence's Wheaton.*

CHAPTER VIII.

PORTIONS OF THE SEA.

CXCVII. Though the open sea be thus incapable of being subject to the rights of property, or jurisdiction, yet reason, practice, and authority have firmly settled that a different rule is applicable to *certain portions* of the sea (*a*).

CXCVIII. And first with respect to that portion of the sea which washes the coast of an independent State. Various claims have been made, and various opinions pronounced, at different epochs of history, as to the extent to which territorial property and jurisdiction may be extended. But the rule of law may be now considered as fairly established—namely, that this absolute property and jurisdiction does not extend, unless by the specific provisions of a Treaty (*b*) or an unquestioned usage, beyond a marine league (being three miles), or the distance of a cannon-shot from the shore at low tide:—" quousque e terra imperari potest,"—" quousque " tormenta exploduntur,"—" terræ dominium finitur ubi " finitur armorum vis,"—is the language of Bynkershoek (*c*). " In the sea, out of the reach of cannon-shot" (says Lord Stowell), " universal use is presumed." This is the limit fixed to absolute property and jurisdiction; but the rights

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(*a*) *Günther*, t. ii. s. xxviii. p. 48: " Eigenthum und Herrschaft des Meeres an den Küsten."

Heffters, 1. Buch, s. lxxvi. p. 141: " Schutzrechte über die Küstengewässer."

Ortolan, Dipl. de la Mer, t. i. l. ii. c. viii.: " Mer territoriale."

Kent's Commentaries, vol. i. s. xxvi. p. 25.

(*b*) *Valin, Ordonnance de la Marine*, l. v. tit. i. p. 687, " De la Liberté de la Pêche," contains a full dissertation on this subject.

Klüber, s. 130, n. *a*.

(*c*) *Quæstiones Juris Publici*, cap. viii.

of Independence (*d*) and self-preservation in times of peace have been judicially considered to justify a nation in preventing her revenue laws from being evaded by foreigners beyond this exact limit; and both Great Britain and the United States of North America have provided by their municipal law against frauds being practised on their revenues, by prohibiting foreign goods to be transhipped within the distance of four leagues of the coast, and have exercised a jurisdiction for this purpose in time of peace. These were called the *Hovering Acts* (*e*).

Nevertheless, it cannot be maintained as a sound propo-

(*d*) *The Louis*, 2 *Dodson's Adm. Rep.* p. 245.
The Twee Gebrœders, 3 *Rob. Adm. Rep.* p. 339.
Jacobsen, *Seerecht*, pp. 586–590.

" Si quelque vaisseau de l'une ou de l'autre partie est en engagement avec un vaisseau appartenant à quelqu'une des puissances chrétiennes, *à la portée du canon* des châteaux de l'autre, le vaisseau qui se trouvera ainsi en action sera défendu et protégé autant que possible, jusqu'à ce qu'il soit en sûrete."—*États-Unis et Maroc* (1787), Art. 10.—*De Martens et De Cussy*, *Rec. de Traités, etc.*, vol. i. p. 380.

" En conséquence de ces principes, les hautes parties contractantes s'engagent réciproquement, en cas que l'une d'entre elles fût en guerre contre quelque puissance que ce soit, de n'attaquer jamais les vaisseaux de ses ennemis *que hors de la portée du canon des côtes de son allié.*"—*France et Russie*, Art. 27, *ibid.* p. 395. (This treaty was only entered into for 12 years.)

" Aucune des deux parties ne souffrira que le vaisseau ou effets appartenant aux sujets ou citoyens de l'autre, soient pris à une *portée de canon de la côte*, ni dans aucune des baies, rivières, ou ports de leurs territoires, par des vaisseaux de guerre ou autres, ayant lettres de marque de prince, république ou État, quels qu'ils puissent être. Mais dans le cas où cela arriverait, la partie dont les droits territoriaux auraient été ainsi violés, fera tous les efforts dont elle est capable pour obtenir de l'offenseur pleine et entière satisfaction, pour le vaisseau ou les vaisseaux ainsi pris, soit que ce soient des vaisseaux de guerre ou des navires marchands."—*États-Unis d'Amérique et Grande-Bretagne*, Art. 25.—*De Martens et De Cussy*, *Rec. de Traités*, vol. ii. p. 92.

(*e*) 9 Geo. III. c. 35, prohibited foreign goods from being transhipped within four leagues of the coast without payment of duties. The American Act of Congress, 1799, March 2, ss. 25, 26, 27, 99, contains the same prohibition, and their Supreme Court has declared this regulation to be founded upon International Law.—*Church* v. *Hubbards*, 2 *Cranch's*

sition of International Law that a seizure for purposes of enforcing municipal law can be lawfully made beyond the limits of the territorial waters, though in these *hovering* cases judgments have been given in favour of seizures made within a limit fixed by municipal law, but exceeding that which has been agreed upon by International Law. Such a judgment, however, could not have been sustained if the Foreign States whose subjects' property had been seized had thought proper to interfere. Unless, indeed, perhaps, in a particular case, where a State had put in force, or at least enacted, a municipal law of its own, like that of the Foreign States under which its subject's property had been seized. It is at least quite intelligible why such a State would not interfere on behalf of its subject. My observation does not deny to the neutral, in time of war, the right to complain of and possibly to prevent the *hovering* of belligerent ships so near her coasts and ports as manifestly to menace and alarm vessels homeward or outward bound. This is a question which will receive further consideration when the relations of States in time of war come under discussion. The limit of territorial waters has been fixed at a marine league, because that was supposed to be the utmost distance to which a cannon-shot from the shore could reach. The great improvements recently effected in artillery seem to make it desirable that this distance should be increased, but it must be so by the general consent of nations, or by specific treaty with particular States (*f*).

CXCIX. The rule of the marine league being the boundary of the territorial jurisdiction is liable to be affected by Treaty. The Emperor of China has conceded

(*American*) *Reports*, p. 187.—*The Louis*, 2 *Dodson's Adm. Rep.* 245–6. This case will not be found on examination to support the lawfulness of a seizure beyond the marine league, though often cited for this purpose.—*Sir L. Jenkins*, pp. 727–8, 780, as to the *King's Chambers*.—*Waite's American State Papers*, 1–75.

(*f*) *Hudson* v. *Guestier*, 4 *Cranch*, 293, and 6 *Cranch*, 281. Not easily reconcilable with *Rose* v. *Himely*, 4 *Cranch*, 241. *Dana's Wheaton*, p. 180, n. 108.

jurisdiction to the Crown of England over British subjects in China; and the Crown, by an order in Council assented to by the Chinese Government, has jurisdiction over British subjects "being within the dominions of the Emperor of China, or "being within any ship or vessel at a distance of not more "than *one hundred* miles from the coast of China" (*g*).

CC. Besides the rights of property and jurisdiction within the limit of cannon-shot from the shore, there are certain portions of the sea which, though they exceed this verge, may, under special circumstances, be prescribed for. Maritime territorial rights extend, as a general rule, over arms of the sea, bays, gulfs, estuaries which are enclosed, but not entirely surrounded by lands belonging to one and the same State. With respect to bays and gulfs so enclosed, there seems to be no reason or authority for a limitation suggested by Martens (*h*), "surtout en tant que ceux-ci ne "passent pas la largeur ordinaire des rivières, ou la double "portée du canon,"—or for the limitation of Grotius (*i*), which is of the vaguest character,—"mare occupari potuisse "ab eo qui terras ad latus utrumque possideat, etiamsi aut "supra pateat ut sinus, aut supra et infra ut fretum, dummodo "non ita magna sit pars maris ut non cum terris comparata "portio earum videri possit." The real question, as Günther truly remarks, is, whether it be within the physical competence of the nation, possessing the circumjacent lands, to exclude other nations from the whole portion of the sea so surrounded: or, as Martens declares in his earliest, and in some respects best, treatise on International Law, "Partes "maris territorio ita natura vel arte inclusæ ut *exteri aditu* "*impediri possint*, gentis ejus sunt, cujus est territorium "circumjacens" (*k*). To the same effect is the language of Vattel: "Tout ce que nous avons dit des parties de la mer

(*g*) Papers presented to both Houses of Parliament by command of her Majesty, 1853. *Vide post*, ch. xix.

(*h*) Lib. ii. c. i. s. 40.

(*i*) Lib. ii. c. iii. s. 8.

(*k*) *Primæ Lineæ Juris Gentium*, l. iv. c. iv. s. 110.

"voisines des côtes, se dit plus particulièrement et à plus "forte raison des rades, des baies et des détroits, comme plus "capables encore d'être occupés, et plus importants à la sûreté "du pays. Mais je parle des baies et détroits de peu d'étendue, "et non de ces grands espaces de mer auxquels on donne "quelquefois ces noms, tels que la baie de *Hudson*, le détroit "de *Magellan*, sur lesquels l'empire ne saurait s'étendre, et "moins encore la propriété. Une baie dont on peut défendre "l'entrée, peut être occupée et soumise aux lois du souverain; "il importe qu'elle le soit, puisque le pays pourrait être "beaucoup plus aisément insulté en cet endroit que sur des "côtes ouvertes aux vents et à l'impétuosité des flots" (*l*).

Thus Great Britain has immemorially claimed and exercised exclusive property and jurisdiction over the bays or portions of sea cut off by lines drawn from one promontory to another, and called *the King's Chambers*. And there is the high authority of Sir Leoline Jenkins (*m*), that vessels, even of the enemies of Great Britain, captured by foreign cruisers within these *Chambers*, would be restored by the High Court of Admiralty. In time of war (*n*), at least, the Solent, or the portion of the sea which flows between the Isle of Wight and the mainland, might be justly asserted to belong as completely as the soil of the adjacent shores to Great Britain.

CCI. Mr. Chancellor Kent states the claims of the United States upon this matter in the following language:—

"Considering the great extent of the line of the American "coasts, we have a right to claim, for fiscal and defensive

(*l*) *Vattel, Le Droit, etc.* t. i. l. i. c. xxiii. s. 291.

(*m*) *Life of Sir Leoline Jenkins*, vol. ii. pp. 727, 732, 755, 780.

(*n*) I do not think that the judgment of the Privy Council (1864) in the case of *The Eclipse*, 15 *Moore's P. C. Rep.* p. 267, affects this proposition, but I think it right to cite the passage. (The question in the case was whether a collision between a British and foreign vessel in the Solent should be tried by the ordinary Maritime Law or the 17th and 18th Vict. c. 104.) Their Lordships say: "In our opinion, the statute cannot be considered to have any local application to the Solent, and to affect foreign as well as British vessels navigating within the limits of that channel; and that, even if the statute were binding on all vessels navigating within a tidal river, which, however, the case of the

" regulations, a liberal extension of maritime jurisdiction; " and it would not be unreasonable, as I apprehend, to as- " sume, for domestic purposes connected with our safety and " welfare, the control of the waters on our coasts, though " included within lines stretching from quite distant head- " lands, as, for instance, from Cape Ann to Cape Cod, and " from Nantucket to Montauck Point, and from that point " to the Capes of the Delaware, and from the South Cape of " Florida to the Mississippi. It is certain that our Govern- " ment would be disposed to view with some uneasiness and " sensibility, in the case of war between other maritime " powers, the use of the waters of our coast, far beyond the " reach of cannon-shot, as cruising ground for belligerent " purposes. In 1793 our Government thought they were " entitled, in reason, to as broad a margin of protected navi- " gation as any nation whatever, though at that time they " did not positively insist beyond the distance of a marine " league from the seashores; and in 1806 our Government " thought it would not be unreasonable, considering the " extent of the United States, the shoalness of their coast, " and the natural indication furnished by the well-defined " path of the Gulf Stream, to expect an immunity from " belligerent warfare, for the space between the limit and the " American shore. It ought, at least, to be insisted, that the " extent of the neutral immunity should correspond with " the claims maintained by Great Britain around her own

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Fyenoord (*Swab.* 374) discountenances, we think that it could not be locally binding within the water of the Isle of Wight and the mainland, and that the circumstance that the Isle of Wight is by local and territorial designation to be deemed a portion of the county of Southampton does in any degree affect this question. We are of opinion that this collision must be considered to have taken place on the high seas, in a place where a foreign vessel has a right of sailing without being bound by any of the provisions of the statutes enacted to govern British ships. This being so, it follows that the Merchant Shipping Act has no application to this case, as it has been fully determined that where a British and a foreign ship meet on the high seas the statute is not binding on either. The principle, therefore, by which this case must be decided must be found in the ordinary rules of the sea."

"territory, and that no belligerent right should be exercised
"within 'the chambers formed by headlands, or anywhere
"'at sea within the distance of four leagues, or from a right
"'line from one headland to another.' In the case of the
"*Little Belt,* which was cruising many miles from the shore
"between Cape Henry and Cape Hatteras, our Government
"laid stress on the circumstance that she was 'hovering on
"'our coasts;' and it was contended on the part of the United
"States, that they had a right to know the national character
"of armed ships in such a situation, and that it was a right
"immediately connected with our tranquillity and peace. It
"was further observed, that all nations exercised the right,
"and none with more rigour, or at a greater distance from
"the coast, than Great Britain, and none on more justifiable
"grounds than the United States. There can be but little
"doubt that, as the United States advance in commerce and
"naval strength, our Government will be disposed more and
"more to feel and acknowledge the justice and policy of the
"British claim to supremacy over the narrow seas adjacent to
"the British Isles, because we shall stand in need of similar
"accommodation and means of security" (*o*).

CCII. In 1822 Russia laid claim to a sovereignty over the Pacific Ocean north of the 51st degree of latitude; but the Government of the United States of America resisted this claim as contrary to the principles of International Law (*p*).

CCIII. The portion of sea actually occupied by a fleet riding at anchor is within the dominion of the nation to which the fleet belongs, so long as it remains there; that is, for all purposes of jurisdiction over persons within the limits of the space so occupied. The like principle is applicable to the portion of territory occupied by an army,—a fleet being considered as a maritime army (*q*).

(*o*) *Commentaries*, vol. i. pp. 29, 30.

(*p*) *Ibid.* p. 28.

Mr. Adams's Letter to the Russian Minister, March 30th, 1822.

(*q*) "Videtur autem imperium in maris portionem eadem ratione acquiri

This proposition is of course not to be considered without reference to the place of anchorage: a French fleet permitted to anchor in the Downs, or an English fleet at Cherbourg, would only have jurisdiction over the subjects of the respective countries which happened to be within the limits of their temporary occupation of the water. Both in the case of the fleet and the army, there is, according to the theory of the law, a continuation or prorogation of the territory to which they belong (*r*).

CCIV. The undoubted proposition, that the sea is open to the navigation of all nations, does not carry with it the further proposition, that it is competent to every individual to navigate his ship without any authority from his Government.

Every ship is bound to carry a flag, and to have on board ship's papers (*lettres de mer*) indicating to what nation she belongs, whence she has sailed, and whither she is bound, under pain of being treated as a pirate (*s*).

CCV. With respect to seas entirely enclosed by the land, so as to constitute a salt-water lake (*Maria clausa;*

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ut imperia alia, id est, ut supra diximus, ratione personarum et ratione territorii. Ratione personarum, *ut si classis qui est maritimus exercitus* aliquo in loco maris se habeat: ratione territorii, quatenus ex terra cogi possunt qui in proxima maris parte versantur, nec minus quam si in ipsa terra reperirentur."—*Grotius*, l. ii. c. 3, § xiii. 2.

"Addo, classem quæ stat in anchoris, eam maris partem cui incubat, videri occupasse, eatenus nempe, quatenus et quamdiu occupat. Si occupaverit, transit in imperium et dominium occupantis secundum ea quæ disputavi."—Cap. iii. s. 4, *Bynk. De Dominio Maris.*

Heffters, 136.

Wheaton's Hist. 723.

(*r*) *Vide post*, further observations on the question of jurisdiction.

(*s*) "Quand on dit que la mer est libre, on ne s'entend parler que des nations, car elle ne l'est point pour des particuliers; ils ne peuvent en jouir que sous la sauvegarde de leur gouvernement, et c'est pour établir cette sauvegarde qu'on a institué les *pavillons* et les *lettres de mer*; la sûreté a exigé cette restriction du droit naturel; et tout bâtiment naviguant sans pavillon et sans lettres de mer est traité comme un *forban*."—*Garden, Traité de Diplomatie*, i. 406.

Ortolan, Dipl. de la Mer, t. i. l. ii. c. ix.—*The Louis*, 2 *Dodson's Adm. Rep.* 246–7.

mers fermées, encloses; Binnenmeere, geschlossene innere Meere), the general presumption of law is, that they belong to the surrounding territory or territories in as full and complete a manner as a fresh-water lake. The Caspian and the Black Sea naturally belong to this class. Upon the former sea Russia had, by Treaty with Persia, the exclusive right of navigating with ships of war; and by the Treaty of the Dardanelles, the Black Sea was practically confined to Russian and Turkish ships of war (*t*). But by the Treaty of Paris, 1856, this sea is neutralized, and opened to the merchant ships of all nations, and closed to ships of war of any State (*u*).

CCVI. There is another class of enclosed seas to which the same rules of law are applicable—seas which are landlocked, though not entirely surrounded by land. Of these, that great inlet which washes the coasts of Denmark, Sweden, Russia, and Prussia, the *Ostsee* as the Germans call it, the *Baltic Sea* according to its usual appellation, is the principal (*x*).

(*t*) 2 *De Martens et De Cussy*, 399, Art. 5.
Heffters, 140.
Wheaton's Hist. 158, 567.

(*u*) Art. xi.

(*x*) *Heffters*, 143, n. 2.
4 *De Martens et De C.* t. i. Index explicatif.
"*Mers fermées.* Parmi les mers fermées on compte généralement:
Le grand et le petit Belt.
Le Sund (le seul détroit dont le passage soit soumis, pour les navires de la marine commerciale, à un péage. Voir *Sund*). [See remarks on the abolition of the Sound dues, p. 217.]
Le Canal de Bristol.
Le Canal de Saint-George.
Le Détroit d'Écosse.
Le Détroit de Messine.
Les Dardanelles.
La Mer de Marmora.
Le Bosphore, etc. etc.
En 1780 le Danemarck déclara la mer Baltique *une mer fermée*, à l'abri des courses des armateurs et des vaisseaux armés."

CHAPTER IX.

PECULIAR CASE OF THE ISTHMUS OF CENTRAL AMERICA.

CCVII. THE most remarkable, and perhaps the most important, instance of the establishment of the *jus transitûs innoxii* is afforded by the recent convention between Great Britain and the United States respecting the *Isthmus of Central America*, which connects the great highways of the world, the Atlantic and Pacific Oceans. The Treaty concerns the formation of a *ship-canal*, or of a *railway* over this strip of land. This Treaty, both on account of its *immediate object*, and the *principle* which it expressly recognizes and recites, is of such vast importance, both to the present and future interests of mankind, that it is necessary to state the provisions *in extenso*.

The preamble set forth that, "Her Britannic Majesty "and the United States of America being desirous of con-"solidating the relations of amity which so happily subsist "between them, by setting forth and fixing in a convention "their views and intentions with reference to any means of "communication by ship-canal, which may be constructed "between the Atlantic and Pacific Oceans by the way of the "river St. Juan de Nicaragua, and either or both of the "lakes of Nicaragua or Managua, to any port or place on "the Pacific Ocean," &c.

The Articles were as follows:—" Art. 1. The Governments of Great Britain and the United States hereby declare that neither the one nor the other will ever obtain or maintain for itself any exclusive control over the said ship-canal; agreeing that neither will ever erect or maintain any fortifications commanding the same, or in the vicinity thereof,

or occupy, or fortify, or colonize, or assume or exercise any dominion over Nicaragua, Costa Rica, the Mosquito Coast, *or any part of Central America* (*a*); nor will either make use of any protection which either affords or may afford, or any alliance which either has or may have, to or with any State or people, for the purpose of erecting or maintaining any such fortifications, or of occupying, fortifying, or colonizing Nicaragua, Costa Rica, the Mosquito Coast, or any part of Central America, or of assuming or exercising dominion over the same. Nor will Great Britain or the United States take advantage of any intimacy, or use any alliance, connection, or influence that either may possess with any State or Government through whose territory the said canal may pass, for the purpose of acquiring or holding, directly or indirectly, for the subjects or citizens of the one, any rights or advantages, in regard to commerce or navigation through the said canal, which shall not be offered, on the same terms, to the subjects or citizens of the other.

"Art. 2. Vessels of Great Britain or the United States traversing the said canal shall, in case of war between the contracting parties, be exempted from blockade, detention, or capture by either of the belligerents; and this provision shall extend to such a distance from the two ends of the said canal as it may hereafter be found expedient to establish.

"Art. 3. In order to secure the construction of the said canal, the contracting parties engage that if any such canal shall be undertaken upon fair and equitable terms by any parties having the authority of the local government or governments through whose territory the same may pass, then the persons employed in making the said canal, and their property used or to be used for that object, shall be protected, from the commencement of the said canal, to its completion, by the Governments of Great Britain and the United States, from unjust detention, confiscation, seizure, or any violence whatsoever.

(*a*) *Vide infra.*

"Art. 4. The contracting parties will use whatever influence they respectively exercise with any State, States, or Governments possessing, or claiming to possess, any jurisdiction or right over the territory which the said canal shall traverse, or which shall be near the waters applicable thereto, in order to induce such States or Governments to facilitate the construction of the said canal by every means in their power; and, furthermore, Great Britain and the United States agree to use their good offices, wherever or however it may be most expedient, in order to procure the establishment of two free ports, one at each end of the said canal.

"Art. 5. The contracting parties further engage, that when the said canal shall have been completed, they will protect it from interruption, seizure, or unjust confiscation, and that they will guarantee the neutrality thereof, so that the said canal may for ever be open and free, and the capital invested therein secure. Nevertheless, the Governments of Great Britain and the United States, in according their protection to the construction of the said canal, and guaranteeing its neutrality and security when completed, always understand that this protection and guarantee are granted conditionally, and may be withdrawn by both Governments, or either Government, if both Governments or either Government should deem that the persons or company undertaking or managing the same adopt or establish such regulations concerning the traffic thereupon as are contrary to the spirit and intention of this Convention, either by making unfair discriminations in favour of the commerce of one of the contracting parties over the commerce of the other, or by imposing oppressive exactions or unreasonable tolls upon passengers, vessels, goods, wares, merchandise, or other articles. Neither party, however, shall withdraw the aforesaid protection and guarantee, without first giving six months' notice to the other.

"Art. 6. The contracting parties in this Convention engage to invite every State with which both or either have

friendly intercourse, to enter into stipulations with them similar to those which they have entered into with each other, to the end that all other States may share in the honour and advantage of having contributed to a work of such general interest and importance as the canal herein contemplated; and the contracting parties likewise agree, that each shall enter into treaty stipulations with such of the Central American States as they may deem advisable, for the purpose of more effectually carrying out the great design of this Convention, namely, that of constructing and maintaining the said canal as a ship communication between the two oceans for the benefit of mankind, on equal terms to all, and of protecting the same; and they also agree, that the good offices of either shall be employed, when requested by the other, in aiding and assisting the negotiation of such treaty stipulations; and should any differences arise as to right or property over the territory through which the said canal shall pass, between the States or Governments of Central America, and such differences should in any way impede or obstruct the execution of the said canal, the Governments of Great Britain and the United States will use their good offices to settle such differences, in the manner best suited to promote the interests of the said canal, and to strengthen the bonds of friendship and alliance which exist between the contracting parties.

"Art. 7. It being desirable that no time should be unnecessarily lost in commencing and constructing the said canal, the Governments of Great Britain and the United States determine to give their support and encouragement to such persons or company as may first offer to commence the same, with the necessary capital, the consent of the local authorities, and on such principles as accord with the spirit and intention of this Convention: and if any persons or company should already have, with any State through which the proposed ship-canal may pass, a contract for the construction of such a canal as that specified in this Convention, to the stipulations of which contract neither of the contracting

parties in this Convention have any just cause to object, and the said persons or company shall, moreover, have made preparations and expended time, money, and trouble on the faith of such contract, it is hereby agreed that such persons or company shall have a priority of claim over every other person, persons, or company, to the protection of the Governments of Great Britain and the United States, and be allowed a year, from the date of the exchange of the ratifications of this Convention, for concluding their arrangements, and presenting evidence of sufficient capital subscribed to accomplish the contemplated undertaking; it being understood, that if, at the expiration of the aforesaid period, such persons or company be not able to commence and carry out the proposed enterprise, then the Governments of Great Britain and the United States shall be free to afford their protection to any other persons or company that shall be prepared to commence and proceed with the construction of the canal in question.

" Art. 8. The Governments of Great Britain and the United States having not only desired, in entering into this Convention, to accomplish a particular object, but also *to establish a general principle,* they hereby agree to extend their protection by treaty stipulations to any other practicable communications, *whether by canal or railway,* across the isthmus which connects North and South America; and especially to the interoceanic communications, should the same prove to be practicable, whether by canal or railway, which are now proposed to be established by the way of Tehuantepec or Panama. In granting, however, *their joint protection to any such canals or railways* as are by this Article specified, it is always understood by Great Britain and the United States, that the parties constructing or owning the same shall impose no other charges or conditions of traffic thereupon than the aforesaid Governments shall approve of as just and equitable; and that the same canals or railways, being open to the subjects and citizens of Great Britain and the United States on equal terms, shall also be open on like terms to the

subjects and citizens of every other State which is willing to grant thereto such protection as Great Britain and the United States engage to afford.

"Art. 9. The ratifications of this Convention shall be exchanged at Washington within six months from this day, or sooner if possible.

"In faith whereof, we, the respective Plenipotentiaries, have signed this Convention, and have hereunto affixed our Seals.

"Done at Washington, the nineteenth day of April anno Domini One thousand eight hundred and fifty.

"(Signed) HENRY LYTTON BULWER.
"JOHN M. CLAYTON" (*b*).

CCVIII. Before the ratifications were exchanged, it was explained by the British to the American Plenipotentiary, that the words "or any part of Central America" were not to apply to the British Settlements in Honduras, or its dependencies. This explanation was fully adopted by the American Plenipotentiary, and the ratifications were exchanged. The Treaty was subsequently submitted by the President of the United States to the Senate (*c*), and was approved of, after discussion, by that deliberative assembly.

It was, however, contended by certain persons averse to the conditions of the Treaty, that the Senate did not understand that the Treaty was to be construed with reference to the American Plenipotentiary's consent, which had been expressed in the reply to the British Plenipotentiary's explanation with respect to the Honduras, and consequently that the Senate had in reality not assented to the Treaty so qualified.

Though there is no ground for this supposition, the objec-

(*b*) *Annual Register*, vol. xcii. (1850) pp. 387–390.
(*c*) *Vide supra*, p. 158.

tion evinces how much a knowledge of the department of Government in which the power of making and ratifying Treaties is vested by the Constitution of each State, is necessary for the security of the foreign relations of all States.

CCIX. The reason of the thing would indeed seem to have excluded the Honduras, as the terms were employed in the Treaty, even without the subsequent express limitation, from the category of "Central America," though geographically and literally within the scope of the expressions. It is true that Great Britain had originally only certain limited *jura in re* with respect to the Honduras, such as the right of cutting mahogany and logwood conceded to her by Treaties with Spain, the right of sovereignty being reserved to the Crown of the latter country; yet since Spain has ceased to exercise any sovereignty, either at Honduras or in the circumjacent territory, and the British jurisdiction is exercised there under a Commission of the Crown which has been recognized by the United States, inasmuch as their Consul is received at Belize under the *exequatur* of the British Crown, Honduras, therefore, was justly considered as both *de facto* and *de jure* a British settlement; and the terms in the Treaty appear, by the ordinary and admitted rules of construction (*d*), applied with reference to the subject-matter and context of the Treaty, not to include the British possession of Honduras (*e*).

The discordant constructions put by England and the United States upon this Treaty did not, as has been shown, receive a satisfactory adjustment until 1859-60, when England, by separate Treaties with Honduras and Nicaragua, relinquished the Mosquito protectorate, and recognized the Bay Islands as part of the Republic of Honduras (*f*).

(*d*) *Vide post*, chapter on TREATIES, vol. ii.

(*e*) "Convention entre Sa Majesté le Roi de la Grande-Bretagne et Sa Majesté le Roi d'Espagne, conclue à Londres le 14 juillet 1786."—*Martens, Rec. de Tr.* iv. (1786), pp. 133–140.

Annual Register, 1787, p. 78.

(*f*) *De Martens*, vol. xlv. p. 374; *Hertslet's Treaties*, vol. xi. p. 367.

The neutral character of this ship-canal between the Atlantic and Pacific Oceans has been thus recognized and established. The neutrality of what is called the "Honduras "Interoceanic Railway" was guaranteed by a Convention of August 27, 1856, between Great Britain and Honduras (*g*).

(*g*) *Lawrence's Wheaton,* i. p. 478; *Hertslet's Treaties,* vol. x. p. 871. The contract between the State of New Granada and the Panama Railway Company is given in the *State Papers,* vol. xlii. p. 1187. In 1846 the United States and New Granada entered into a Treaty of Commerce and Navigation.—*State Papers,* vol. xxxvi. p. 994. See also Treaty between England and the United States of Colombia, February 16, 1866.

CHAPTER X.

SELF-PRESERVATION.

CCX. The Right of Self-Preservation, by that defence which prevents, as well as that which repels, attack, is the next International Right which presents itself for discussion, and which, it will be seen, may under certain circumstances, and to a certain extent, modify the Right of Territorial Inviolability.

CCXI. The Right of Self-Preservation is the first law of nations, as it is of individuals. A society which is not in a condition to repel aggression from without, is wanting in its principal duty to the members of which it is composed, and to the chief end of its institution (*a*).

All means which do not affect the independence of other nations are lawful for this end. No nation has a right to prescribe to another what these means shall be, or to require any account of her conduct in this respect.

CCXII. The means by which a nation usually provides for her safety are—1. By alliances with other States; 2. By maintaining a military and naval force; and, 3. By erecting fortifications, and taking measures of the like kind within her own dominions. Her full liberty in this respect cannot, as a general principle of International Law, be too boldly announced or too firmly maintained; though some modification of it appears to flow from the equal and corresponding

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(*a*) *Vattel*, t. i. c. xiv. s. 177. *Οὐ γὰρ αἵρεσίς ἐστιν ἡμῖν τοῦ πράγματος, ἀλλ' ὑπολείπεται τὸ δικαιότατον καὶ ἀναγκαιότατον τῶν ἔργων, ὃ ὑπερβαίνουσιν ἑκόντες οὗτοι. τί οὖν ἐστι τοῦτο; ἀμύνεσθαι τὸν πρότερον πολεμοῦνθ' ἡμῖν.*—*Demosth.* περὶ τῶν ἐν Χεῤῥον. c. 91. Est igitur hæc non scripta sed nata lex, etc.—*Cic. pro Milone*, c. 4.

rights of other nations, or at least to be required for the sake of the general welfare and peace of the world.

CCXIII. Armaments suddenly increased to an extraordinary amount are calculated to alarm other nations, whose liberty they appear, more or less, according to the circumstances of the case, to menace (*b*).

It has been usual, therefore, to require and receive amicable explanations of such warlike preparations; the answer will, of course, much depend upon the tone and spirit of the requisition.

Thus the British Secretary for Foreign Affairs (Lord Grenville), in 1793, replied to Monsieur Chauvelin (who had been the accredited minister of the King of France, and remained in England after the Republic was declared), "It "is added, that if these explanations should appear to us "unsatisfactory; if you are again obliged to hear the lan-"guage of haughtiness; if hostile preparations are continued "in the ports of England, after having exhausted everything "which could lead to peace, you will dispose yourselves to "war.

"If this notification, or that which related to the treaty of "commerce, had been made to me in a regular and official "form, I should have found myself obliged to answer, that "a threat of declaring war against England, because she "thinks proper to augment her forces, as well as a declara-"tion of breaking a solemn Treaty, because England has "adopted for her own security precautions of the same "nature as those which are already established in France, "could neither of them be considered in any other light "than that of new offences, which, while they subsisted, "would preclude all negotiation" (*c*).

CCXIV. We have hitherto considered what measures a nation is entitled to take, for the preservation of her safety, *within* her own dominions. It may happen that the same

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(*b*) *Martens*, l. iv. c. i. pp. 116–7–8.
(*c*) *State Papers during the War*, Lond. 1794, p. 242.

Right may warrant her in extending precautionary measures *without* these limits, and even in transgressing the borders of her neighbour's territory. For International Law considers the Right of Self-Preservation as prior and paramount to that of Territorial Inviolability, and, where they conflict, justifies the maintenance of the former at the expense of the latter right.

The case of conflict indeed must be indisputable, *pomeridiana luce clarior* in the language of canonists. Such a case, however, is quite conceivable. A rebellion, or a civil commotion, it may happen, agitates a nation; while the authorities are engaged in repressing it, bands of rebels pass the frontier, shelter themselves under the protection of the conterminous State, and from thence, with restored strength and fresh appliances, renew their invasions upon the State from which they have escaped. The invaded State remonstrates. The remonstrance, whether from favour to the rebels, or feebleness of the executive, is unheeded, or, at least, the evil complained of remains unredressed.

In this state of things the invaded State is warranted by International Law in crossing the frontier, and in taking the necessary means for her safety, whether these be the capture or dispersion of the rebels, or the destruction of their stronghold, as the exigencies of the case may fairly require.

CCXV. Vattel maintains strongly this opinion: "*Il est* "*certain que si mon voisin donnait retraite à mes ennemis* "*lorsqu'ils auraient du pire et se trouveraient trop faibles pour* "*m'échapper, leur laissant le temps de se refaire, et d'épier* "*l'occasion de tenter une nouvelle irruption sur mes terres,* "cette conduite, si préjudiciable à ma sûreté et à mes intérêts, "serait incompatible avec la neutralité. Lors donc que mes "ennemis battus se retirent chez lui, si la charité ne lui "permet pas de leur refuser passage et sûreté, il doit les "faire passer outre le plus tôt possible, et *ne point souffrir* "*qu'ils se tiennent aux aguets pour m'attaquer de nouveau;* "*autrement il me met en droit de les aller chercher dans ses* "*terres. C'est ce qui arrive aux nations qui ne sont pas en*

" *état de faire respecter leur territoire*; le théâtre de la guerre " s'y établit bientôt; on y marche, on y campe, on s'y bat, " comme dans un pays ouvert à tous venants " (*d*).

CCXVI. The hypothetical case here described was that which Great Britain alleged to have actually occurred, except that the circumstances were of a more aggravated character, with respect to the invasion of her Canadian possessions in 1838. For she alleged, that the Canadian rebels not only found shelter on the American frontier of the Niagara, but that American citizens joined the rebels, and that they obtained arms, by force indeed, from the American arsenals, and that shots were fired from an Island within the American territories, while a steamer called the *Caroline* was employed in the transport of munitions of war to the Island, which when not so employed was moored off the American shore. In this state of things a British captain and crew, having boarded and forcibly captured the *Caroline*, cut her adrift, and sent her down the falls of Niagara. The act was made the subject of complaint, on the ground of violation of territory, by the American Government, and vindicated by Great Britain on the ground of self-preservation; which, if her version of the facts were correct, was a sufficient answer, and a complete vindication (*e*).

CCXVII. In 1826, the mustering and equipment of Portuguese rebels (*f*) on the Spanish frontier, unchecked by the Spanish authorities, was considered by Great Britain as obliging her to consider that " casus fœderis," on the happening of which she was bound to assist her ally, to have actually arisen; and she accordingly sent troops to Portugal.

CCXVIII. Upon the same principle, though a nation has a right to afford refuge to the expelled governors, or even the leaders of rebellion flying from another country, she is bound

(*d*) Lib. iii. c. vii. s. 133.

(*e*) *Vide post*, authorities and references.

(*f*) *Mr. Canning's* Speech on the King's message relative to the affairs of *Portugal*, December 12th, 1826.—*Canning's Speeches*, vol. vi. p. 60.

to take all possible care that no hostile expedition is concerted in her territories, and to give all reasonable guarantees upon this subject, in answer to the remonstrances of the nation from which the exiles have escaped (*g*). During the time when the residence of the Pretender in France within the vicinity of England gave reasonable alarm to the British Government, the removal of his residence to a place of less danger to Great Britain formed the subject of the stipulations of various Treaties. If the hostile expedition of the present (or late) Emperor of the French in 1842, against the then existing monarchy of France, had taken place with the sanction or connivance of the British Government, England would have been guilty of a very gross violation of International Law; and she showed at the time a wise and just anxiety to purge herself from any such suspicion. But though the strange vicissitudes of fortune afterwards compelled the very monarch, against whom that expedition had been directed, to take refuge in this country, the then representative of the executive of France, though the leader of that expedition, had no cause of complaint, either on this ground, or because other political refugees, professing all shades and kinds of opinion, resided in safety in England; which, before it was their refuge, had so often been, and indeed still is, the theme of their vituperation.

CCXIX. In all cases where the territory of one nation is

(*g*) "Les Princes de Transilvanie refuseront asyle aux ennemis de la Maison d'Autriche; et réciproquement cette Puissance ne pourra donner retraite aux ennemis des Princes et États de Transilvanie."—*Traité de Vienne,* Art. 12; *Mably, Le Droit public,* t. ii. p. 59.

"L'année 1716 fut employée en négociations entre la France, l'Angleterre, et les Provinces-Unies; et dans la suivante, ces Puissances signèrent à la Haye le Traité de la *Triple Alliance.* La France se chargeoit d'engager le Chevalier de Saint-Georges à sortir du comtat d'Avignon, pour se retirer au-delà des Alpes. Chaque contractant promettoit de ne donner aucun asyle sur ses terres aux personnes qui seroient déclarées rebelles par l'un des deux autres."—*Ib.* p. 19.

"La France promet de ne point reconnoître les droits que le fils du Roi Jacques II peut avoir sur l'Angleterre, et de ne le pas souffrir sur ses terres."—*Traité d'Ut. fr.-ang.* Art. 4; *Ib.* p. 157.

invaded from the country of another—whether the invading force be composed of the refugees of the country invaded, or of subjects of the other country, or of both—the Government of the invaded country has a right to be satisfied that the country from which the invasion has come has neither by *sufferance* nor *reception* (*patientia aut receptu*) knowingly aided or abetted it. She must purge herself of both these charges; otherwise, if the cause be the feebleness of her Government, the invaded country is warranted in redressing her own wrong, by entering the territory, and destroying the preparations of war therein made against her; or, if these have been encouraged by the Government, then the invaded country has a strict right to make war upon that country herself; because she has afforded not merely an asylum, but the means of hostility, to the foes of a nation with whom she was at peace. For it never can be maintained, however such a State may suffer from piratical incursions, which the feebleness of the executive Government of the country whence they issue renders it incapable of preventing or punishing, that, until such Government shall *voluntarily acknowledge* the fact, the injured State has no right to give itself that security, which its neighbour's Government admits that it ought to enjoy, but which that Government is unable to guarantee.

It must be admitted that there is a *practical* acknowledgment of such inability, which, as much as a voluntary confession, justifies the offended country in a course of action which would under other circumstances be unlawful. There is a very important chapter, both in Grotius, and in his commentator Heineccius, entitled "De Pœnarum Communicatione," as to when the guilt of a malefactor, and its consequent punishment, is communicated to others than himself; and the question is particularly considered with reference to the responsibility of a State for the conduct of its citizens. The tests for discovering "Civitasne delinquerit an cives?" are laid down with great precision and unanimity of sentiment by

all Publicists, and are generally reduced to two, as will be seen from the following extract from Burlemaqui (*h*) (who repeats the opinion of Grotius (*i*) and Heineccius). "In "civil societies," (he says), "when a particular member has "done an injury to a stranger, the governor of the common-"wealth is sometimes responsible for it, so that war may be "declared against him on that account. But to ground this "kind of imputation, we must necessarily suppose one of "these two things, *sufferance* or *reception* (*k*), viz. either that "the sovereign has suffered this harm to be done to the "stranger, or that he afforded a retreat to the criminal. In "the former case it must be laid down as a maxim, that a "sovereign who, knowing the crimes of his subjects—as, for "example, that they *practise piracy* on strangers,—and being "also able and obliged to hinder it, does not hinder it, "renders himself criminal, because he has consented to the "bad action, the commission of which he has permitted, and "consequently furnished a just reason of war. The two con-"ditions above mentioned, I mean the knowledge and suffer-"ance of the sovereign, are absolutely necessary, the one not "being sufficient without the other to communicate any "share in the guilt. Now it is presumed that a sovereign "knows what his subjects openly and frequently commit; "and as to his power of hindering the evil, this likewise is "always presumed, unless the want of it be clearly proved." So Vattel (*l*): "Si un souverain qui pourrait retenir ses "sujets dans les règles de la justice et de la paix, souffre qu'ils "maltraitent une nation, ou dans son corps ou dans ses

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(*h*) *The Principles of Natural and Public Law*, by *J. J. Burlemaqui*, Professor at *Geneva*. I only possess the English translation, London, 1763. Sir J. Mackintosh calls him "an author of distinguished merit."

(*i*) See *Grotius de J. B. et P.* l. ii. c. xxi.; *De Pœnarum Communicatione*; and the admirable *Prælectiones* of *Heineccius* on this chapter.

Vattel, l. ii. c. vi.: "De la part que la nation peut avoir aux actions de ses citoyens."

(*k*) "Patientia aut receptu."—*Grot. & Heinecc.*

(*l*) Book ii. c. vi. s. 72.

" membres, il ne fait pas moins de tort à toute la nation, que " s'il la maltraitait lui-même" (*m*).

The act of an individual citizen, or of a small number of citizens, is not to be imputed, without special proof, to the nation or Government of which they are subjects (*n*). A different rule would of course apply to the acts of large numbers (*o*) of persons, especially if they appeared in the array and with the weapons of a military force, as in the case of the invasion of Portugal which has been referred to above.

CCXX. The consideration of the means by which nations have enabled themselves to perform this duty towards their neighbours and the rest of the world, and of the very important and much-vexed question of the lawfulness of allowing a friendly Power to raise troops in a neutral territory, will be discussed when we enter upon the Right of Jurisdiction, incident to a State, over all persons and things within the territory, and also in a later part of this work upon the

(*m*) Letter to Lord Ashburton, by *R. Phillimore*, pp. 27, 183: London, 1842.

(*n*) "Cependant, comme il est impossible à l'État le mieux réglé, au souverain le plus vigilant et le plus absolu, de modérer à sa volonté toutes les actions de ses sujets, de les contenir en toute occasion dans la plus exacte obéissance, il serait injuste d'imputer à la nation ou au souverain toutes les fautes des citoyens. On ne peut donc dire, en général, que l'on a reçu une injure d'une nation, parce qu'on l'aura reçue de quelqu'un de ses membres (on ne peut imputer à la nation les actions des particuliers)."—*Vattel*, t. i. l. ii. c. vi. s. 73.

(*o*) *Heffters*, zweites Buch, *Völkerrecht im Zustand des Unfriedens*, s. 148, pp. 258–9: After saying that what the State may not lawfully do collectively it may not do individually—"Sollte freilich die Theilnahme der Unterthanen eine *massenhafte* werden, dadurch die Aufmerksamkeit und Bedenklichkeit der Gegenpartei erregen, demnach Represalien derselben befürchten lassen."

Zouch, De Judicio inter Gentes, pars ii. s. vi. p. 120 (ed. Oxoniæ, 1650): "An repræsaliæ sint licitæ? Imperator Zeno æquitati naturali contrarium dicit ut, pro alieno debito, alii molestentur; et in Novella Justiniani prohibentur pignorationes pro aliis: addita causa, quod rationem non habet, alium esse debitorem, alium exigi: *Jure tamen Gentium* introductum apparet, ut pro eo quod præstare debet civilis societas, aut ejus caput, sive per se primo, sive quod alieno debito jus non reddendo se obstrinxerint, *obligata sint omnia bona subditorum.*"

Rights and Duties of Neutrals. But this present is not an unfit place for offering some general remarks upon the control exercised by the State over strangers, whether domiciled and commorant (*habitans*), or merely travellers through the country (*étrangers qui passent*) (*p*).

It is a received maxim of International Law, that the Government of a State may prohibit the entrance of strangers into the country, and may therefore regulate the conditions under which they shall be allowed to remain in it, or may require and compel their departure from it. According to the Law of England, local allegiance is due from an alien or stranger born, so long as he continues within the protection and dominion of the Crown; and it ceases the instant he transfers himself from this kingdom to another. The allegiance and the protection of the stranger, therefore, are both confined, in point of time, to the duration of the residence; and in point of locality, to the dominion of the British Empire (*q*). During periods of revolutionary disturbances both on the Continent and within this kingdom, it has been customary to pass Acts of Parliament authorizing certain high officers of the State to order the departure of aliens from the realm within a specified time, and their imprisonment in case of refusal. These Acts have generally been limited in their duration: the operation of the last was confined to the period of one year (*r*).

(*p*) *Vattel*, l. i. c. xix. s. 213, l. ii. c. viii. *passim*.

(*q*) *Calvin's case*, 7; *Coke's Reports*, 6 a.

Stephen's Blackstone, vol. ii. 6, iv. pt. i. c. 11.

1 *Hale's Pleas of the Crown*, 60.

(*r*) "This power," as Mr. Canning observed, "had undoubtedly been exercised by the Crown, sometimes with, sometimes without, the consent of Parliament" (5 *Canning's Speeches*, p. 255). The 33 Geo. III. c. 4, A.D. 1793, was the first Alien Act passed by the Parliament of this kingdom, and was followed up by Lord Grenville's note, dismissing Monsieur Chauvelin.

(*Translation.*)

"Whitehall, Jan. 24th, 1793.

"I am charged to notify to you, Sir, that the character with which you have been invested at this Court, and the functions of which have been

so long suspended, being now entirely terminated by the fatal death of his late Most Christian Majesty, you have no more any public character here.

"The King can no longer, after such an event, permit your residence here. His Majesty has thought fit to order that you should retire from this kingdom within the term of eight days; and I herewith transmit to you a copy of the order which his Majesty, in his Privy Council, has given to this effect.

"I send you a passport for yourself and your suite; and I shall not fail to take all the other necessary steps, in order that you may return to France with all the attentions which are due to the character of Minister Plenipotentiary from his Most Christian Majesty, which you have exercised at this Court.

"I have the honour to be, &c.,

"GRENVILLE."

(*State Papers on the War*, p. 245.)

This Act has been followed up by:—

38 Geo. III. c. 50, 77.
41 Geo. III. c. 24.
42 Geo. III. c. 93.
43 Geo. III. c. 155.
54 Geo. III. c. 155.
55 Geo. III. c. 54.
56 Geo. III. c. 86.
58 Geo. III. c. 96.
1 Geo. IV. c. 105.
3 Geo. IV. c. 97.
5 Geo. IV. c. 37.

The last Statute was passed on June 9th, 1848, 11 & 12 Vict. c. 20, "An Act to authorize for one Year and to the end of the then next Session of Parliament the Removal of Aliens from the Realm."

Horner's Memoirs, vol. ii. p. 522. Speech on the Alien Bill, 1816.

CHAPTER XI.

RIGHT TO A FREE DEVELOPMENT OF NATIONAL RESOURCES BY COMMERCE.

CCXXI. This Right (*a*) is little more than a consequence from what has been already stated with respect to the free navigation of the ocean, and the exceptions which International Law has sanctioned in the case of particular portions of the ocean. The general law as to the perfect liberty of commerce incident to every nation, is forcibly and truly stated by Grotius (*b*): "Quominus gens quæque cum quavis gente "seposita commercium colat, impediendi nemini jus est: id "enim permitti interest societatis humanæ; nec cuiquam "damno id est: nam etiam si cui lucrum speratum, sed non "debitum, decedat, id damni vice reputari non debet."

The extravagant pretensions of Spain and Portugal to exclusive commerce with the East and West Indies, and their practical abandonment, have been discussed in a former chapter. It is, however, perfectly competent to any nation to make what regulations it pleases with respect to its own commerce, to admit every nation equally to it, to exclude nations from it, to admit some under favourable, and others

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(*a*) "Commercium cum Turcis vetitum dicere lege omnes videntur. Et mihi tamen non libet facilè discedere à regula certissima Juris Gentium, quod constituit commercia, nec distinguit aliquid de Gentibus." —*Albericus Gent. Advoc. Hispan.* cc. 25, 26.

Grotius, l. ii. c. 2, 5.

Martens, l. iv. c. iii. s. 139.

Klüber, s. 69.

Massé, Le Droit commercial dans ses rapports avec le Droit des Gens et le Droit civil, t. i. l. ii. p. 88.

(*b*) L. ii. c. 2, 13, 5.

under unfavourable conditions, unless, indeed, such original liberty be curtailed by the express provisions of a Treaty.

A nation has the same power of restricting commerce with regard to its distant provinces and colonies. Every colony almost has, at one time or other, been confined to commercial intercourse with its mother country, or to some great privileged company of that country. Every page of the history of colonial dependencies shows with what rigour this monopoly has been exerted by the mother country in time of *peace*, and with what jealousy the forced relaxation of such monopoly in time of *war* by one belligerent in favour of neutrals, has been regarded by the other belligerent. England has steadily denied to the neutral the right of carrying on that commerce with the colonies of the belligerent in time of war from which it had been excluded in time of peace. But this subject belongs to another part of this work.

" The colonial monopoly, that fruitful source of wars" (Mr. Wheaton writes in 1845), " has nearly ceased; and with it " the question as to the right of neutrals to enjoy in war a " commerce prohibited in time of peace "(*c*).

The whole *status of Consuls* is considered in a later portion of this work (*d*).

(*c*) *Hist.* pp. 759–60.
(*d*) *Et vide antè*, ch. ii. s. xiii.

CHAPTER XII.

RIGHT OF ACQUISITION.

CCXXII. In the discussion upon the Rights of Territorial Inviolability, the fact of rightful Possession has been assumed (*a*). " Totum autem jus " (the Roman lawyers say) " consistit aut in adquirendo, aut in conservando, aut in " minuendo. Aut enim hoc agitur, quemadmodum quid " cujusque fiat; aut quemadmodum quis rem vel jus suum " conservet: aut quomodo alienet aut amittat "(*b*).

Before, however, we enter upon the consideration of the manner in which Acquisitions are made by a State, it seems expedient to offer some observations upon the nature of—

1. Possession (*possessio*); and of
2. Property (*proprietas*), or Dominion (*dominium*).

The Roman Law (*c*) is the repository from which all

(*a*) " Les territoires de l'*Europe* ont été appropriés à chaque nation à la suite de révolutions successives, dans lesquelles la force, puis la marche lente et logique des évènements, ont eu plus d'influence que le droit. L'invasion des peuples du nord dans le monde romain : plus tard, la réunion des différentes petites puissances de la féodalité en états plus forts et moins nombreux, sont, dans ce travail, les deux faits principaux. Pendant ce long espace de temps, et depuis, des transformations diverses, des traités nombreux, se sont succédés, et tout finit par constituer le territoire des états actuels.

" Il serait inutile de discuter sur la légitimité des premières occupations qui se rencontrent à l'origine de ces états."—*Des Moyens d'acquérir le Domaine international*, par *Eugène Ortolan*, s. lxi. p. 42.

(*b*) *Dig.* l. i. t. iii. 41.

(*c*) *Warnkönig*, *Instit. Juris Rom. Privati*, l. ii. c. i. t. iii., c. ii. t. ii.
Puchta, *Pandekten*, Kap. 2.
Mackeldey, *Besond. Theil.* Kap. 1, t. i.
Savigny, *Besitzrecht.*
Mühlenbrück, *Doctrina Pandect.* l. ii. c. 2.

jurists, whether writing on private or public law, have borrowed their elementary learning upon this point; and it is with truth that a very distinguished modern jurist observes, "Possessionis notio atque indoles, ejus acquisitio vel omissio, "accuratius à jurisconsultis Romanis definitæ sunt, ut ea jam "non facti solum sed juris quoque esse dicatur" (*d*).

CCXXIII. The generic term *possession* branches forth into various species (*e*).

That person is *properly* said to *possess* a thing who both actually and corporally retains it, and who desires and intends at the same time to make it his own.

That person who, having no such desire or intention, by mere corporal act retains a thing, is, only in a gross and in accurate sense, said to *possess* it.

(*d*) *Warnkönig*, *Instit. Juris Romani Privati*, s. 295.

In *The Fama*, 5 *Robinson's Adm. Rep.* pp. 114–16, Lord Stowell applies the rules relating to Possession, &c. in the Institutes and Digests to decide a question of International Law.

(*e*) *Dig.* xli. 2: "De acquirenda vel amittenda possessione."

Ib. xliii. 17: "Uti possidetis."

Inst. ii. t. vi.: "De usucapione."

"Possessio appellata est, ut et Labeo ait, a sedibus, quasi positio, quia naturaliter tenetur ab eo, qui ei insistit; quam Græci κατοχὴν dicunt."—*Dig.* xli. 2, 1.

"Qui jure familiaritatis amici fundum ingreditur, non videtur possidere, quia non eo animo ingressus est, ut possideat, licet corpore in fundo sit."—*Ib.* 41.

"Quod meo nomine possideo, possum et alieno nomine possidere; nec enim muto mihi causam possessionis, sed desino possidere, et alium possessorem ministerio meo facio. Nec idem est possidere, et alieno nomine possidere; nam is possidet, cujus nomine possidetur. Procurator alienæ possessionis præstat ministerium."—*Ib.* 18.

"Justa enim an injusta adversus ceteros possessio sit, in hoc interdicto nihil refert; qualiscunque enim possessor hoc ipso, quod possessor est, plus juris habet, quam ille, qui non possidet."—*Ib.* xliii. 17, 2.

"Creditores missos in possessionem rei servandæ causa interdicto uti possidetis uti non posse; et merito, quia non possident. Idemque et in ceteris omnibus, qui custodiæ causa missi sunt in possessionem, dicendum est."—*Ib.* 17, 3, 8.

"Dejicitur is, qui possidet, sive civiliter, sive naturaliter possideat; nam et naturalis possessio ad hoc interdictum pertinet."—*Ib.* xliii. 16, 1. s. 9.

That person who retains a thing in the conviction that he is the rightful *possessor* of it, though he be mistaken, and be not the rightful possessor, may acquire, by the operation of *time*, a legal title to it, and be protected by law in the possession of it (*ad usucapionem possidet*).

There are, therefore, three *species* of *possession* :

1. Natural possession, or the bare seizing and detaining a thing (*naturalis possessio, sive nuda rei detentio*).

2. Legal possession, by act and intention (*animo et facto, de droit et de fait, possessio proprie sic dicta*) (*f*).

3. Possession by operation of time (*civilis possessio*).

CCXXIV. Dominion (*dominium*) is the fullest right which can be exercised over a thing : *the right of property*, properly so called.

According to the ancient Roman Law, *dominium* could only be acquired by a Roman citizen, and through the medium of certain strict formalities ("*in mancipio habere*, "*ex jure Quiritium dominus*"). But the Prætor, following the dictates of natural equity (*jus gentium*), introduced a doctrine, which, without these formalities, secured to the stranger (*peregrinus*) as well as the citizen, a dominion over the thing (*in bonis, bonitarium*) which he had lawfully, and "*jure gen*-"*tium*" acquired.

Justinian abolished altogether this distinction (*g*) between

(*f*) "Si me in vacuam possessionem fundi Corneliani miseris, ego putarem me in fundum Sempronianum missum, et in Cornelianum iero, non acquirem possessionem, nisi forte in nomine tantum erraverimus, in corpore consenserimus. Quoniam autem in corpore non consenserimus an a te tamen recedat possessio? quia animo deponere et mutare nos possessionem posse et Celsus et Marcellus scribunt, dubitari potest; et si animo acquiri possessio potest, numquid etiam acquisita est? sed non puto errantem acquirere, ergo nec amittet possessionem qui quodammodo sub conditione recessit de possessione."—*Dig.* xli. 2, 34.

"Differentia inter dominium et possessionem hæc est, quod dominium nihilo minus ejus manet, qui dominus esse non vult, possessio autem recedit ut quisque constituit nolle possidere. Si quis igitur ea mente possessionem tradidit, ut postea ei restituatur, desinit possidere." —*Ib.* 17, 1.

(*g*) *Cod.* vii. 25 : De nudo jure Quiritium tollendo.
Warnkönig, Instit. J. R. l. ii. ch. i. t. 3.

the ancient and the Prætorian Equity, and established universally the *dominium jure gentium.* The law, however, still recognized certain modes of *acquiring* property: these were either according to the *jus gentium* or the *jus civile.*

The principal modes under the *jus gentium* were:

1. Occupation (*occupatio*).
2. Natural increase (*accessio*).
3. Transfer (*traditio*): either
   - *a.* inter vivos,
   - *β.* or by testament or succession.

The mode of acquisition under the *jus civile* was,

1. By the effect of a law (*lege*).
2. By a judicial sentence (*adjudicatione*).
3. By the operation of time (*vetustatis auctoritate, usucapione, præscriptione*).

Dominion might suffer an *interruption* by the invasion of another person (*usurpatio*).

1. By an overt act on the part of an individual (*naturalis usurpatio*);
2. By an adverse decision of a legal tribunal (*civilis usurpatio*).

As *Dominion* is acquired by the combination of the two elements of *fact* and *intention,* so, by the dissolution of these elements, or by the *contrary fact* and *intention,* it may be lost (*h*) or extinguished (*i*).

The application of these principles of Roman jurisprudence to the system of International Law appears to have been readily made by Grotius and other jurists; and without some acquaintance both with the language and doctrine of the Roman Law upon the subject of Possession and Dominion, it is impossible correctly to understand and justly to appreciate the writings of commentators upon International Law.

(*h*) "Quemadmodum nulla possessio acquiri nisi animo et corpore potest, ita nulla omittitur nisi in qua utrumque in contrarium actum est." —*Dig.* xli. 2, 8.

(*i*) *Vide post.*

It will be well to recite, as a preface to the discussion upon the Rights of Acquisition by a State, the doctrine and language of Bynkershoek: "Postquam Lex certos dominii "acquirendi modos præscripsit, hos sequemur" (*k*). From Grotius (*l*) we learn that these modes of Acquisition were:

1. By Occupation (*occupatione derelicti*).
2. By Treaty and Convention (*pactionibus*).
3. By Conquest (*victoriæ jure*).

And if Acquisition by Accession and by Prescription be considered as corollaries to Occupation, and all cases of Transfer be held to fall under the category of Treaty and Convention, the enumeration may be considered as sufficiently complete (*m*).

CCXXV. But Acquisition itself is divided into two classes; Original (*acquisitio originaria*) and Derivative (*derivativa, facto hominis, vel facto legis*).

Under the former head may be classed Acquisition by Occupation, Accession, and Prescription: under the latter, all Acquisitions by Treaty or Convention, including Transfer (*traditio*), Gift, Sale, Exchange, Inheritance by Testament or Succession, and Acquisitions by Conquest (*n*).

(*k*) *Opera*, iii. 254: De Dominio Maris.

(*l*) Lib. ii. c. ix. s. 11, p. 338.

(*m*) "Dominiumque rerum ex naturali possessione cœpisse, Nerva filius ait, ejusque rei vestigium remanere in his, quæ terra, mari, cœloque capiuntur; nam hæc protinus eorum fieri, qui primi possessionem eorum apprehenderint. Item bello capta, et insula in mari enata, et gemmæ, lapilli, margaritæ in littoribus inventæ ejus fiunt, qui primus eorum possessionem nactus est."—*Dig.* xli. 2, 1, i.

"Sed quemadmodum, cum Theatrum commune sit, rectè tamen dici potest ejus esse eum locum quem quisque occuparit: sic in urbe mundove communi non adversatur jus quo minus suum quidque cujusque sit."—*Cicero De Fin.* l. iii. c. 20.

"Sunt autem privata nulla natura: sed aut veteri occupatione, ut qui quondam in vacua venerunt: aut victoria, ut qui bello potiti sunt; aut lege, pactione, conditione, sorte, ex quo fit ut ager Arpinas Arpinatum dicatur: Tusculanus Tusculanorum: similisque est privatorum possessionum descriptio, ex quo quia suum cujusque fit, eorum, quæ natura fuerunt communia, quod cuique obtigit, id quisque teneat: eo si qui sibi plus appetet, violabit jus humanæ societatis."—*De Off.* l. i. c. 8.

(*n*) The effect of Christianity upon the doctrines of possession and

CCXXVI. With respect to Original Acquisition, we have first to consider under this head the title which a nation acquires by occupation. *Discovery, Use,* and *Settlement* are all ingredients of that *Occupation* which constitutes a valid title to national acquisitions.

CCXXVII. *Discovery,* according to the acknowledged practice of nations, whether originally founded upon *Comity* or *Strict Right,* furnishes an *inchoate* title to *possession* in the discoverer. But the discoverer must either, in the first instance, be fortified by the public authority and by a commission from the State of which he is a member, or his discovery must be subsequently (*o*) adopted by that State; otherwise it does not fall, with respect to the protection of the individual, under the cognizance of International Law, except in a limited degree; that is to say, the *individual* has a *natural* title to be undisturbed in the possession of the territory which he occupies, as against all *third* Powers. It will be a question belonging to the Municipal Law of his own country, whether such possessions do not belong to her, and whether he must not hold them under her authority and by her permission. Such would be the case with the possessions of an English subject. But, as far as International Law is

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property, or dominion, was as beneficial as it was upon all other doctrines which are conservative of social order and productive of human happiness. Ascribing to God "the world and all that is therein," it nevertheless consecrated the rights of Property; and though for a season the first professors of Christianity had their goods in common, and no private property, yet this was an accidental arrangement, growing out of the particular exigencies of a particular epoch, and ceasing when they ceased. The arrangement, moreover, while it lasted, was voluntary; and even during its continuance a respect for the strict *rights* of property was carefully inculcated and preserved.—See *Troplong, de l'Influence du Christianisme sur le Droit civil des Romains,* p. 121.

(*o*) "*Ratihabitio* constituit tuum negotium, quod ab initio tuum non erat, sed tui contemplatione gestum."—*Dig.* iii. 5, vi. 9. *De Negotiis gestis.*

"Sed etsi non vero procuratori solvam, ratum autem habet dominus, quod solutum est, liberatio contingit: *rati enim habitio mandato comparatur.*" —*Dig.* xlvi. 3, xii. 4, *de Solut.*: cf. *Dig.* xliii. 16, i. 14, *de vi et de vi arm.*

concerned, Vattel, following the rules of natural equity incorporated into Roman Jurisprudence, says justly: "Tous "les hommes ont un droit égal aux choses qui ne sont "point encore tombées dans la propriété de quelqu'un; et "ces choses-là appartiennent au premier occupant. Lors "donc qu'une nation trouve un pays inhabité et sans maître, "elle peut légitimement s'en emparer; et après qu'elle a "suffisamment marqué sa volonté à cet égard, un autre ne peut "l'en dépouiller. C'est ainsi que des navigateurs, allant à la "découverte, munis d'une commission de leur souverain, et "rencontrant des îles, ou d'autres terres désertes, en ont pris "possession au nom de leur nation: et communément ce "titre a été respecté, pourvu qu'une possession réelle l'ait "suivi de près" (*p*).

CCXXVIII. In the various discussions which took place between the United States and Great Britain with respect to the right of the Oregon Territory, the title resulting from discovery was attempted to be pushed far beyond the limits of this doctrine, even to the extent of maintaining, that the first discovery by an *uncommissioned merchant-ship* gave priority to the claims of America upon these regions. But such a position appears opposed to all authorities upon International Law, and it was steadily denied by Great Britain.

CCXXIX. The *inchoate title*, then, must in the first place be fortified by the previous commission or confirmed by the subsequent Ratification of the State to which the discoverer belongs. So far, according to the practice of nations, strengthened in some degree by the principles of natural Law and the reason of the thing, the fact of authorized discovery may be said to found the *right to occupy*.

"It is to be observed, then," (Lord Stowell says), "that "all corporeal property depends very much upon occupancy. "With respect to the origin of property, this is the sole foundation: *quod nullius est ratione naturali occupanti conceditur.*

(*p*) "Comment une nation s'approprie un pays désert."—*Vattel*, tom. i. l. i. c. 18, s. 207.

"So with regard to transfer also, it is universally held, in "all systems of jurisprudence, that to consummate the right "of property, a person must unite the *right of the thing with "possession.* A question has indeed been made by some "writers, whether this necessity proceeds from what they "call the natural law of nations, or from that which is only "conventional. *Grotius* seems to consider it as proceeding "only from civil institutions. *Puffendorf* and *Pothier* go "farther. All concur, however, in holding it to be a ne-"cessary principle of jurisprudence, that, to complete the "right of property, *the right to the thing* and *the possession "of the thing* itself should be united; or, according to the "technical expression, borrowed either from the civil law, or, "as *Barbeyrac* explains it, from the commentators on the "Canon Law, that there should be both the *jus in rem* and "the *jus in re.* This is the general law of property, and "applies, I conceive, no less to the right of territory than to "other rights. Even in newly discovered countries, where "a title is meant to be established *for the first time,* some "act of possession is usually done and proclaimed as a notifi-"cation of the fact.

"In transfer, surely, where the former rights of others are "to be superseded and extinguished, it cannot be less neces-"sary that such a change should be indicated by some public "acts, that all who are deeply interested in the event, as the "inhabitants of such settlements, may be informed under "whose dominion and under what laws they are to live. "This I conceive to be the general propriety of principle on "the subject, and no less applicable to cases of territory, "than to property of every other description" (q).

CCXXX. The next step is to consider what facts constitute an Occupation; what are the signs and emblems of its having taken place: for it is a clear principle of International Law, that the title may not be concealed, that the *intent* to occupy must be manifested by some *overt* or *external*

(q) *The Fama,* 5 *Rob. Adm. Rep.* pp. 114–116.

acts. The language of the commentators is clear and full upon this point.

"Simul discimus quomodo res in proprietatem iverint: "*non animi actu solo*; neque enim scire alii poterant quid "alii suum esse vellent, ut eo abstinerent; et idem velle "plures poterant: sed *pacto quodam aut expresso*, ut per "divisionem, *aut tacito*, ut per occupationem" (*r*).

Again:

"Requiritur autem corporalis quædam possessio ad domi-"nium adipiscendum" (*s*).

And again:

"Præter animum possessionem desidero, sed qualemcun-"que, quæ probet, me nec corpore desiisse possidere" (*t*).

These acts, then, by the common consent of nations, must be *use* of and *settlement* in the discovered territories.

CCXXXI. By a Bull promulgated in 1454, Pope Nicholas V. gave to the crown of Portugal the Empire of Guinea, and the power to subdue all the barbarous nations therein, and prohibited the access of all other nations thereto (*u*). By a Bull promulgated in 1493, Pope Alexander VI. granted to the crown of Spain all lands already, or hereafter discovered, lying to the west and south of the Azores, drawing a line from one pole to the other, a hundred leagues from the west of the Azores. This pontifical decision was subsequently ratified by the *Treaty of Tordesillas* in 1494 (*v*), and confirmed by Pope Julius in 1506. These Papal grants to, and arbitrations between, Spain and Portugal, as well as the conventions on this subject between the lay Powers themselves, were always utterly disregarded by Great Britain, France, and Holland, though not altogether abandoned by the grantees, till their futility had been demon-

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(*r*) *Grotius*, l. ii. c. ii. 2, s. 5.
(*s*) *Grotius*, l. ii. c. viii. s. 3.
(*t*) *Bynkershoek*, *De Dom. Maris*, c. i.
(*u*) *Günther*, Kap. i. 6, Kap. ii. 2, s. 10.
(*v*) *Martens*, *Rec.* t. i. p. 372.

strated by the result of many sanguinary wars (*w*). Vattel is very clear upon this point: "Mais c'est une question de "savoir si une nation peut s'approprier ainsi, par une simple "prise de possession, des pays qu'elle n'occupe pas ré- "ellement, et s'en réserver de cette manière beaucoup "plus qu'elle n'est capable de peupler et de cultiver. Il "n'est pas difficile de décider qu'une pareille prétention "serait absolument contraire au droit naturel, et opposée "aux vues de la nature, qui, destinant toute la terre aux "besoins des hommes en général, ne donne à chaque peuple "le droit de s'approprier un pays que pour les usages "qu'elle en tire, et non pour empêcher que d'autres en "profitent. Le droit des gens ne reconnaîtra donc la *pro- "priété* et la *souveraineté* d'une nation que sur les *pays vides* "qu'elle aura occupés *réellement et de fait,* dans lesquels elle "aura formé un établissement, ou dont elle tirera un usage "actuel (*x*). En effet, lorsque des navigateurs ont rencontré "des pays déserts, dans lesquels ceux des autres nations "avaient dressé en passant quelque monument, pour marquer "leur prise de possession, ils ne se sont pas plus mis en "peine de cette vaine cérémonie que de la disposition des "papes, qui partagèrent une grande partie du monde entre les "couronnes de Castille et de Portugal" (*y*). Indeed, writers on International Law agree that Use and Settlement, or, in other words, *continuous use,* are indispensable elements of occupation properly so called. The mere erection of crosses, landmarks, and inscriptions is ineffectual for acquiring or maintaining an exclusive title to a country of which no real use is made (*z*).

(*w*) Even in modern times Spain has claimed the north-western coasts of America upon the sole ground of having first discovered them.

(*x*) "Quam est hic fortunatus putandus, cui soli verè licet omnia, non *Quiritium,* sed *sapientium jure,* pro suis vindicare! nec civili nexo, sed *communi lege naturæ* quæ vetat ullam rem esse cujusquam, nisi ejus qui *tractare* et *uti* sciat."—*Cicero, De Republica,* l. i. c. 17.

(*y*) L. i. c. xviii. s. 208.

(*z*) *Klüber,* s. 126.

Wheaton, Élém. i. c. 4.

CCXXXII. But when occupation by Use and Settleme
has followed upon discovery, it is a clear proposition
Law, that there exists that corporeal possession (*corpora
quædam possessio* (*a*), *detentio corporalis* (*b*)) which confe
an exclusive title upon the occupant, and the *Dominiu
eminens*, as Jurists speak, upon the country whose age
he is.

CCXXXIII. Next arises the difficult question, as to ho
much territory is occupied by such a settlement? to wh
extent must the corporeal possession go, in order to give
title to more than is actually inhabited? (*c*)—what, in fac
is the International doctrine of *contiguity* (*ratio vicinitatis*)

CCXXXIV. Vattel says, that when several nations posse
and occupy a desert (*d*) and unoccupied land, they should agr
upon an equitable partition between themselves; if the
cannot do this, each nation has a right of empire and doma
in the parts where they have first made their settlement
This remark, however, does not afford much assistance t
wards a solution of the difficulty (*e*).

In truth, it is impossible to do more than lay down
broad general rule, aided in some degree by the practice

(*a*) *Grotius*, l. ii. c. viii. s. 3.

(*b*) "Cultura utique et cura agri possessionem quam maximè indica
Neque enim desidero, vel desideravi unquam, ut tunc demum videat
quis possidere, si res mobiles, ad instar testudinum, dorso ferat suo, v
rebus immobilibus incubet corpore, ut gallinæ solent incubare ovi
Præter animum possessionem desidero, sed qualemcunque, quæ probe
me nec corpore desiisse possidere. . . . . Igitur quicquid dicat Titiu
quicquid Mævius, ex possessione jure naturali et gentium suspendit
dominium, nisi pacta dominium, citra possessionem, defendant, ut defend
jus cujusque civitatis proprium."—*Bynkershoek, Op.* t. vi., *De Domin
Maris*, pp. 360, 361.

(*c*) "Et adipiscimur possessionem corpore et animo, neque per s
animo, aut per se corpore. Quod autem diximus et corpore et anim
acquirere nos debere possessionem, non utique ita accipiendum est, ut qu
fundum possidere velit, omnes glebas circumambulet, sed sufficit quam
libet partem ejus fundi introire, dum hac mente et cogitatione sit, u
totum fundum usque ad terminum velit possidere."—*Dig.* xli. 2, 3, 1.

(*d*) *Ibid.* 7, 5.

(*e*) *Vattel*, l. ii. s. 95.

nations, to be applied to each case as it may arise, and modified in some degree by any particular circumstance which may belong to it.

CCXXXV. Some natural circumstances, however, seem to distinguish the rule in its application to a continent or an island.

With respect to a continent.—The occupation of a portion of the sea-coast gives a right to the usual protecting limit at sea, which is holden to exist in all old countries. The right of dominion would extend from the portion of the coast actually and duly occupied inland, so far as the country was uninhabited, and so far as it might fairly be considered to have the occupied *sea-board* for its natural outlet to other nations.

CCXXXVI. A remarkable instance of an International dispute, arising out of the doctrine of contiguity, is afforded by the discussion, which arose upon the interpretation of the language of the Treaty of Utrecht relating to the cessions of France to England. The expressions were as follows:

" Dominus Rex Christianissimus eodem quo pacis præsentis " Ratihabitiones commutabuntur die, Dominæ Reginæ " Magnæ Britanniæ litteras, tabulasve solennes et authen- " ticas tradendas curabit, quarum vigore, insulam Sancti " *Christophori*, per subditos Britannicos sigillatim dehinc pos- " sidendam; *Novam Scotiam quoque, sive Acadiam totam,* " *limitibus suis antiquis comprehensam, ut et Portus Regii* " *urbem, nunc Annapolin regiam dictam, cæteraque omnia in* " *istis regionibus quæ ab iisdem terris et insulis pendent,* unacum " earundem insularum, terrarum, et locorum dominio, proprie- " tate, possessione, et quocunque jure sive per pacta, sive alio " modo quæsito, quod Rex Christianissimus, corona Galliæ, " aut ejusdem subditi quicunque ad dictas insulas, terras et " loca, eorumque incolas, hactenus habuerunt, Reginæ Magnæ " Britanniæ ejusdemque coronæ in perpetuum cedi constabit " et transferri, prout eadem omnia nunc cedit ac transfert " Rex Christianissimus; idque tam amplis modo et forma, " ut regis Christianissimi subditis in dictis maribus, sinubus,

"aliisque locis ad littora Novæ Scotiæ, ea nempe quæ Eurum "respiciunt, intra triginta leucas, incipiendo ab insula, vulgo "*Sablé* dicta, eaque inclusa et Africum versus pergendo, "omni piscatura in posterum interdicatur" (*f*).

The words in Italics led to a variety of demands on the part of Great Britain, with respect to the territories included under these words. The French replied: "Les mots de "*limitibus* et de *comprehensam* n'ont jamais été placés nulle-"part pour donner de l'extension. La phrase (*ut et*) que "citent les Commissaires anglois ne donne aucune extension "à la cession, et ne peut pas opérer sans le dire, et par une "vertu secrète, que ce qui n'étoit pas Acadie avant le traité "soit devenu Acadie après le traité; ni que les pays *circon-"voisins*, ou les *confins* de l'Acadie, en soient devenus des "dépendances; ni que l'accessoire soit six ou huit fois plus "considérable que le principal. Jamais on ne prouvera, que "par les *appartenances* et les dépendances d'un pays, on "doive entendre ceux qui en sont voisins. Proximité et "dépendance sont deux idées différentes, distinctes; leur "confusion entraîneroit celle des limites de tous les États" (*g*). The dissensions on this subject were the principal cause of the war which broke out in 1756. A similar quarrel arose with respect to the provinces claimed from Germany by the Chambers of Reunion of France. By the following words in the 12th article of the Peace of Munster (1648)—"Su-"premum dominium, jura superioritatis *aliaque omnia* in "Episcopatus Metensem, Tallensem et Viradunensem, ur-"besque cognomines eorumque Episcopatuum *districtus*," &c., it was contended that the throne of France was exempted from various feudal liabilities to the German Empire, to which these bishoprics had been previously subject, but, as Günther (*h*) remarks, without any foundation in justice.

(*f*) *Treaty of Utrecht*, 1713:—*Schmauss, Corpus Jur. Gent. Academ.* vol. ii. p. 1332.

(*g*) *Mémoires des Commissaires de S. M. Très-Chrétienne, etc.*, tom. i. *R.* 1, pp. 54, 62, 183.

(*h*) *Europ. Völkerrecht*, vol. ii. p. 180. See also *Bolingbroke's Letters on the Study and Use of History*, l. vii. p. 273 (ed. 1752).

The United States of America, during the pendency of the negotiations with England, with respect to the Oregon boundary, asserted "that a nation discovering a country, by "entering the mouth of its principal river at the sea-coast, "must necessarily be allowed to claim and hold as great an "extent of the interior country as was described by the course "of such principal river and its tributary streams" (*i*).

But this proposition was strenuously denied by Great Britain upon various grounds:—1. That no such right accrued at all to mere discovery; 2. Not to discovery by a private individual. Great Britain "was yet to be informed "(she said) under what principles or usage, among the "nations of Europe, his having first entered or discovered "the mouth of the River Columbia, admitting this to have "been the fact, was to carry after it such a portion of the "interior country as was alleged. Great Britain entered "her dissent from such a claim; and least of all did she "admit that the circumstance of a merchant vessel of the "United States having penetrated the coast of that continent "at Columbia River, was to be taken to extend a claim in "favour of the United States along the same coast, both "above and below that river, over latitudes that had been "previously discovered and explored by Great Britain her-"self, in expeditions fitted out under the authority and with "the resources of the nation" (*j*).

CCXXXVII. If the circumstances had been these, viz. that an actual settlement had been grafted upon a discovery made by an authorized public officer of a nation at the mouth of a river, the law would not have been unreasonably applied.

There appears to be no variance in the opinions of writers upon International Law as to this point. They all agree that the Right of Occupation incident to a settlement, such as has been described, extends over all territory actually and *bona fide* occupied, over all that is essential to the real use

(*i*) *State Papers*, vol. iii. p. 506. *Twiss, Oregon Question Examined.*
(*j*) *State Papers*, vol. xiii. p. 509.

of the settlers, although the use be only inchoate, and not fully developed; over all, in fact, that is necessary for the integrity and security of the possession, such necessity being measured by the principle already applied to the parts of the sea adjacent to the coasts, namely, "*ibi finitur imperium ubi* "*finitur armorum vis.*" The application of the principle to a territorial boundary is, of course, dependent in each case upon details of the particular topography.

Martens, discussing "jusqu'où s'étend l'occupation," writes with as much precision and clearness upon the point as the subject will admit of. "Une nation qui occupe un "district doit être censée avoir occupé toutes les parties "vacantes qui le composent; sa propriété s'étend même sur "les places qu'elle laisse incultes, et sur celles dont elle "permet l'usage à tous. Les limites de son territoire sont "ou naturelles (telles que la mer, les rivières, les eaux, les "montagnes, les forêts) ou artificielles (telles que des bar- "rières, des bornes, des poteaux, etc.). Les montagnes, les "forêts, les bruyères, etc., qui séparent le territoire de deux "nations, sont censés appartenir à chacune des deux jus- "qu'à la ligne qui forme le milieu, à moins qu'on ne soit "convenu de régler différemment les limites, ou de les "neutraliser. A défaut des limites certaines, le droit d'une "nation d'exclure des nations étrangères des terres ou îles "voisines ne s'étend pas au-delà du district qu'elle cultive, "ou duquel du moins elle peut prouver l'occupation; à moins "que, de part et d'autre, l'on ne soit convenu de ne pas "occuper certains districts, îles, etc., en les déclarant "neutres" (*k*).

CCXXXVIII. This middle distance mentioned by Martens appears, in cases where there is no sea-coast boundary, to be recognized in practice.

In the negotiations between Spain and the United States of America respecting the western boundary of Louisiana, the latter country laid down with accuracy and clearness

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(*k*) *Martens, Droit des Gens*, l. ii. c. 1, s. 38.

certain propositions of law upon this subject, and which fortify the opinion advanced in the foregoing paragraphs. "The principles" (America said on this occasion) "which "are applicable to the case, are such as are dictated by "reason, and have been adopted in practice by European "Powers in the discoveries and acquisitions which they "have respectively made in the New World. They are "few, simple, intelligible, and, at the same time, founded "in strict justice. The first of these is, that when any "European nation takes possession of any extent of sea-"coast, that possession is understood as extending into the "interior country, to the sources of the rivers emptying "within that coast, to all their branches, and the country "they cover, and to give it a right, in exclusion of all other "nations, to the same. (See *Mémoire de l'Amérique*, p. "116.) It is evident that some rule or principle must "govern the rights of European Powers in regard to each "other, in all such cases: and it is certain that none "can be adopted, in those to which it applies, more reason-"able or just than the present one. Many weighty consi-"derations show the propriety of it. Nature seems to have "destined a range of territory so described for the same "society; to have connected its several parts together by "the ties of a common interest, and to have detached them "from others. If this principle is departed from, it must "be by attaching to such discovery and possession a more "enlarged or contracted scope of acquisition; but a slight "attention to the subject will demonstrate the absurdity of "either. The latter would be to restrict the rights of an "European Power, who discovered and took possession of a "new country, to the spot on which its troops or settlements "rested; a doctrine which has been totally disclaimed by "all the Powers who made discoveries and acquired posses-"sions in America. The other extreme would be equally "improper; that is, that the nation who made such dis-"covery should, in all cases, be entitled to the whole of the "territory so discovered. In the case of an island, whose

" extent was seen, which might be soon sailed round and " preserved by a few forts, it may apply with justice; but " in that of a continent it would be absolutely absurd. " Accordingly we find, that this opposite extreme has been " equally disclaimed and disavowed by the doctrine and " practice of European nations. The great continent of " America, north and south, was never claimed or held by " any one European nation; nor was either great section " of it. Their pretensions have been always bounded by " more moderate and rational principles. The one laid " down has obtained general assent.

" This principle was completely established in the con-" troversy which produced the war of 1755. Great Britain " contended that she had a right, founded on the discovery " and possession of such territory, to define its boundaries " by given latitudes in grants to individuals, retaining the " sovereignty to herself, from sea to sea. This pretension " on her part was opposed by France and Spain, and it was " finally abandoned by Great Britain in the treaty of 1763, " which established the Mississippi as the western boundary " of her possessions. It was opposed by France and Spain, " on the principle here insisted on, which of course gives it " the highest possible sanction in the present case.

" The second is, that whenever one European nation " makes a discovery and takes possession of any portion of that " continent (*l*), and another afterwards does the same at some " distance from it, where the boundary between them is not " determined by the principle above mentioned, the middle " distance becomes such of course. The justice and pro-" priety of this rule is too obvious to require illustration.

" A third rule is, that whenever any European nation has " thus acquired a right to any portion of territory on that " continent, that right can never be diminished or affected " by any other Power, by virtue of purchases made, by grants

(*l*) As to the character of the early acquisitions made by the East India Company, see Speech on Motion relative to the Speech from the Throne, *Burke's Works*, vol. iv. p. 161 and note.

" or conquests of the natives within the limits thereof. It
" is believed that this principle has been admitted (*m*)
" and acted on invariably since the discovery of America,
" in respect to their possessions there, by all the European
" Powers. It is particularly illustrated by the stipula-
" tions of their most important treaties concerning those
" possessions and the practice under them, viz., the Treaty
" of Utrecht in 1713, and that of Paris in 1763. In con-
" formity with the 10th Article of the first-mentioned
" Treaty, the boundary between Canada and Louisiana on
" the one side, and the Hudson Bay and North-western
" Companies on the other, was established by Commis-
" saries, by a line to commence at a Cape or Promontory
" on the Ocean in 58° 30′ north latitude, to run thence
" south-westwardly to latitude 49° north from the Equator,
" and along that line indefinitely westward. Since that
" time, no attempt has been made to extend the limits of
" Louisiana or Canada to the north of that line or of
" those Companies to the south of it, by purchase, conquest,
" or grants from the Indians. By the Treaty of Paris,
" 1763, the boundary between the present United States
" and Florida and Louisiana was established by a line to
" run through the middle of the Mississippi from its source
" to the river Iberville, and through that river to the
" Ocean. Since that time, no attempts have been made,
" by those States since their independence, or by Great
" Britain before it, to extend their possessions westward
" of that line, or of Spain to extend hers eastward of it,
" by virtue of such acquisitions made of the Indians.
" These facts prove incontestably that this principle is not
" only just in itself, but that it has been invariably observed
" by all the Powers holding possessions in America, in all ques-
" tions to which it applies relative to those possessions" (*n*).

(*m*) In the case of *Johnson* v. *Mackintosh*, decided by the Supreme Court of the U.S. The practice and law on this subject are fully considered, 8 *Wheaton's Rep.* p. 543, A.D. 1823.

(*n*) *State Papers*, vol. v. pp. 327–329.

CCXXXIX. Here it should be remarked that in those instances in which (*o*) rivers form the boundary between two States, all nations appear to have acquiesced in the wisdom and justice of the rules laid down in the Roman Law upon this subject.

CCXL. The law of property as incident to Neighbourhood (*vicinitas*) or Contiguity was discussed under many and various heads (*p*) in that system of jurisprudence. But it was especially treated of in the following cases relating to *fluvial Accessions.*

Proceeding upon the principle that the river itself was "*communis usus,*" but that the bed of it was so much land belonging to the proprietors of the banks, though the property was in abeyance while covered with water, and that the mid-channel was the line of demarcation between the neighbours, it decided—

1. That if an island emerged in the stream, the property of it accrued to the owner of the nearest bank.

2. If it emerged in the middle of the stream, the property was divided between the *arcifinii,* as the opposite proprietors were called.

3. If the channel of the river was left dry (*alveus derelictus*) it was also equally apportioned between the owners of the banks.

4. If the river abandoned its new channel, a difference of opinion existed whether that channel also accrued in equal moieties to the owners of the banks, or whether it reverted to the dominion of the ancient proprietor (*cujus antea fuit*). The former opinion was given by *Caius,* the latter by *Pomponius,* and both were incorporated in the *Digest*; though the former only appeared in the *Institutes,* with an intimation that

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(*o*) *Vattel,* i. c. xxii. s. 266: *Des Fleuves, des Rivières, et des Lacs.*

(*p*) *Dig.* xliii. t. xii. l. i. s. 7. *De Fluminibus, &c.*

Instit. l. ii. t. i. ss. 20, 21. *De Rerum divis. &c.*

Cod. vii. 41. *De Alluvionibus.*

Dig. xli. t. i. l. 7, l. 29, l. 30, l. 56, l. 65. *De Adquir. rerum domin.*

it was doubtful Law (*sed vix est ut id obtineat*), as indeed it appears to be, though much might depend upon the length of time during which the new channel had been occupied.

5. All alluvial deposits belonged *jure gentium,* that is, by natural law, to the owner of the bank to which they adhered.

6. If the violence of the stream (*vis fluminis*) had detached a portion of the soil from one bank and carried it over to the other side, the Law decided, that if it became firmly imbedded so as to be irremovable, it belonged to the owner of that side, otherwise it might be vindicated by its old proprietor.

CCXLI. Modern times have furnished us with a very important practical commentary upon this ancient rule of Public Law.

In the case of the *Anna,* captured by a British privateer and brought into the High Court of Admiralty for adjudication, Lord Stowell made the following observations:—"When "the ship was brought into this country, a claim was given of "a grave nature, alleging a violation of the territory of the "United States of America. This great leading fact has very "properly been made a matter of much discussion, and "charts have been laid before the Court to show the place of "capture, though with different representations from the "adverse parties. The capture was made, it seems, at the "mouth of the River Mississippi, and, as it is contended in "the claim, within the boundaries of the United States. We "all know that the rule of Law on this subject is, *terræ* "*dominium finitur, ubi finitur armorum vis*; and since the "introduction of fire-arms, that distance has usually been "recognized to be about three miles from shore. But it so "happens in this case, that a question arises as to what is to "be deemed the shore, since there are a number of little "mud-islands composed of earth and trees drifted down by "the river, which form a kind of portico to the main land. "It is contended that these are not to be considered as any "part of the territory of America, that they are a sort of "'*no man's land,*' not of consistency enough to support the

"purposes of life, uninhabited, and resorted to only for "shooting and taking birds' nests. It is argued that the line "of territory is to be taken from the Balise, which is a fort "raised on made land by the former Spanish possessors. I "am of a different opinion; I think that the protection of "territory is to be reckoned from these islands; and that "they are the natural appendages of the coast on which they "border, and from which, indeed, they are formed. Their "elements are derived immediately from the territory, and on "the principle of alluvium and increment, on which so much "is to be found in the books of Law, *quod vis fluminis de "tuo prædio detraxerit, et vicino prædio attulerit, palam tuum "remanet* (*q*), even if it had been carried over to an adjoining "territory. Consider what the consequence would be if "lands of this description were not considered as appendant "to the main land, and as comprised within the bounds of "territory. If they do not belong to the United States of "America, any other Power might occupy them; they might "be embanked and fortified. What a thorn would this be in "the side of America! It is physically possible, at least, that "they might be so occupied by European nations, and then "the command of the river would be no longer in America, "but in such settlements. The possibility of such a conse-"quence is enough to expose the fallacy of any arguments "that are adduced to show that these islands are not to be "considered as part of the territory of America. Whether "they are composed of earth or solid rock, will not vary the "right of dominion; for the right of dominion does not "depend upon the texture of the soil. I am of opinion "that the right of territory is to be reckoned from those "islands" (*r*).

It was not without reason that the ancients worshipped the God *Terminus* on account of the fidelity with which he preserved the Rights of Property between nations as well as

(*q*) *Inst.* l. ii. tit. i. s. 21.

(*r*) *The Anna*, 5 *Robinson's Adm. Rep.* p. 373.

individuals, and because they saw that if his jurisdiction were to cease, quarrels would be endless.

Tu populos urbesque et regna ingentia finis (*s*).

The River and the Mountain are not necessary landmarks (*t*); there may be, and often are, artificial landmarks wholly irrespective of any natural boundaries. In these cases, the change in the course of the river has no effect upon the property. We know indeed, alas! by recent experience, that the phrases "natural boundaries" and "rectification of frontiers," have been used by powerful military States to cover unjust spoliation of the property of their weaker neighbour. But turning from these acts of violence and wrong, it is to be observed that in countries which have no other limit than a river, there is a distinction to be taken, according to Grotius, between a change made in the course of a river by imperceptible degrees, and a change made all at once. In the former case, the river, being the same, continues to be the boundary; in the latter, the river leaving its old channel all at once, it is no longer reckoned the same: the old bed of the river continues to be the boundary.

CCXLII. The nature of Occupation is not confined to any one class or description; it must be a *beneficial use and occupation* (*le travail d'appropriation* (*u*)); but it may

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(*s*) "Conveniunt, celebrantque dapes vicinia supplex,
Et cantant laudes, Termine sancte, tuas.
Tu populos urbesque et regna ingentia finis;
Omnis erit sine te litigiosus ager.
Nulla tibi ambitio est: nullo corrumperis auro,
Legitima servas credita rura fide."
Ovid, Fasti, ii. 655.

(*t*) *Grotius*, l. ii. c. iii. ss. 16, 17.
Heffters, s. 66: *Grenzen der Staatsgebiete.*
Traité des Limites entre le Brésil et la République orientale de l'Uruguay, *Annuaire des Deux Mondes*, 1851–2. Appendix, p. 985.
Klüber, s. 133.
Günther, Kap. ii. 4.
Rutherforth, b. ii. c. ix. vii. p. 491 (ed. Baltimore, 1832).
(*u*) *Eug. Ortolan, Dom. intern.* p. 37.

be by a settlement for the purpose of prosecuting a particular trade, such as a fishery, or for working mines, or pastoral occupations, as well as agriculture, though Bynkershoek is correct in saying, "*cultura* utique et *cura agri* possessionem "quam maxime indicat" (*x*).

Vattel justly maintains that the pastoral occupation of the Arabs entitled them to the exclusive possession of the regions which they inhabit. "Si les Arabes pasteurs voulaient "cultiver soigneusement la terre, un moindre espace pour-"rait leur suffire. Cependant, aucune autre nation n'est en "droit de les resserrer, à moins qu'elle ne manquât absolu-"ment de terre; car enfin ils *possèdent* leur pays; ils s'en "servent à leur manière; ils en tirent un usage convenable "à leur genre de vie; sur lequel ils ne reçoivent la loi de "personne" (*y*).

It has been truly observed that, "agreeably to this rule, "the North American Indians would have been entitled to "have excluded the British fur-traders from their hunting "grounds; and not having done so, the latter must be "considered as having been admitted to a joint occupation "of the territory, and thus to have become invested with a "similar right of excluding strangers from such portions of "the country as their own industrial operations pervade" (*z*).

CCXLIII. A similar settlement was founded by the British and Russian Fur Companies in North America.

The chief portion of the Oregon Territory is valuable solely for the fur-bearing animals which it produces. Various establishments in different parts of this territory organized a system for securing the preservation of these animals, and exercised for these purposes a control over the native population. This was rightly contended to be the only exercise of *proprietary right* of which these particular

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(*x*) *De Dominio Maris*, vol. vi. c. i. p. 360.

(*y*) *Vattel*, l. ii. s. 97.

(*z*) *The Oregon Question*, a pamphlet by *Edward J. Wallace*, 1846, p. 25.

regions at that time were susceptible; and to mark that a *beneficial use* was made of the whole territory by the occupants.

CCXLIV. It should be mentioned that the practice of nations in both hemispheres is to acknowledge, in favour of any civilized nation making a settlement in an uncivilized country, a right of *pre-emption* of the *contiguous* territory from the native inhabitants as against any other civilized nation (*a*). It is a right claimed by Great Britain with respect to her Australian settlements, especially New Zealand; and by the United States of America with respect to the Indians in their back States (*b*).

CCXLV. The Bulls of Alexander VI. reserved from the grant to Spain all lands previously acquired by any *Christian* nation. It is much to be lamented, both for the influence of Christianity and the honour of Europe, that the regard, which has been shown of late years, for the rights of *natives* in those countries, into which the overflowings of European population have been poured, was not exhibited at an earlier period.

It may indeed be justly said, that the Earth was intended by God to supply the wants of the general family of mankind, and that the cultivation of the soil is an obligation imposed upon man; and it seems a fair conclusion from these premisses, that when the population of a country exceeds the means of support which that country can afford, they have a right, not only to occupy uninhabited districts (which, indeed, they would be entitled to do irrespectively of this emergency), but also to make settlements in countries capable of supporting large numbers by cultivation, but at present wandered over by nomad or hunting tribes. Vattel goes further, and gives a right to expel by force the inhabitants of a country, who, refusing to cultivate the soil, live entirely by rapine on their neighbours; and such people, like the

(*a*) *Wallace's Pamphlet*, p. 28.
(*b*) *Twiss, Oregon*, p. 166.

modern Buccaniers in the Chinese Seas, may lawfully be treated as pirates.

CCXLVI. To return, however, to the previous question. Vattel says: "Ceux qui retiennent encore ce genre de vie "oisif, usurpent plus de terrain qu'ils n'en auraient besoin "avec un travail honnête, et ils ne peuvent se plaindre, si "d'autres nations, plus laborieuses et trop resserrées, vien-"nent en occuper une partie. Ainsi, tandis que la conquête "des empires policés du *Pérou* et de *Mexique* a été une "usurpation criante, l'établissement de plusieurs colonies "dans le continent de *l'Amérique septentrionale* pouvait, en "se contenant dans de justes bornes, n'avoir rien que de "très-légitime. Les peuples de ces vastes contrées les "parcouraient plutôt qu'ils ne les habitaient" (*c*).

And again: "On ne s'écarte donc point des vues de la "nature, en resserrant les sauvages dans des bornes plus "étroites. Cependant, on ne peut que louer la modération "des *Puritains* anglais, qui les premiers s'établirent dans "la Nouvelle-Angleterre. Quoique munis d'une charte de "leur souverain, ils achetèrent des sauvages le terrain qu'ils "voulaient occuper. Ce louable exemple fut suivi par "*Guillaume Penn* et la colonie de Quackers, qu'il conduisit "dans la Pennsylvanie" (*d*).

Though it is to be hoped that this comparison in favour of Great Britain is, in great measure, founded in justice, it cannot be denied that she is not without her share in the guilt of forcibly dispossessing and exterminating unoffending inhabitants of countries with whom she had no just cause of

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(*c*) *Vattel*, t. i. l. i. c. vii. s. 81.

(*d*) *Ib.* c. xviii. s. 209.

"He that brings wealth home is seldom interrogated by what means it was obtained. This, however, is one of those modes of corruption with which mankind ought always to struggle, and which they may in time hope to overcome. There is reason to expect that as the world is more enlightened, policy and morality will at last be reconciled, and that nations will learn not to do what they would not suffer."—*Thoughts on the Transactions relating to the Falkland Islands*, 1771, by *Dr. Johnson*, *Works*, vol. xii. pp. 123, 124.

war. "The patent granted by King Henry VII. of England "to John Cabot and his sons authorized them 'to seek out and "'discover all islands, regions, and provinces whatsoever "'that may belong to heathens and infidels,' and, 'to subdue, "'occupy, and possess these territories, as his vassals and "'lieutenants.' In the same manner the grant from Queen "Elizabeth to Sir Humphrey Gilbert empowers him 'to "'discover such remote heathen and barbarous lands, coun- "'tries, and territories, not actually possessed of any Christian "'prince or people, and to hold, occupy, and enjoy the same, "'with all their commodities, jurisdictions, and royalties'" (*e*). Most truly does Mr. Wheaton say, "There was one thing "in which they" (i.e. the European nations) "all agreed, "that of almost entirely disregarding the right of the native "inhabitants of these regions" (*f*).

CCXLVII. Nor can a better excuse for such conduct be alleged than the detestable doctrine, which it is melancholy to find maintained by some modern writers, viz. that International Law is confined in its application to European territories. A denial of this doctrine formed part of an earlier chapter of this work (*g*), and need not be more particularly referred to in this place.

It should be remembered that Penn, though formally commissioned by his sovereign, acquired his territory by treaty and convention with the aboriginal inhabitants.

CCXLVIII. It may therefore be considered as a maxim of International Law, that Discovery alone, though accompanied by the erection of some symbol of sovereignty, if unaccompanied by acts of a *de facto* possession, does not constitute a national acquisition.

A different opinion appears, indeed, to have been entertained by the officers of Great Britain in 1774, at the period of her temporary abandonment of the Falkland Islands.

(*e*) *Wheaton's Elements* (English ed.), pp. 209, 210.

(*f*) *Ibid.*

(*g*) Pt. i. ch. iii.

But the doctrine in the text may now be said to be very generally established (*h*).

CCXLIX. The practice of nations supports the doctrine of *beneficial use and occupation* (*i*). In a dispute which arose between Great Britain and Spain relative to the subject of Nootka Sound (*k*), Spain claimed a large portion of the north-western coast of America upon the ground of priority of discovery and of long possession, confirmed by the 8th Article (*l*) of the Treaty of Utrecht (1713). The British Government resisted their claim upon the ground that the Earth was the heritage of all mankind, and that it was competent to each State, through the means of occupation and cultivation, to appropriate a portion of it. The dispute was ended by a convention between the two Powers, in which it was agreed, that it was lawful for the respective subjects of each to navigate freely the Pacific and the Southern Seas, to land upon the coasts of these seas, to traffic with the natives, and to form settlements; subject to certain conditions specified in the convention.

CCL. The claims of the United States of North

(*h*) *Eug. Ortolan, Dom. intern.* p. 49, n. 2; *Moser's Versuch*, Buch 5, p. 541.

Wenck, t. iii. p. 815.

Johnson's Works, vol. xii.: *Thoughts on the Falkland Islands.*

Martens, Rec. t. ii. p. 1.

Inscription que le Lieutenant Clayton, commandant le fort Egmont, fit graver sur une plaque de plomb attachée au fort Egmont pour conserver les droits de la couronne d'Angleterre sur les Isles de Falckland lorsque les Anglais quittèrent ledit fort le 22 *mai* 1774:

"Qu'il soit notoire à toutes les nations que les Isles de Falckland, ainsi que ce Fort, les Magasins, Quais, Havres, Bayes et Criques qui en dépendent, appartiennent de droit uniquement à Sa Très-Sacrée Majesté George III, Roi de la Grande-Bretagne, de France, et d'Irlande, Défenseur de la Foi, etc. En foi de quoi cette Plaque a été fixée, et les Pavillons de S. M. Britannique déployés et arborés, comme une marque de possession, par Samuel Guillaume Clayton, Officier commandant aux Isles de Falckland, le 22 mai 1774."

(*i*) *Eug. Ortolan, Dom. int.* p. 48.

(*k*) *Wheaton, Élém.* t. i. p. 162.

(*l*) *Schmauss*, ii. 1422. The words of the Article are very vague.

America upon the Oregon Territory were, as has been shown, chiefly founded upon priority of discovery, both by their own subjects, and by the Spaniards, whose pretensions they had by the Treaty of 1819 inherited. The British Government denied both the fact of prior discovery, and the enormous inference sought to be drawn from it; and most clearly asserted at the same time the right of other nations to occupy vacant portions of the earth wheresoever they might be. The temporary arrangements of 1818 and 1827 were merged in the definitive Treaty of Washington in 1846 (*m*).

(*m*) *Article I.*—From the point on the forty-ninth parallel of north latitude, where the boundary laid down in existing Treaties and Conventions between Great Britain and the United States terminates, the line of boundary between the territories of her Britannic Majesty and those of the United States shall be continued westward along the said forty-ninth parallel of north latitude to the middle of the channel which separates the continent from Vancouver's Island, and thence southerly, through the middle of the said channel, and of Fuca's Straits to the Pacific Ocean; provided, however, that the navigation of the whole of the said channel and straits, south of the forty-ninth parallel of the north latitude, remain free and open to both parties.

Article II.—From the point at which the forty-ninth parallel of north latitude shall be found to intersect the great northern branch of the Columbia River, the navigation of the said branch shall be free and open to the Hudson's Bay Company, and to all British subjects trading with the same, to the point where the said branch meets the main stream of the Columbia, and thence down the said main stream to the ocean, with free access into and through the said river or rivers; it being understood that all the usual porterage along the line just described shall be in like manner free and open.

In navigating the said river or rivers, British subjects, with their goods and produce, shall be treated on the same footing as citizens of the United States; it being, however, always understood that nothing in this article shall be construed as preventing or intending to prevent the Government of the United States from making any regulations respecting the navigation of the said river or rivers not inconsistent with the present Treaty.

Article III.—In the future appropriation of the territory south of the forty-ninth parallel of north latitude, as provided in the first article of this Treaty, the possessory rights of the Hudson's Bay Company, and of all British subjects who may be already in the occupation of land or

other property lawfully acquired within the said territory, shall be respected.

Article IV.—The farms, lands, and other property of every description belonging to the Puget's Sound Agricultural Company, on the north side of the Columbia River, shall be confined to the said company. In case, however, the situation of those farms and lands should be considered by the United States to be of public and political importance, and the United States Government should signify a desire to obtain possession of the whole or of any part thereof, the property so required shall be transferred to the said Government at a proper valuation, to be agreed upon between the parties.—*Ann. Reg.* 1846, pp. 453, 454.

CHAPTER XIII.

PRESCRIPTION.

CCLI. The second mode of Original Acquisition is effected by the operation of time, by what English and French jurists term *Prescription* (*a*). In order to arrive at any solution of this difficult question which may be at all satisfactory, it is necessary to make some observations upon the place which Prescription occupies in the systems both of Private and Public Law, as introductory to the consideration of the place occupied by the same doctrine in the system of International Jurisprudence.

First, as to Private Law. In all systems of *private* jurisprudence, the lapse of time has a considerable bearing upon the question of property (*b*). There is, according to all such systems, a period when a *de facto* becomes a *de jure* ownership, when possession becomes property. The nature of man, the reason of the thing, the very existence of society, demand that such should be the case. The Roman Law does but give expression to this paramount necessity in the maxim, "*Vetus-*

(*a*) *Grotius*, l. ii. c. iv.
Puffendorf, *Jus Nat. et Gent.* l. iv. c. xii.
Wolff, *Jus Nat.* p. iii. c. vii.
Vattel, l. i. c. xvi. s. 199; l. ii. c. xi. ss. 140, 151.

(*b*) *Grotius* indeed says that *usucapio* is the creature of the Civil Law, because nothing is done *by* time, though everything is done *in* time; but this seems an unworthy subtlety, and is inconsistent with other passages in his work.

"Le Temps, qui renferme en soi l'idée de la durée, de la répétition, et de la succession des phénomènes, un des agents de modification, de destruction et de génération pour les choses physiques, restera-t-il sans influence sur la modification, sur la destruction, et sur la génération des droits?"—*Domaine internat., par E. Ortolan*, p. 98.

"*tas* quæ semper pro *lege* tenetur" (*c*). The doctrine of *Usucapio* exhibits the first trace of this mode of acquisition in Roman Jurisprudence (*d*). According to this doctrine, the possessor *justo titulo et bonâ fide*, during two years of land, and during one year of movables, which had not previously belonged to him, acquired a property in it or them. This institution was originally confined to the *prædia Italica* and to the Roman citizen; but the Prætor extended it to the *fundi provinciales*, and to the *peregrinus*, under the appellation of *præscriptio longi temporis*. Justinian, who destroyed the distinction between civil and natural property, took also away the distinction between *fundi Italici* and *provinciales*, blended together the *usucapio* and the *præscriptio*, and conferred not only a right of possession but of property on the person who had possessed movables for three, and immovables for ten years *inter præsentes*, or twenty *inter absentes*, provided that the subject-matter had been capable of *usucapio* or *præscriptio*, and there had been *justus titulus* and *bona fides* (*e*). He also added another species of Prescriptive Acquisition, the

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(*c*) *Dig.* de aq. et aq. pluv. arc. xxxix. 3, 2: see also *Dig.* de loc. et itin. publ. xliii. 7, 3.

Dig. de aqua quotidiana et æstiva, 43, 20, 3, 4: "Ductus aquæ *cujus origo memoriam excessit, jure constituti* loco habetur."

(*d*) Which the Germans call *Ersitzung*. In the XII Tables it bore the name of *ususauctoritas*, i. e. usus et auctoritas.

Puchta, Instit. ii. s. 240.

Savigny, R. R. iv. s. 195.

Savigny, Recht des Besitzes, Abschnitt i. s. 2.

Instit. ii. 6, de usucapionibus et longi temporis præscriptionibus.

Dig. xli. 3, de usurpationibus et de usucapionibus.—Code 31, de usucapione transformanda et de sublata differentia rerum mancipi et nec mancipi.—33, de præscriptione longi temporis decem vel viginti annorum.—34, in quibus causis cessat longi temporis præscriptio.—35, quibus non objicitur longi temporis præscriptio.—38, ne rei dominicæ vel templorum vindicatio temporis præscriptione submoveatur.—39, de præscriptione xxx vel xl annorum.

(*e*) "Par là cessent les différences entre la propriété civile et la propriété naturelle—entre l'*usucapion*, cette patronne de l'Italie, et la *prescription*, cette patronne du genre humain."—*Troplong*, p. 139.

Cod. C., De Usucapione transformanda.

Præscriptio xxx vel xl annorum. This *longissimi temporis possessio,* as it was afterwards called, did not confer property on the possessor or take it away from the proprietor, but it furnished the possessor with a defence against all claimants, and that though there had been no *justus titulus.* Besides these classes of Prescription measured by a definite time, was the indefinite class, Immemorial Prescription (*immemoriale tempus, possessio vel præscriptio immemorialis*), which was called "*adminiculum juris quo quis tuetur possessionem,* "*quæ memoriam hominum excedit*" (*f*).

This kind of Prescription was available when the origin of the possession was incapable of proof—when nobody could recollect that it had belonged to another person. Such a Prescription might have for its object things incapable of being otherwise acquired, though not such things as were by nature *res communes.* It is mentioned, however, with reference to only three heads of what may be called *public* law —namely, 1. With reference to public ways (*viæ publicæ, privatæ, vicinales*); 2. To a right of protection from the rain-water (*aquæ pluviæ arcendæ*); 3. The right relating to water-courses (*ductus aquæ* (*g*)).

CCLII. The passages in the Roman Law (*h*) show that the doctrine of *Immemorial Prescription* was applicable only to those few cases in which either a right of a *public* character, or an exemption from the obligation of such a right, was to be acquired. It is not surprising, therefore, that the doctrine should have occupied a very subordinate place in Roman

(*f*) *Dig.* de aqua quotid. et æst. xliii. 20, 3, 4, x. l. v. t. 40, c. 26, de V. S.

Dig. de aqu. et aqu. pluv. arc., xxxix. 3, 24.—"The possession necessary to constitute a title by prescription must be uninterrupted and peaceable, both according to the Law of England, the Civil Law, and those of France, Normandy, and Jersey."—*Benest* v. *Pipon,* 1 *Knapp's Privy Council Reports,* p. 60.

(*g*) See note (*c*).

"Scævola respondit solere eos, qui juri dicundo præsunt, tueri ductus aquæ *quibus auctoritatem vetustatis daret, tametsi jus non probaretur.*"—*Dig.* xxxix. 3, 26.

(*h*) *Savigny, R. R.* iv. s. 198.

jurisprudence, or, the reason of the thing being considered, that it should during the Middle Ages have risen into an institute of continual use and of the highest importance.

In the first two of the three instances specified in the *Digest*, Immemorial Prescription appears, on examination, to be unconnected with the fact of actual possession, but in the last to be necessarily bound up with it; and this condition is treated as indispensable in later jurisprudence.

CCLIII. The Canon Law (*i*) contains two remarkable instances of the application of Immemorial Prescription. In the year 1209 a Papal Legate forbad the Count of Toulouse the exercise of certain regal privileges with respect to the imposition of taxes. The Pope, at the request of the Count, declared that the prohibition extended only to the taxes arbitrarily imposed, and not to those which were equitable; under which class were to be reckoned those which had been permitted by the Emperor, the King, or the Lateran Council, and also those "vel ex antiqua consuetudine, *a* "*tempore cujus non exstat memoria*, introducta" (*k*). The

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(*i*) *Savigny, R. R.* iv. s. 198.

Eichhorn, Kirchenrecht, b. vii. c. vii. iv.: "Verjährung gegen die Kirche."

Suarez, De Leg. l. viii. c. xxxv. s. 21. More than 100 years, however, were held necessary to establish a prescription against the Church of Rome: l. ii. t. xiii. c. ii., t. vi.

The distinction between "Usucapio" and "Præscriptio" is thus stated by one of the most eminent of modern canonists, *Schmalzgrüber* (*Jus Canonicum*, vol. ii. p. 321). He says:

"Distinctio propria et primaria" is—

1. Usucapio is *cause*.
2. Præscriptio is *effect*.

"Distinctio ordinaria" is—

1. "Usucapio" concerns "res corporales" and requires actual possession, "*veram possessionem*."
2. "Præscriptio" does *not*, but is content with *quasi possessio*.

The use of the phrase "præscriptum est obligationi" implies *opposition* to a *former proprietor*.

"Prescripta est servitus, præscripsi rem" implies, "no more than legitimate acquisition."

(*k*) x. l. v. t. 40, c. 26, de V. S.

second passage relates to the case of a bishop, who claimed a *Prescriptive* Right to the tithes and churches within the see of another bishop. It has been seen that, according to the Roman Law, a possession for three, ten, or twenty years with, or for thirty without, a title, furnished the possessor with a defence on the ground of *præscriptio* or *usucapio* against any private claimant. Churches were, generally speaking, privileged against any Prescription less than forty years; but that Prescription against the Church did not require a title provided there were a *bona fides.* In the case of the bishop, however, this Prescription of forty years, it was said, would not avail, because it was contrary to the Common Law: "ubi tamen est ei *jus commune* contrarium " vel habetur *præsumptio* contra ipsum, *bona fides* non sufficit: " sed est necessarius *titulus,* qui possessori causam tribuat " præscribendi: nisi tanti temporis allegetur præscriptio, *cujus* " *contrarii memoria non existat*" (*l*).

CCLIV. The tendency and spirit of modern legislation and jurisprudence has been to substitute, in *Private* Law, a short definite period of time in lieu of Immemorial Prescription.

In England, the " time of memory " was, at a very early period of her history, ascertained by the law to commence from the reign of a particular monarch; for though a custom was said to be good when it had been used " time out of " mind," or " for a time whereof the memory of man runneth " not to the contrary," the phrase referred to a *fixed* epoch, namely, that the custom was in use before the beginning of the reign of Richard I. Recent legislation has introduced

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(*l*) The whole passage in the sixth book of the *Decretals* is as follows: " Episcopum, qui ecclesias et decimas, quas ab eo repetis, proponit, licet in tua sint constitutæ diœcesi, se legitimè præscripsisse, adlegare oportet, *cum jus commune contra ipsum faciat,* hujusmodi præscriptionis titulum et probare; nam licet ei qui rem præscribit ecclesiasticam, si sibi non est contrarium jus commune, vel contra eam præsumtio non habeatur, *sufficiat bona fides*; ubi tamen," &c.—L. ii. t. 13, cap. 1. *De Præscript.* in VIto.

a Prescription limited by a specific number of years, which it has substituted for the doctrine of immemorial usage (*m*).

In France (*n*) Immemorial Prescription has been abolished, and a fixed period substituted; and in Austria; as well as in Prussia also, though in this country very long periods of time are required in certain cases (*o*).

CCLV. Secondly, as to Public Law. The doctrine of Immemorial Prescription is, from the very necessity of the case, indispensable (*p*) in the system of Public Law. Accordingly, we find it mentioned more than once in the Constitutions of the ancient German Empire, and as a mode of acquiring Public Rights (*q*).

Savigny illustrates the use of Immemorial Prescription in

(*m*) *Blackstone's Commentaries on the Laws of England*, b. 2, c. iii.

The rule was adopted when, by the Statute of Westminster (3 Edward I. c. 39), the reign of Richard I. was made the time of limitation in a writ of right.

Statute of 2 & 3 William IV. c. lxxi., An Act "for shortening the time of prescription in certain cases." It was the intention of this Act to establish practically and generally a 30-years', and certainly and universally a 60-years', prescription.—*Stephen's Comment.* b. 2, t. i. c. xxii.

(*n*) *Code civil.*

" 690. Les servitudes continuées et apparentes s'acquièrent par titre, ou par la possession *de trente ans.*" (c. 688, 689, 706, s. 2177, 2232, 2281.)

" 691. Les servitudes continuées non apparentes, et les servitudes discontinuées apparentes ou non apparentes, ne peuvent s'établir que par titres.

" La possession même immémoriale ne suffit pas pour les établir; sans cependant qu'on puisse attaquer aujourd'hui les servitudes de cette nature déjà acquises par la possession, dans les pays où elles peuvent s'acquérir de cette manière." (c. 688, 689.)

(*o*) Six, thirty, forty years in Austria.

Thirty, forty, forty-four, fifty years in Prussia.

Blume, Deutsches Privatrecht, s. 179.

Savigny, R. R. iv. s. 198.

(*p*) "Im öffentlichen Recht ist die unvordenkliche Zeit durchaus nicht zu entbehren, und es ist ganz gleichgültig wie wir Juristen darüber urtheilen, sie wird sich unfehlbar Bahn brechen, so oft eine Veranlassung dazu erscheint."—*Savigny, ib.*

(*q*) *Savigny, ib.*, citing *Aurea Bulla*, c. viii. s. 1: "A tempore cujus contrarii hodie non existit memoria." See too a *Reichsabschied* of 1548 and of 1576.

matters of Public Law, by a reference to the condition of England from the Revolution of 1688 to the death of the last of the male Stuarts, the Cardinal of York, in 1806. During a considerable portion of this interval it might have been, and it actually was, a question of grave conscientious doubt to many, whether the change of dynasty was the effect of temperate equity and wise policy, or of mere violence and injustice: and if, during this interval, a successful invasion had reseated the Stuarts upon the British throne, their right, as having continued unbroken, though suspended by violence, would have obtained a very general recognition. Who can point out, in this or in a similar instance, the exact year when the doubt was merged into certainty? and yet it is not difficult to describe the general character of such a transition. When the generation had passed away which had been alive during the former state of things; when the convictions, feelings, and interests of the succeeding generation had become identified with the new order of things; then might not improperly be said to begin the Prescription of Public Law. This is, in principle, very much the same as the Prescription of the Private Law; which, indeed, may be said to have been modelled upon the usage of Public Law, and which usage grew out of the reason of the thing.

CCLVI. Having discussed the position of prescription in the systems of Private and Public Law (*r*), we now approach the consideration of a matter, holden by the master mind of Grotius to be one of no mean difficulty, namely, International Prescription. Does there arise between nations, as between individuals, and as between the State and individuals, a *presumption* from long possession of a territory or of a right which must be considered as a legitimate source of International Acquisition?

In seeking an answer to this important question, it is

(*r*) *'Αλλὰ μὴν οὐδ' ἐκεῖνο ὑμᾶς λέληγεν, ὅτι τὰς κτήσεις καὶ τὰς ἰδίας, καὶ τὰς κοινὰς, ἣν ἐπιγένηται πολὺς χρόνος, κυρίας καὶ πατρῴας ἅπαντες εἶναι νομίζουσι.—Isocr., Orat. Archidam.*

necessary to keep clear of all subtle disquisitions with which this subject has been perplexed; whether, for instance, it be the creature of Natural or Civil Law, or whether it must always be founded upon a presumption of voluntary abandonment or dereliction by the former owner. Through these metaphysical labyrinths we cannot find a clue for questions of International Jurisprudence. The effect of the *lapse of time* upon the property and right of one nation relatively to another is the real subject for our consideration. And if this be borne steadily in mind it will be found, on the one hand, in the highest degree irrational to deny that Prescription is a legitimate means of International Acquisition; and it will, on the other hand, be found both inexpedient and impracticable to attempt to define the exact period (*s*) within which it can be said to have become established—or, in other words, to settle the precise limitation of time which gives validity to the title of national possessions.

And therefore to the question, what duration or lapse of time is required by the canons of International Jurisprudence in order to constitute a lawful possession? it is enough to reply—First, that the title of nations in the actual enjoyment and peaceable possession of their territory, *howsoever originally obtained*, cannot be at *any* time questioned and disputed: Secondly, that a forcible and unjust seizure of a country, which the inhabitants, overpowered for the moment by the superiority of physical force, ineffectually resist, is a possession which, lacking an originally just title, requires the aid of time to cure its original defect; and if the nation so subjugated succeed, before that cure has been effected, in shaking off the yoke, it is legally and morally entitled to resume its former position in the community of States.

(*s*) *Vattel*, l. ii. c. xii. s. 151, expresses a wish that such a period could be ascertained by the universal consent of nations: but the inexpediency is as great as the impossibility of such a scheme.

Grotius refers to the analogy of custom: "Tempus vero, quo illa consuetudo effectum juris accipit, non est definitum sed arbitrarium, quantum satis est ut concurrat ad significandum consensum."—l. ii. c. iv. 5, s. 2.

CCLVII. This is called, in technical language, the doctrine of *Postliminium*, which will be discussed hereafter (*t*). It must, however, be remarked here, that the rights of *Postliminium* can only attach to States which have been, previous to their subjugation, Independent Kingdoms. It was therefore with justice that the Allied Powers, in the adjustment of the relations between Belgium and Holland after the revolution of 1830, resisted certain Belgic claims founded upon an alleged *Postliminium*, on the ground that Belgium had never been an Independent State, had never been "*sui* "*juris*," and could therefore have no title to the application of this doctrine.

CCLVIII. It is true that some later writers on the Law of Nations have denied that the doctrine of Prescription has any place in the system of International Law (*u*). But their opinion is overwhelmed by authority, at variance with practice and usage, and inconsistent with the reason of the thing. Grotius, Heineccius, Wolff, Mably, Vattel, Rutherforth, Wheaton, and Burke (*x*), constitute a greatly prepon-

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(*t*) *Vide post*, ch. xvi.

(*u*) *Klüber*, s. 6, 125.

Martens, l. ii. c. iv. s. 71.

(*x*) *Grotius*, l. ii. c. iv. "De derelictione præsumpta et eam secuta occupatione: et quid ab usucapione et præscriptione differat;" and the commentary of *Heineccius* thereupon in his *Prælect. Acad.* in *Grot.*

Burke, *vide post*.

Vattel, l. ii. c. xi.

Wheaton, *Élém.* c. iv. s. 4, t. i. p. 159.

Bynkershoek may, I think, fairly be added to the list. Such it seems to me is the inference from the following, among other passages, in which he combats the possibility of the Dominion of the Sea being acquired by Prescription: "Sed Hugo Grotius (p. 386) et Vasquius Grotio repræsentatus cap. vii. *Maris liberi*, docuerunt, longa possessione non quæri marium dominia. Et quî potest modus acquirendi, qui duntaxat est a Jure Civili, diversos principes obligare? Utitur etiam ea ratione Grotius, sed benè est, quod parcius, quia id ipsum rursus concessit (*de Jure B. et P.* lib. ii. c. 4) et *ita nunc vulgo placet*, si adsint, quas ille persequitur, tacitæ concessiones, indicia, præsumtiones aliaque adminicula, per quæ ipsa magis, quam per longi temporis capionem extraneos excludi jus fasque esset. At vero, per me licet, excute quicquid est

derating array of authorities, both as to number and weight, upon the opposite side.

The practice of nations, it is not denied, proceeds upon the presumption of Prescription, whenever there is scope for the admission of that doctrine. The same reason of the thing which introduced this principle into the civil jurisprudence of every country, in order to quiet possession, give security to property, stop litigation (*y*), and prevent a state of continued bad feeling and hostility between individuals, is equally powerful to introduce it, for the same purposes, into the jurisprudence which regulates the intercourse of one society with another, more especially when it is remembered that war represents between States litigation between Individuals (*z*). It is very strange that the fact, that most nations possess in their own municipal codes a positive rule of law upon the subject, has been used as an argument that the general doctrine has no foundation in International Law.

It is admitted, indeed, that Immemorial Prescription constitutes a good title to national possession; but this is a perfectly nugatory admission, if, as it is sometimes explained, it means only that a State which has acquired originally by

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earum præsumptionum, et si quid conjecturis dandum, reperies gentium animos adversus præscriptionem maris omnimodo militare et nihil reliqui facere, quominus voluntatem suam enixè declarent; testantur id acta populorum publica, testatur quotidie suo quisque exemplo, dum, quod alius mare in dominium suum transcribit, alius eo vel invito ingrediatur et alterius possessionem, si quam prætendat, continua navigatione turbet."

And again he says: "Cæterum ne plura addam, Grotius et Vasquius in causa sunt, namque hi maris usucapionem submoverunt *eis rationibus quas meas facere non dubitem,* si demas, quæ ipsi aiunt de natura maris præscriptioni adversa, utpote re communi ex legibus Naturæ et Gentium, et quæ nec in bonis esse posset, nec possideri, nec quasi possideri, nec alienari, et cætera, de quibus non nihil dicam *cap. ult.*"—*De Dominio Maris Præscriptio,* c. vi.

(*y*) "Vetustas quæ semper pro lege habetur minuendorum scilicet litium causa."—*Dig.* xxxix. 3, 2, *De Acq. Pluv.*

(*z*) "Bono publico usucapio introducta est, ne scilicet quarundem rerum diu et ferè semper incerta dominia essent."—*Dig.* xli. t. 3, 1.

a bad title, may keep possession of its acquisition as against a State which has no better title. If it had been merely alleged that the exact number of years prescribed by the Roman Law, or by the municipal institute of any particular nation, as necessary to constitute ordinary prescriptions (*a*), is not binding in the affairs of nations, the position would be true. It is, perhaps, the difficulty attending the application to nations of this technical part of the doctrine, which has induced certain writers to deny it altogether; but incorrectly, for, whatever the necessary lapse of time may be, there unquestionably is a lapse of time after which one State is entitled to exclude every other from the property of which it is in actual possession. In other words, there is an International Prescription, whether it be called Immemorial Possession, or by any other name. The peace of the world, the highest and best interests of humanity, the fulfilment of the ends for which States exist, require that this doctrine be firmly incorporated in the Code of International Law. It

(*a*) *Puffendorf*, under the title "*De Usucapione*," in the 12th chapter of his 4th Book, discusses the application of the doctrine of Prescription to nations. His remarks are perspicuous and wise. "Inter hasce (he says in his 9th section) discrepantes sententias id quidem liquidum videtur: quemadmodum dominia rerum pacis causa sunt introducta; ita et illud ex eodem fonte promanare, quod possessores bonæ fidei aliquando sint in tuto collocandi, neve ipsis in perpetuum super sua possessione controversia queat moveri. Quantum autem sit illud spatium, intra quod possessio bonæ fidei in vim dominii evalescat, precisè neque naturali ratione, neque universali gentium consensu determinatum deprehenditur; sed arbitratu boni viri non citra aliquam latitudinem definiendum erit." He then refers with some humour to the vague tests of *prescriptive* poetry proposed in Horace, lib. 2, ep. 1, and proceeds:—"In designando autem hoc tempore ratio habebitur et antiqui domini, et recentis possessoris. Illius quidem, ut ne maturè nimis a persequenda et investiganda sua re excludatur." And he closes the section with saying:—"Adeoque cum dominia rerum introducerentur, id quoque pacis causa placuisse, ut qui aliquid *neque vi, neque clam, neque precario*, suo nomine possideret, tantisper dominus præsumeretur, quoad ab altero contrarium probaretur; qui autem per longissimum temporis spatium, per quod nemo mediocriter diligens rem suam negligere creditur, quid bona fide possederit, serum petitorem planè posset repellere, quia non citius rem suam vindicatum iverit."—*De Jure Naturæ et Gentium.*

is with great force of reason and language that Grotius, repelling the contrary proposition, observes: "Atque id si "admittimus, sequi videtur maximum incommodum, ut con-"troversiæ de regnis regnorumque finibus nullo unquam "tempore extinguantur: quod non tantum ad perturbandos "multorum animos et bella serenda pertinet, sed et *communi* "*gentium sensui* repugnat" (*b*).

CCLIX. It is impossible to speak with greater accuracy upon this very delicate subject; as the application of the general rule must of necessity be greatly modified by the special circumstances of each particular case. Vattel's remarks upon this subject are clear and sensible:—

"La Prescription ne pouvant être fondée que sur une pré-"somption absolue, ou sur une présomption légitime, elle "n'a point lieu si le propriétaire n'a pas véritablement négligé "son droit. Cette condition importe trois choses: 1° que "le propriétaire n'ait point à alléguer une ignorance invin-"cible, soit de sa part, soit de celle de ses auteurs; 2° qu'il "ne puisse justifier son silence par des raisons légitimes et "solides; 3° qu'on ait négligé son droit, ou gardé le silence "pendant un nombre considérable d'années; car une négli-"gence de peu d'années, incapable de produire la confusion "et de mettre dans l'incertitude les droits respectifs des par-"ties, ne suffit pas pour fonder ou autoriser une présomption "d'abandonnement. Il est impossible de déterminer en droit "naturel le nombre d'années requis pour fonder la Prescrip-"tion. Cela dépend de la nature de la chose dont la pro-"priété est disputée, et des circonstances" (*c*).

(*b*) L. ii. c. iv. s. 1.

See, too, Wolff.

And so Vattel: "Le droit de succession n'est pas toujours primitivement établi par la nation; il peut avoir été introduit par la concession d'un autre souverain, par l'usurpation même. Mais lorsqu'il est appuyé d'une longue possession, le peuple est censé y consentir, et ce consentement tacite le légitime, quoique sa source soit vicieuse. *Il pose alors sur le même fondement seul légitime et inébranlable, auquel il faut toujours revenir.*"—*Vattel*, t. i. l. i. c. v. s. 59.

(*c*) "De ce qui est requis pour fonder la Prescription ordinaire."

But that Prescription is the main pillar upon which the security of national property and peace depends, is as incontrovertible a proposition as that the property and peace of individuals rest upon the same doctrine (*d*).

To these remarks should be added the observation of a great modern jurist (*e*):—

"The general consent of mankind has established the "principle, that long and uninterrupted possession by one "nation excludes the claim of every other. Whether this "general consent be considered as an implied contract or as "positive law, all nations are equally bound by it, since all "are parties to it; since none can safely disregard it without "impugning its own title to its possessions; and since it is "founded upon mutual utility, and tends to promote the "general welfare of mankind."

In one of those treatises (*f*) which show how deeply the

Vattel, Le Droit des Gens, t. i. l. ii. c. xi. s. 142. And again: "Mais si la nation protégée ou soumise à certaines conditions ne résiste point aux entreprises de celle dont elle a recherché l'appui, si elle n'y fait aucune opposition, si elle garde un profond silence quand elle devrait et pourrait parler, sa patience, après un temps considérable, forme un consentement tacite qui légitime le droit de l'usurpateur. Il n'y aurait rien de stable parmi les hommes, et surtout entre les nations, si une longue possession, accompagnée du silence des intéressés, ne produisait un certain droit. Mais il faut bien observer que le silence, pour marquer un consentement tacite, doit être volontaire. Si la nation inférieure prouve que la violence et la crainte ont étouffé les témoignages de son opposition, on ne peut rien conclure de son silence, et il ne donne aucun droit à l'usurpateur."—*Vattel*, t. i. c. xvi. s. 199.

See list of authorities on the doctrine of International Prescription given by *Ompteda*, 512, s. 213, *Lit. des Völkerrechts.*

(*d*) *Vattel*, l. ii. c. xi. s. 142.

(*e*) *Wheaton*, vol. i. c. iv. s. 5, p. 207.

"Es liessen sich viele Beispiele, unter andern in Deutschland nachweisen, wo das Recht der Staatsgewalt nur auf langen Besitzstand gegründet ist, ohne erweislichen Rechtstitel."—*Heffters*, s. 69, 1.

(*f*) Vol. ix. p. 449. *Letter to R. Burke, Esq.*

See, too, vol. x. p. 97: *Reform of Representation in the House of Commons.* "Prescription is the most solid of all titles, not only to property, but, which is to secure that property, *to Government.*" And vol. v. p. 274: "With the National Assembly of France possession is nothing.

mind of the writer was imbued with the principles of general jurisprudence, Mr. Burke uses the following admirable expressions:—

"If it were permitted to argue with power, might one not "ask one of these gentlemen, whether it would not be more "natural, instead of wantonly mooting these questions con- "cerning their property, as if it were an exercise in law, to "found it on the solid rock of *prescription*?—the soundest, "the most general, the most recognized title between man "and man that is known in municipal or in public jurispru- "dence; a title in which not arbitrary institutions but the "eternal order of things gives judgment; a title which is not "the creature, but the master of positive law; *a title which,* "*though not fixed in its term, is rooted in its principles in the* "*Law of Nature itself,* and is indeed the original ground of "all known property; for all property in soil will always be "traced back to that source, and will rest there." . . . "These gentlemen, for they have lawyers amongst them, "know as well as I that in England we have had always a "prescription or limitation, *as all nations have against each* "*other.*" . . . All titles terminate in Prescription; in which "(differently from Time, in the fabulous instances) the son "devours the father, and the last Prescription eats up all "the former" (*g*).

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law and usage are nothing. I see the National Assembly openly reprobate the doctrine of Prescription, which one of the greatest of their own lawyers (Domat) tells us, with great truth, is part of the Law of Nature. He tells us that the positive ascertainment of its limits and its security from invasion were among the causes for which civil society itself was instituted."—*Reflections on the Revolution in France.*

(*g*) The *Abbé de Mably,* speaking of the Treaty of the Pyrenees, which followed the Treaty of Westphalia (1659), observes:—"Le Roi de France proteste contre toute prescription et laps de temps, au sujet du Royaume de Navarre, et se réserve la faculté d'en faire la poursuite par voie amiable, de même que tous les autres droits qu'ils prétend lui appartenir, et auxquels lui ou ses prédécesseurs n'ont pas renoncé." (*Traité de Vervin, rappelé par le Traité des Pyrénées,* art. 23. *Traité des Pyrénées,* art. 89.) "Tous les auteurs qui ont écrit sur le Droit des Gens conviennent que la prescription rend légitimes les droits les plus équivoques dans leur origine; et ce qui prouve la sagesse de ce principe, c'est

CCLX. In the foregoing observations, the foundation of International Prescription has not been necessarily laid upon the *abandonment* or *dereliction* of the State to whom the possession formerly belonged. It has been placed upon the length of time during which the possession has been held by the State which *prescribes* for it. It is important to establish clearly that *dereliction* does not, in the case of nations, necessarily precede prescriptive acquisition. Much of the uncertainty and confusion in the writings of International Jurists upon this subject may be ascribed to the want of firm discrimination and clear statement upon this point.

Dereliction or *voluntary abandonment* by the original possessor may be often incapable of proof between nations after the lapse of centuries of adverse possession; whereas the proofs of *prescriptive possession* are simple and few. They are, principally, publicity, continued occupation, absence of interruption (*usurpatio*), aided no doubt generally, both morally and legally speaking, by the employment of labour and capital upon the possession by the new possessor during the period of the silence, or the passiveness (*inertia*), or the absence of any attempt to exercise proprietary rights, by the former possessor. The period of time, as has been repeatedly said, cannot be fixed by International Law between nations as it may be by Private Law between individuals: it must depend upon variable and varying circumstances; but in all cases these proofs would be required.

Now it has been well observed by a recent writer (*h*), that in cases where the dereliction is capable of proof, the new

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qu'il est de l'intérêt de chaque nation en particulier de l'adopter. La difficulté consiste à savoir, comment la prescription s'acquiert; pour moi je croirois qu'elle ne peut être établie que par le silence de la partie lésée, quand elle traite avec le Prince qui possède son bien, ou que celui-ci le vend, le cède et l'aliène en quelque autre manière. Le silence dans ces occasions équivaut à un consentement."—*Droit public*, t. i. p. 31.

(*h*) *Monsieur Eugène Ortolan*. See his chapter on *Prescription acquisitive*, in his work *Du Domaine international* (Paris, 1851).

possessor may found his claim upon original Occupation alone, without calling in the aid of Prescription. The loss of the former, and the gain of the later possessor, are distinct and separate facts. Whereas, in cases of Prescriptive Acquisition, the facts are necessarily connected; the former possessor loses, because the new one gains.

CCLXI. There was a dispute of long standing between France and England respecting Santa Lucia, one of the Antilles Islands. After the Treaty of Aix-la-Chapelle (1748), the matter was referred to the decision of certain Commissioners, and it was the subject of various State Papers (*i*) in 1751 and 1754. The French negotiators maintained, that though the English had established themselves in 1639, they had been driven out or massacred by the Caribbees in 1640, and they had, *animo et facto* and *sine spe redeundi*, abandoned the island; that Santa Lucia being *vacant*, the French had seized it again in 1650, when it became immediately, and without the necessity of any prescriptive aid, their property. The English negotiators contended that their *dereliction* had been the result of violence, that they had not *abandoned* the island *sine spe redeundi*, and that it was not competent to France to profit by this act of violence, and surreptitiously obtain the territory of another State; and that by such a proceeding no *dominium* could accrue to them. The principal discussion turned, not upon the nature of the conditions of Prescriptive Acquisition, but upon the nature of the conditions of Voluntary Dereliction, by which the rights of property were lost, and the possession returned to the class of vacant and unowned (*ἀδέσποτα*) territories (*k*).

(*i*) *Eugène Ortolan, Du Domaine international*, p. 111.

(*k*) *Vide post*, Extinction of Acquisition.

CHAPTER XIV.

DERIVATIVE ACQUISITION.

CCLXII. We now enter upon the second kind of Acquisition, viz., that which in the system of Private Law is called *Derivative.*

Derivative Acquisition (*a*) is said to be that which takes place by the act of another, or by the act of the law (*acquisitio derivativa, vel facto hominis, vel facto legis*). In this system, not only Individuals, but Corporations or legal persons, are enabled to acquire and to alienate rights of property, through the medium of a representative, as minors and lunatics are in all systems of jurisprudence enabled to act through their guardian or tutor.

Who the representative of the corporation may be, depends upon the constitution of this legal person. But, as a general rule, the will of a corporation is expressed not only by the unanimous assent, but by the assent of the major part of its members. The rule that the will of the corporation may be collected from the agreement of a part of its members seems to be founded in Natural Law, as otherwise the body might be prevented from acting at all (*b*).

(*a*) *Eugène Ortolan*, p. 23.
Heffters, s. 71.

(*b*) "— quod à *majore* parte ordinis salubriter fuit constitutum."—*Cod.* x. t. 32, 46. *De Decur.*

"Quod *major pars curiæ* effecit, pro eo habetur, ac si omnes egerint." —*Dig.* l. 1, 19.

Savigny, *R. R.* s. 97.

But see *Burke*, vol. vi. p. 212: *Appeal from the New to the Old Whigs.*

The constructive whole, therefore, is holden, for certain purposes, to reside in a part only.

Turning from the system of Private to the system of International Law, we find that it is competent to one State possessed of property to alienate it, and to another to receive the alienated portion. So far the analogy is sound between the State and the Individual or the Corporation; the rights incident to a proprietor attach in both cases. But, in the case of the State, it may be a matter of theoretical and practical difficulty to ascertain where and in whom the power of acquiring and alienating is lodged? in whom what has been happily called "the contracting capacity" (*c*) of the nation is vested (*d*)? whether the general procuration of the State (*e*) be placed in the hands of one man, or of a few, or of a majority of representatives? The solution of this grave question belongs rather to the province of Public and Constitutional, than to that of International Law (*f*). It has, indeed, been discussed by writers on International Law, especially by Grotius (*g*) and Vattel (*h*): but both those writers dealt, on this as on other occasions, with subjects which belonged to the sphere of the Publicist rather than that of the International Jurist (*i*).

CCLXIII. Grotius divides all kingdoms into Patrimonial

(*c*) *Burke*, vol. ix. p. 384: *Tracts on Popery Laws*, c. 3, *in fine*.

(*d*) See below, the Act of Renunciation of the Grand Duchy of Tuscany by Leopold II., on his accession to the throne of Austria, in favour of his second son.—*Martens, Rec. de Traités*, vol. iv. p. 476. (A.D. 1790.)
Eugène Ortolan, pp. 14, 35.
Rutherforth, Institutes of Natural Law, c. viii.
Savigny, R. R. s. 140, b. iii. p. 310.

(*e*) *Burke*, vol. vi. p. 212: *Appeal from the New to the Old Whigs.*

(*f*) *Grotius*, l. ii. c. vi.
Wheaton's Elements, pp. 102–3.
Günther, pp. 11–77, Buch 2, Kap. ii.

(*g*) *Grotius*, l. ii. c. vi.: *De acquisitione derivativa facto hominis, ubi de alienatione imperii, et rerum imperii.*

(*h*) *Vattel*, l. i. c. xxi.: *De l'Aliénation des biens publics, et de celle d'une partie de l'État.*

(*i*) *De Jure Belli*, l. i. c. iii.—*Heinec. Prælec.*

and Usufructuary; and he reckons among the latter all kingdoms over which the people elected a Governor, and all that are acquired by treaty or marriage. Patrimonial kingdoms, he seems to think, may be alienated by their rulers without the sanction of the people; but Usufructuary, not without their consent. Whatever countenance this doctrine might have derived from the practice and principles of the time in which Grotius lived, it can hardly be predicated of any Christian, and certainly of no European State (*k*) at present existing in the world. Puffendorf, indeed, lays it down as law, that the general presumption is against the power of the sovereign to alienate, without the consent of his subjects, any portion of the public property or domain; and the doctrine is distinctly and indignantly repudiated by Vattel (*l*); nevertheless, a miserable attempt was made in 1814 to palliate the guilt

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(*k*) "Die Eigenschaft eines Patrimonial-Staates (das heisst, dass der Regent noch *Eigenthumsrecht* über den Staat verfügen könne) ist in Europa durch Staatsgrundgesetze nirgend festgesetzt."—*Klüber*, s. 31.

"He will discover that when Grotius examines the subjects in detail he excludes every case of *patrimonial* governments. The fair conclusion to be drawn from it is therefore this, that there is no such thing as a patrimonial government."—*Lord Grenville, Debate on Blockade of Norway*, May 10, 1814. *Hansard's Parl. Deb.*

(*l*) "J'ai osé cependant m'écarter quelquefois de mon guide, et m'opposer à ses sentiments; j'en donnerai ici quelques exemples. M. Wolf, entraîné peut-être par la foule des écrivains, consacre plusieurs propositions à traiter de la nature des royaumes *patrimoniaux*, sans rejeter ou corriger cette idée injurieuse à l'humanité. Je n'admets pas même la dénomination, que je trouve également choquante, impropre, et dangereuse dans ses effets, dans les impressions qu'elle peut donner aux souverains; et je me flatte qu'en cela j'obtiendrai le suffrage de tout homme qui aura de la raison et du sentiment de tout vrai citoyen."—*Vattel, Préface.*

And again, l. i. c. v.: "Nous ne voyons point en Europe de grand État qui soit réputé aliénable."

In another part of his work he limits the power of alienating national property as follows:—"Le corps de la nation ne peut donc abandonner une province, une ville, ni même un particulier qui en fait partie, à moins que la nécessité ne l'y contraigne, ou que les plus fortes raisons, prises du salut public, ne lui en fassent une loi."—L. i. c. ii.

Puffendorf, De Jure Nat. et Gent. l. viii. c. xii. ss. 1–3.

Vattel, l. i. c. xxi. s. 260: "Il ne peut aliéner les biens publics."

of the forcible annexation of Norway to Sweden by an appeal to the authority of Grotius.

CCLXIV. So far, indeed, as respects the conduct of third parties in transactions of this nature, International Law may claim to be heard. How far the right of Self-preservation (which includes the right of preventing the undue aggrandisement of any particular Power) justifies the INTERVENTION of third Powers, will be hereafter considered.

The rule which, according to the true principles of International Law, ought to be binding upon all nations who are, as it were, bystanders in such transactions, is, rigidly and punctiliously to abstain from interfering to compel by force either part of the nation, whether it be that which wishes to alienate or that which refuses to be alienated, to adopt the one course or the other. To do otherwise, is directly to violate the most sacred principle of the jurisprudence of which we are treating, to trample in the most offensive way upon the independence of a nation, by assuming the judicial office upon the nicest and most vital questions of her constitutional law, and the executive office, in carrying this unwarranted and illegal decision into effect.

CCLXV. When in 1814 Norway refused, as she did, by the actual and constructive voice of her people, to be annexed to Sweden, the question should have been left, according to the spirit and letter of the law, to the decision of arms between the two countries. It is painful and humiliating to an Englishman (*m*) to think that this abhorred union, for such it was at the time, was effected, partly, by the blockade of a British fleet. The plea that such a union formed part of the provisions of a general treaty of peace, which had for its

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(*m*) See the debates in both Houses of Parliament on the blockade of Norway, 1814, *Hansard's Parl. Deb.*, especially the speeches of *Lord Grenville* and *Sir James Mackintosh*, which contain an admirable exposition of the soundest principles of International Law. Lord Grenville condemns the act as subversive of public morality, as opposed to the authority of all writers upon International Law, as justifying in principle the aggressions of France for the preceding twenty years.

object the re-establishment and pacification of Europe, after years of bloodshed and misery, did not justify the grievous injustice, the intrinsic illegality of this act. The delivery of Genoa to Sardinia, after that republic had yielded to our arms on the faith of its national independence being preserved, was as wrongful an act, accompanied with the additional sin of violating a faith specifically pledged. To both these cases the expressions of *Martens*—no favourer of democracy—were fully applicable: "Il en est de même "*de l'impossibilité morale* à l'égard des traités dont l'accom-"plissement blesserait les droits d'un tiers" (*n*).

CCLXVI. Though such be the rule of law to which nations, being in the condition of third parties and bystanders, should scrupulously adhere, there can be no doubt that one nation may by its proper organ, whatever that may be, alienate, and that another nation may receive, property. It is, moreover, of the last importance to remember, that a nation which allows its ruler, either in his own person or through his minister, to enter into negotiations respecting the alienation of property with other nations, must be holden to have consented to the act of the ruler; unless, indeed, it can be clearly proved that the other contracting party was aware, at the time, that the ruler in so doing was transgressing the fundamental laws of his State (*o*).

(*n*) *Martens, Des Traités non obligatoires,* l. ii. c. ii. s. 53.

(*o*) "A l'occasion du même traité de *Madrid,* dont nous venons de parler, les notables du royaume de France, assemblés à *Cognac,* après le retour du roi, conclurent tous d'une voix, 'que son autorité ne s'étendait point jusqu'à démembrer la couronne.' Le traité fut déclaré nul, comme étant contraire à la loi fondamentale du royaume. Et véritablement il était fait sans pouvoirs suffisants; la loi refusait formellement au roi le pouvoir de démembrer le royaume; le concours de la nation y était nécessaire, et elle pouvait donner son consentement par l'organe des états-généraux. *Charles V* ne devait point relâcher son prisonnier avant que ces mêmes états-généraux eussent approuvé le traité; ou plutôt, usant de sa victoire avec plus de générosité, il devait imposer des conditions moins dures, qui eussent été au pouvoir de *François I*[er] et dont ce prince n'eût pu se dédire sans honte. Mais aujourd'hui que les états-généraux ne s'assemblent plus en France, le roi demeure le seul organe

CCLXVII. This is the universally acknowledged distinction between cases of internal transactions between the State and its Subjects, and of international transactions between the State and other Nations. The reasons which support this leading position of International Law are perspicuously stated by Vattel:—

"Il est nécessaire que les nations puissent traiter et transiger validement entre elles, sans quoi elles n'auraient aucun moyen de terminer leurs affaires, de se mettre dans un état tranquille et assuré. D'où il suit que quand une nation a cédé quelque partie de ses biens à une autre, la cession doit être tenue pour valide et irrévocable, comme elle l'est en effet, en vertu de la notion de *propriété*. Ce principe ne peut être ébranlé par aucune loi fondamentale, au moyen de laquelle une nation prétendrait s'ôter à elle-même le pouvoir d'aliéner ce qui lui appartient. Car ce serait vouloir s'interdire tout contrat avec d'autres peuples, ou prétendre les tromper. Avec une pareille loi, une nation ne devrait jamais traiter de ses biens: si la nécessité l'y oblige, ou si son propre avantage l'y détermine, dès qu'elle entre en traité, elle renonce à sa loi fondamentale. On ne conteste guère à la nation entière le pouvoir d'aliéner ce qui lui appartient; mais on demande si son conducteur, si le souverain a ce pouvoir. La question peut être décidée par les lois fondamentales. Les lois ne disent-elles rien directement là-dessus? Voici notre second principe. 2° Si la nation a déféré la pleine souveraineté à son conducteur, si elle lui a commis le soin, et donné sans réserve le droit

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de l'État envers les autres puissances; elles sont en droit de prendre sa volonté pour celle de la France entière, et les cessions que le roi pourrait leur faire demeureraient valides, en vertu du consentement tacite par lequel la nation a remis tout pouvoir entre les mains de son roi, pour traiter avec elles. S'il en était autrement, on ne pourrait contracter sûrement avec la couronne de France. Souvent, pour plus de précaution, les puissances ont demandé que leurs traités fussent enregistrés au parlement de Paris; mais aujourd'hui cette formalité même ne paraît plus en usage."—*Vattel*, l. i. c. xxi. s. 265.

"de traiter et de contracter avec les autres États, elle est "censée l'avoir revêtu de tous les pouvoirs nécessaires pour "contracter validement. Le prince est alors l'organe de la "nation; ce qu'il fait est réputé fait par elle-même; et bien "qu'il ne soit pas le propriétaire des biens publics, il les "aliène validement comme étant dûment autorisé" (*p*).

CCLXVIII. Upon the same principle, when foreign Governments or their subjects have obtained from the *de facto* Government of a country, by treaty or otherwise, a part of the national domain of confiscated property, if the sovereign *de jure* be restored, he cannot annul this contract or cession. Whatever power he may possess to annul alienation made to his own subjects, the acts of the *de facto* Government, though it was that of a usurper, are binding upon him as to all international transactions (*q*).

There can be no doubt, then, that a State may make acquisitions by the acceptance of property transferred to it from another State. This transference may be effected in as great a variety of ways in the case of the State, as in the case of the individual.

According to the principles of Private Law, the delivery (*traditio*) of possession (*r*) effected a change of ownership (*dominii*), the deliverer transfers the rights which he had enjoyed to the receiver (*s*).

(*p*) *Vattel*, l. i. c. xxi. s. 262.

(*q*) *Grotius*, l. ii. c. xvi. s. 16.

Wheaton, Elements, vol. i. p. 102.

Mably, Droit pub. t. ii. p. 271.

(*r*) "Hæ quoque res, quæ traditione nostræ fiunt, jure gentium nobis acquiruntur; nihil enim est tam conveniens naturali æquitati, quam voluntatem domini volentis rem suam in alium transferre ratam haberi." —*Dig.* xli. t. i. 9, 3.

"Traditionibus et usucapionibus dominia rerum, non nudis pactis transferuntur."—*Cod.* ii. 3, 20 (*de Pactis*).

(*s*) "Quoties autem dominium transfertur, ad eum qui accipit, tale transfertur, quale fuit apud eum qui tradit."—*Dig.* xli. t. i. 20, 1.

The validity of the transaction depends upon considerations relating to—

1. The person delivering or transferring the property.
2. The cause of the transference.
3. The form and manner in which it is transferred.

1. The person (*t*) must have the will and the power to alienate the thing; and the alienee the will and power to receive it.

2. The cause (*u*) must be lawful and just, that is to say, it must be such as warrants the transference, and must not relate to a class of things which may not be alienated.

3. The form and manner (*x*) need not be such as to convey the thing by corporal seisin; overt acts indicating the intention of the alienator, or symbolical delivery, may suffice.

The Treaty of Partition in 1700, which parcelled out among various European nations the dominions of the Spanish crown upon the demise of the wearer of it, without the consent either of him or of the nation, provided by its ninth article, that the kingdom of Spain should never be held in joint possession with that of France or Germany, however it might have accrued to either of these countries—" soit par *succes-*" *sion, testament, contrat de mariage, donation, échange, cession,*" *appel, révolte,* ou quelque autre voie que ce soit." And in

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(*t*) "Traditio nihil ampliùs transferre debet vel potest ad eum qui accipit, quam est apud eum qui tradit. Si igitur quis dominium in fundo habuit, id tradendo transfert; si non habuit, ad eum qui accipit nihil transfert."—*Dig.* xli. t. i. 20, 1.

"Nihil autem interest utrum ipse dominus tradat alicui rem, an voluntate ejus alius cui ejus rei possessio permissa sit."—*Inst.* ii. t. i. 42.

(*u*) "Nunquam nuda traditio transfert dominium, sed ita, si venditio, aut *aliqua justa causa,* præcesserit propter quam traditio sequeretur."—*Dig.* xli. t. i. 31.

(*x*) *Dig.* xlvi. t. iii. 79, *De Solut.*; xli. t. ii. 18, 2; xxiii. t. iii. 43, 1, *de j. dot.*

"Interdum etiam sine traditione nuda voluntas domini sufficit ad rem transferendam; veluti si rem, quam commodavi aut locavi tibi aut apud te deposui, vendidero tibi; licet enim ex ea causa tibi eam non tradiderim, eo tamen quod patior eam ex causa emtionis apud te esse tuam efficio."—xli. t. i. 9, 5.

that part of the great Treaty of Utrecht, which in 1713 was concluded between France and the States General, it was provided: "On est aussi convenu qu'aucune Province, Ville, " Fort, ou Place desdits Païs-Bas Espagnols, ni de ceux qui " sont cédez par Sa Majesté Très-Chrétienne, soient jamais " cédez, transportez, ni donnez, ni puissent échoir à la Cou-" ronne de France, ni à aucun Prince ou Princesse de la Mai-" son ou Ligne de France, soit en vertu de quelque *Don*, " *Vente, Échange, Convention matrimoniale, Succession par* " *testament, ou ab intestat,* ou sous quelqu'autre Titre que ce " puisse être, ni être mis de quelque manière que ce soit au " pouvoir, ni sous l'autorité du Roi Très-Chrétien, ni de " quelque Prince ou Princesse de la Maison ou Ligne de " France"(*y*).

These provisions contain an enumeration of every conceivable mode of acquisition, except that of original occupation, discussed in the foregoing chapters. Many historical examples may be cited of these International titles to property.

CCLXIX. The *exchange* of territories, and especially of portions of territories, is familiar to all who are acquainted with European History, and with the provisions of the principal treaties. Thus, in the Treaty of Nimeguen, it is provided by Article XIV., " pour prévenir toutes les difficultés que les enclaves ont causées dans l'exécution du " traité d'Aix-la-Chapelle, et rétablir pour toujours la bonne " intelligence entre les deux couronnes, il a été accordé que " les terres enclavées seront échangées contre d'autres qui " se trouveront plus proches et à la bienséance de S. M. " Catholique," &c. The islands of Sardinia and Sicily (*z*), the

(*y*) *Günther*, vol. ii. p. 91.

Art. xiv. *Schmauss*, p. 1393.

(*z*) "Reference had been made indeed to other territories, the Germanic body, the States of Italy, Sicily, &c., where cessions were frequent; but they were only nominally independent; they were attached to larger kingdoms; they were the infirm and palsied limbs of Europe, and became invariably the first points of attack in every war."—*Hansard's Debates in Parliament on the Blockade of Norway*, 1814, Speech of *Sir James Mackintosh*.

Duchies of Tuscany, Parma, and Placentia, were continually exchanged with each other in the multiplicity of entangled negotiations which intervened between the Peace of Utrecht, in 1713, and the Treaty of Aix-la-Chapelle, in 1748. By the 6th Article (*a*) of the Quadruple Alliance in 1720, Philip V. of Spain renounced the reversionary title on Sicily, conferred on him by the Treaty of Utrecht, and received in exchange a reversionary title to Sardinia; and by the first article, the Duke of Savoy made a reciprocal renunciation of his rights to Sicily. By the same Treaty, it was agreed that the reversion of Tuscany, Parma, and Placentia, about to be vacant by the extinction of the male descendants of the Houses of Medici and Farnese, should be declared male fiefs of the Empire, and the investiture be conferred by the Emperor on the eldest son of the second wife (Elizabeth Farnese) of Philip V. (*b*).

By the Treaty of Vienna, in 1738, Tuscany was given in reversionary exchange for the Duchy of Lorraine, to the Duke of that province; Naples and Sicily to Don Carlos, the son of Philip V.; while Parma and Placentia were ceded to the Emperor.

In 1790, Leopold II., succeeding to the Austrian Empire, renounced by a formal act—in which his eldest son Francis (afterwards Emperor) joined—his sovereignty over Tuscany, in favour of his second son, Ferdinand III., who confirmed the act, and accepted in due form the sovereignty. These "actes," the address of the Regius Advocatus, and the reply of the Senate to the Grand Duke through their organ the principal Senator, are all contained in what is called in the Diplomatic Code the "Acte de cession du Grand-Duché "de Toscane à la branche puisnée de la maison de l'Au- "triche" (*c*).

(*a*) *Koch, Hist. des Tr.* t. i. c. xiii. p. 236.

(*b*) *Koch,* t. i. c. xv. p. 256.

(*c*) *Martens, Rec. de Traités,* tom. iv. (1785–90), p. 476: "Acte de renonciation de S. M. I. et R. Léopold II, par rapport au Grand-Duché de Toscane, en faveur de S. A. R. l'Archiduc Ferdinand, son second fils,

By the last Treaty of Vienna (1814-15 (*d*)), these Italian provinces were again parcelled out among various Powers; and the Stati dei Presidi (a district belonging anciently to Sienna), the Island of Elba, the Principality of Piombino (over which the Crown of Naples had exercised feudal rights (*e*)), were thrown into the portion of Tuscany, and given to the Archduke Ferdinand of Austria.

CCLXX. *Cessions* (*f*) of territory are generally consequent on war, and the subjects of provisions in the Treaties which conclude it; but instances are to be found of their taking place in the time of peace. In 1777, Portugal ceded to Spain the islands of *Annobon* and *Fernando del Po*, in order to facilitate the slave trade of Spain with the coast of Africa. In 1784, France ceded to Sweden the islands of St. Bartholomew in the West Indies, in return for the free use of the harbour of Gottenburg, and certain other commercial advantages. The most recent instance of cession is afforded by the Convention in 1850 between Great Britain and Denmark, whereby Denmark ceded to Great Britain, in consideration of the sum of ten thousand pounds, all the possessions of the Danish Crown on the Gold Coast, or Coast of Guinea, in Africa (*g*).

CCLXXI. *Gifts* of territory were not uncommon in earlier times; for, not to mention the handsome presents, already adverted to, of different parts of the globe made by the Pope to Spain and Portugal, John XVIII., in 1004,

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et des descendans mâles de celui-ci, ensemble avec l'acte d'investiture du Grand-Duché et la cession pleinière de ce pays, tant de la part de S. M. I. et S. A. Léopold II, que de S. A. R. l'Archiduc François (aujourd'hui Empereur), à la Secondo-geniture, en date de Vienne le 21 juill. 1790, ainsi que l'acceptation de S. A. R. le Grand-Duc Ferdinand III de la confirmation des loix, statuts, etc. du Grand-Duché en date du 22 févr 1791, et de l'hommage prêté au Grand-Duc le 16 mars 1791."

(*d*) *Koch*, vol. iii. c. xli. p. 493.

(*e*) I.e. *la suzeraineté*, relating to *le droit féodal*, distinguished from *la suzeraineté* which relates to *droit politique*.

(*f*) *Günther*, vol. ii. p. 94 (*Abtretung*).

(*g*) *Annual Register*, vol. xcii. p. 391, art. i.

offered the island of Sardinia to whomsoever would take it from the Saracens; and Boniface VIII. (*h*), in 1297, bestowed the same island, together with Corsica, upon James II. of Arragon. In 1485, Queen Charlotte of Cyprus (*i*) gave that island to Duke Charles I. of Savoy; and, in 1530, the Emperor Charles V. (*k*) gave Malta to the Knights of St. John. We may pass over the earlier alleged donations of Pepin and Charlemagne to the Roman See, and the acquisitions of the French Crown by gift, such as the province of Dauphiné in 1349.

CCLXXII. The history of Louisiana furnishes a more recent and very remarkable instance of the practical application of some of the foregoing modes of acquisition by independent nations.

By a secret *convention* (*l*) (never, it is said, yet printed) between the Courts of Versailles and Madrid, on the 2nd of November, 1762, New Orleans, together with that part of Louisiana which lies on the western side of the Mississippi, was ceded to Spain. The object of this cession was to indemnify Spain for the loss of Florida, which, by the preliminaries of the memorable Treaty of Paris (*m*), she had given up to Great Britain; and, in spite of the remonstrances of the French inhabitants of Louisiana, Spain took complete possession of this province in 1769.

By a secret Treaty concluded between the French Republic and Spain, at Saint Ildefonse, on the 1st of October, 1800, Spain engaged to retrocede to France—six months after the fulfilment of certain conditions relative to the Duchy of Parma, in favour of the daughter of the King of Spain—the province of Louisiana as at that time possessed by Spain.

(*h*) *Günther*, vol. i. p. 95; *Schmauss*, vol. i. p. 14.
(*i*) *Schmauss*, vol. i. p. 124.
(*k*) *Günther*, vol. i. p. 96.
(*l*) *Koch, Hist. des Traités*, c. xvii.; *Traités de Paris et de Hubertsbourg*, vol. i. p. 362.
(*m*) The secret convention was signed on the same day as the preliminaries of the Treaty. The Treaty itself was not signed till 1763.

As soon as this Treaty was made known, Great Britain and the United States took alarm, and determined to oppose to the utmost its completion. Buonaparte, then First Consul, urged by the difficulty of his position, and partly perhaps also by his need of pecuniary resources, resolved upon the expedient of selling his new, or rather inchoate, acquisition to the United States. To this bargain, however, he gave the name of *Cession*, and it was effected by the Treaty of Paris, of 1803, between France and the United States of North America. The words of the Convention were remarkable :—

" Attendu, y est-il dit, que par l'article 3 du Traité conclu " à Saint-Ildéfonse, le 9 vendémiaire, an IX, entre le Pre- " mier Consul de la République Française et S. M. C., il a " été convenu ce qui suit : [ici est inséré l'article ;] et comme, " par suite dudit traité, et spécialement dudit art. 3, la " République Française a un titre incontestable au domaine " et à la possession dudit territoire, le Premier Consul de la " République, désirant de donner un témoignage remarquable " de son amitié aux dits États-Unis, leur fait, au nom de " la République Française, cession, à toujours et en pleine " souveraineté, dudit territoire, avec tous ses droits et appar- " tenances, ainsi et de la manière qu'ils ont été acquis par la " République Française, en vertu du traité susdit, conclu " avec S. M. C." (*n*)

The peculiarity of this form arose from the fact that the Treaty of October 1800 had never been formally executed by either of the contracting parties. The ninth article of this Treaty provided that two particular conventions, to be signed the same day, should be considered as inserted in the Treaty itself. The first contained the stipulation that sixty millions of francs should be paid to France ; the second, that all claims upon France by the United States for illegal captures or other matters should be considered as discharged.

It belongs to the province of the historian to record the ineffectual regret of deceived and injured Spain, and the

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(*n*) *Koch*, vol. ii. p. 322.

sagacity of the United States in profiting by the troubles of Europe, both at this period and subsequently by the acquisition of Western Florida. But it should be observed here that the instance illustrates national acquisition by *gift*, *sale*, and *exchange*, and that the title of the United States to this acquisition has never been questioned.

The fate of Venice has been remarkable. Bestowed like a chattel upon Austria by the First Napoleon, she obtains her liberty from his nephew in a manner which could scarcely have been foretold.

In the war of 1866 between Prussia and Austria, in which Italy was the ally of the former Power, Austria ceded to France Venetia, which France accepted, and, by the Treaty of Vienna, August 24, 1866, conferred upon Italy, an arrangement recognized by a Treaty of the 23rd of October in the same year between Austria and Italy (*o*).

CCLXXIII. The *Election* of an individual to the sovereignty of a State, though not strictly speaking a mode of acquiring territory, may indirectly be the cause of it, when the elected person is already ruler over an independent kingdom, to which the new State becomes united. Thus the Poles, by the election of the Duke Jagello in 1386, united Litthauens to their own kingdom. And this result may ensue not only in the case of an elective sovereignty, but also in the instances, not infrequent in history, of the failure of the first line of sovereigns, and the consequent necessity of choosing a collateral branch (*p*).

Towards the close of the fourteenth century (*q*) (1375) the race of King *Svend Estrithson* became extinct in the person of Waldemar IV. His grandchild Olaf, the son of his youngest daughter Margaret, wife of the King of Norway and the asserted heir of Sweden, was chosen successor to the throne, because he would eventually unite Norway with Denmark (*r*).

(*o*) *Ann. Reg.* 1866, p. 260.

(*p*) *Günther*, vol. ii. p. 97.

(*q*) *Dahlman's Geschichte von Dänemark*, Band 2, pp. 46–75.

(*r*) The senators were at first divided, some wishing for the acquisition to be acquired by the Union; others objecting that Denmark, an elective

Olaf died in 1387, and his ambitious and energetic mother having survived her mother and child, and seized upon the sceptre of Sweden in 1387, united the then Scandinavian kingdoms under one monarchy by the famous Union of Calmar in 1397.

The Election of the House of Brunswick to the throne of Great Britain brought with it the union of Hanover, though happily for a limited time only, to these kingdoms.

CCLXXIV. *Marriage* (*contrat de mariage*) of the hereditary governor of a country has been frequently a mode of acquisition of new territory to that country, sometimes by the incorporation of a province, sometimes by the union of two distinct and independent kingdoms.

The wife of Charles II. of England brought with her Tangiers and Bombay as a dowry, and the latter has proved no unimportant addition to the empire of Great Britain. Philip III. of France acquired to the French throne the countries of Carcasonne and Bezier, the dowry of his wife, Isabella of Arragon. Alphonso III. of Portugal acquired the province of Algarves to the throne of that country, as the dowry of his wife, the natural daughter of Alphonso X. of Castille (*s*).

Philip IV. of France acquired the independent kingdom of Navarre by his marriage with Joanna, Queen of that territory; and though, after a time, Navarre again returned to the government of its own monarchs, it was finally acquired to the throne of Spain by the marriage of Blanche of Navarre to John II. of Arragon in 1425. France acquired, through the successive marriages of Charles VIII. and Louis XIII. with Ann of Brittany, that great and formerly independent Duchy.

The House of Hapsburg owes its power and station, partly to the imperial dignity which it obtained toward the

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monarchy (*ein freies Wahlreich*), would thereby be subjected to Norway, an hereditary kingdom (*Erbreich*), *ib.* 52.

(*s*) *Günther*, vol. ii. p. 98 (*Abtretung*).

end of the thirteenth century, but still more to the marriages which the Emperors of Austria have contracted with heiresses.

Mary of Burgundy, the daughter and sole heiress of the last Duke of that name, brought with her the magnificent dowry of the Low Countries, including Franche-Comté, Flanders, and Artois, to the Emperor Maximilian (*t*). The son of this marriage, Philip the Handsome, married the sole heiress of the crowns of Arragon and Castille, so that it has not been untruly sung by a poet of modern date,—

> Bella gerant alii, tu, felix Austria, *nube*;
> Nam quæ Mars aliis, dat tibi regna Venus.

Sometimes national rights and claims have been conferred by marriage. At the Peace of Noyon, in 1516, Francis I. of France promised to give with his daughter on her marriage with the then King Charles of Castille, all his rights and title to the kingdom of Naples; and in the abortive matrimonial negotiations between the two thrones, it was stipulated that certain lands should be given in compensation for the non-fulfilment of a contracted marriage by the party causing it (*u*).

The marriage of sovereigns may or may not occasion a permanent incorporation of territories, according to the laws of the respective kingdoms; by which will also be governed the rank of each sovereign and their respective powers and authorities. The instances of Philip and Mary in England, Francis II. and Mary in Scotland, William and Mary in the British dominions, will readily occur as illustrations of this remark (*x*).

CCLXXV. *Successio ab intestato* (Succession) is also among the means of national acquisition. It is true that the rules of Civil Law framed for individuals are not, strictly speaking, applicable to nations (*y*). The death of a nation

(*t*) *Koch, Tabl. des Rev.* t. i. p. 316.
(*u*) *Günther,* vol. ii. p. 99.
(*x*) *Günther, ib.* pp. 100–103, and valuable notes.
(*y*) *Grotius,* l. ii. c. ix.

would be the dissolution of its social and political elements; and there would be no next of kin to succeed to the property, which it had occupied, while its corporate character remained. But as States, represented by monarchs, have been allowed to acquire property through the marriage of their sovereign, so have they been allowed to acquire property through his personal relation, as next of kin, to the sovereign of another territory in which the government is hereditary, upon the decease of that sovereign without any nearer relative. The question has been much discussed by writers on the Law of Nations and upon the general principles of Jurisprudence—whether the succession of the next of kin to an intestate person be a law of Nature, or merely an institute of Civil Law (*z*).

It is certain, however, that the death of the ruler of the State, without making any testamentary provision for his succession, even in countries where the power to do so is legitimately vested in him, can give no right to any foreign nation to take possession of the territory; for in that event, the power of disposition devolves upon the body corporate of the State. James I. of England succeeded to the throne of this country, partly by the nomination of the dying Elizabeth, and partly by right of his descent. The whole question of succession—whether through *Agnates*, relations on the male side, or *Cognates*, relations on the female side—is pro-

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(*z*) *Grotius*, l. ii. c. vii. s. iii. p. 277. Grotius is among the supporters of the former opinion, founded on the presumption that the deceased person could not have intended his property to have been lost, but must have wished it to be given to those who were dearest—that is, according to all presumption, those who were nearest—to him. His commentator, Cocceius, thinks that the rule of succession in Europe arises from the necessity of the case; viz., that all land being occupied by somebody, the relations of the deceased would be without support if they did not succeed to his prospects. Sam. Cocceii Introd. ad Henr. Cocceii Grot. illustr. diff. proem. x. ss. 12 et 13: "Cum rebus terræ in universum occupatis nihil amplius supersit quod occupari possit, vel non quantum sufficit; homines occupatis rebus nati succedunt in occupationem parentum."—Günther adopts this reasoning, vol. ii. p. 103.

Puffendorf, l. iv. c. xi. *De Success. ab Intestato.*

perly and exclusively a matter to be settled by the constitutional law of the country itself. How far, at least, any exception may exist to this rule in the right of INTERVENTION which the legitimate apprehension of danger may confer on other nations, will be discussed in the subsequent pages of this work. Nor can it be denied that some of the bloodiest European wars have arisen out of disputed succession to the government of kingdoms. No educated person is ignorant of the wars of England under the Edwards and Henries, for the crown of France,—or of those horrible thirty years of warfare, which originated in the claim of the Elector Palatine of Bohemia, and which desolated Germany till the Treaty of Westphalia,—or of the general distraction and prolonged disturbance of the peace of Europe which arose out of the disputed succession to the House of Spain, and was closed by the Treaty of Utrecht.

The claim of the sovereign of another nation is rarely without the pretext of support from a party in the country which is the object of his ambition. When Philip II. of Spain seized on Portugal, claiming through a young daughter of King Henry, with whom the male line became extinct in 1580, to the exclusion of the House of Braganza, allied to an elder daughter, he was supported by the alleged free choice of the magnates of Portugal. The unfortunate Elector Palatine was supported in his pretensions to the kingdom of Bohemia by the choice and approbation of the States of the realm.

A large party, both in Great Britain and Ireland, were favourable to the claims of the Pretender during the reign of the first two Georges. A similar remark is applicable to the Pretender to the thrones of France, Spain, and Portugal in our own times.

CCLXXVI. *Testamentary disposition* has unquestionably been a mode of territorial acquisition by nations, in the persons of their governors. But it can only be so when the kingdom is proprietary — a state of things which it has been already observed cannot be said now to exist

in Europe; not even, it is presumed, in Russia; though it might happen that the nation adopted and ratified the will of the deceased sovereign. The famous will of Charles II. of Spain, made (2nd October, 1700) under the superintendence of the Cardinal Portocarrero his minister, and after receiving the advice of the Pope and of the most learned theologians—that will by which he bequeathed dominions upon which the sun never set, to the second son of the Dauphin of France—is a remarkable instance of the exercise of this power, but one which is not likely to be imitated.

In truth, the only sound rule upon the whole subject of these modes of acquisition, either *testamento* or *ab intestato*, which can find its place in a work of International Jurisprudence, is this, that the voice of the people of the country, concerning whose government the dispute arises, should, through the legitimate channels of its own constitution, decide the question for itself in such a manner as not to threaten the security of other nations.

Conquest, fortified by subsequent treaty, gives a valid International title to territory; but this subject belongs to a later part of this work.

The case of the acquisition of a portion of the dominion of Saxony by Prussia (*a*), in 1814, is so anomalous, that it is impossible to class it under any known or legitimate category of International Acquisition. If it belong to any, it is to that of Conquest and Treaty just mentioned; but, in truth, it belongs to the class of transactions of which we must say,

Non ragioniam di lor, ma guarda e passa (*b*),

with, however, a strong protest that no axiom of International Law is to be deduced from an act, which seems, upon all the principles of that jurisprudence, indefensible.

(*a*) See Talleyrand's admirable *Mémoire raisonné* on this subject, *Trait. de Dipl.*, *De Garden*, t. iii. p. 146.

(*b*) *Dante*, *Inferno*, iii. 51.

CHAPTER XV.

ACQUISITION OF RIGHTS.

CCLXXVII. The property of a State may not only be alienated, but may also be subjected to *obligations* and *services* in favour of another State; as the property of an individual may be burdened and encumbered in favour of another individual (*a*). This may, of course, happen in various ways; but it most frequently occurs when a State, having contracted pecuniary obligations towards another State, has mortgaged its revenues, or pledged a portion of its territory, as a security for the payment of its debts. Thus, among other instances, the United Provinces of the Netherlands hypothecated Vlissingen, Rameken, and Briel to England, in 1585. Denmark, in 1654, hypothecated the province of Holland to Sweden, as a security for the peace then concluded (*b*). Weimar appears to have been pawned, so to speak, to Mecklenburg in 1803 (*c*), and Corsica by Genoa to France in 1768.

We are not speaking now, it will be observed, of debts contracted by States to Individuals (a question to be dealt with hereafter), but to other States.

CCLXXVIII. It sometimes happens that the debt between the Government of one country and the Government

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(*a*) *Günther*, vol. ii. pp. 153–161.
Vattel, l. ii. c. ii. s. 80.
Heffters, p. 133, s. 71.
Klüber, vol. i. s. 140.
(*b*) *Günther*, vol. ii. p. 153.
Dumont, *C. dipl.* t. v. s. i. p. 454.
(*c*) *Martens*, *Rec.* vol. viii. s. 54. *Ib.* p. 229.
See, too, *Schmauss*, *C. J. G.*, vol. ii. pp. 1140, 1150.

of another is made the subject of a treaty. Sometimes the Government of a third Power guarantees the payment of the debt (*d*). In 1776 Russia guaranteed a loan of 500,000 ducats contracted by the Polish Government.

By the 97th article of the Treaty of Vienna (1815), the maintenance of the credit and solvency of the establishment called the *Mont-Napoléon*, at Milan, was especially provided for.

CCLXXIX. States are sometimes placed in such physical relations to each other, that some limitations of the abstract rights of each *necessarily* flow from their natural relations, or from the reason of the thing. Thus a State is bound to receive the waters which *naturally* flow within its boundaries from a conterminous State. This obligation belongs to the class of "*servitutes* juris gentium *naturales*," and here the provisions of the Digest (*e*) and Institutes may be said to be identical with those of International Law (*f*).

CCLXXX. A State may *voluntarily* subject herself to obligations in favour of another State, both with respect to persons and things, which would not *naturally* be binding upon her. These are "*servitutes* juris gentium *voluntariæ*" (*g*).

In the language of Jurisprudence, when a thing is subject to the exercise of a right by a person who is not the master

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(*d*) *Vattel*, l. ii. c. xvi. ss. 235–261. *Vide post*, chapter on TREATIES.
Klüber, ss. 155–157, n. d.
Günther, vol. ii. pp. 243–254.

(*e*) "Semper hæc est servitus inferiorum prædiorum ut *natura* profluentem aquam excipiant."—*Dig.* xxxix. t. iii. l. s. 22.

(*f*) *Heffters*, s. 43: "Worauf sich unbedenklich auch die Vorschriften des römischen *Weltrechtes* anwenden lassen."

(*g*) *J. N. Hertius*, in diss. de servitute naturaliter constituta *cum inter diversos populos*, tum inter ejusdem reipublicæ cives (*Prolegom.* s. 3, in ejusd. Comment. et Opercul. v. ii. t. iii. p. 66), defines *servitus* as "jus in re aliena, alteri à natura constitutum, cujus vi et potestate dominus istius rei ad alterius utilitatem, aliquid pati aut non facere in suo tenetur."—*De necessitate et usu Juris Gentium, etc.* *Wieland et Foerster*, Lipsiæ, s. xvi. p. 37.

or proprietor, it is said *to serve* (*res servit*) or yield *service* to that other person (*h*).

CCLXXXI. The doctrine of *Servitus* occupies an important place in the Roman Law; and in some shape, and under some appellation or other, exists of necessity in the jurisprudence of all nations (*i*). This obligation to service constitutes a right in the obligee or the person to whom it is due, and it ranks among the "*jura in re*," while it operates as a diminution and limitation of the right of the proprietor to the exclusive and full enjoyment (*libertas rei*) of his property (*k*).

According to the Roman Law, the *Servitus* consisted either—1, in not doing something (*in non faciendo*), and was negative (*servitus negativa*); or, 2, in suffering something to be done (*in patiendo*), and was affirmative (*servitus affirmativa*): but it could not consist in the obligation *to do* something (*in faciendo*). Not that the owner of a thing might not be obliged to do something in relation to that thing, for the benefit of another person; but that this obligation assumed a technically different character, and was not a "*jus* " *in re*" (*l*).

(*h*) *Dig.* viii. *passim.*
Instit. ii. 3.
Cod. iii. t. 34.
Domat. l. i. t. 12, s. 1.
Savigny, Recht des Besitzes, fünfter Abschnitt, p. 575.
Mackeldey, Lehrbuch des R. R. s. 274 u. s. w.
Schilling, Pandekten-Recht, s. 446 u. s. w.
Puchta, Instit. s. 252.

(*i*) "Aussi les servitudes ont-elles été reconnues partout où les hommes se sont fixés d'une manière permanente en formant des associations durables."—*Ahrens, Philosophie du Droit,* p. 324.

"When a thing or property was free from all *servitus,* it was called *res optima maxima.*"—*Dig.* l. t. 16, s. 90, 169.

Cicero, De Lege Agrar. iii. 2.

(*k*) "Cum quis jus suum deminuit, alterius auxit, hoc est ei servitutem ædibus suis imposuit."—*Dig.* xxxix. t. 1, s. 5, 9.

(*l*) "Servitutum non ea natura est *ut aliquid faciat quis* (veluti viridaria tollat, aut amœniorem prospectum præstet, aut in hoc ut in suo pingat:) *sed ut aliquid patiatur aut non faciat.*"—*Dig.* viii. t. i. s. 15.

It is not, however, necessary to examine with greater minuteness the provisions of the Roman Law upon this subject, though some mention of the general doctrine was a necessary preface to the application of it to the case of States; for some States, as well as individuals, have been and are entitled to exercise rights of this description, and others therefore are and have been subject to the obligations which correspond to them.

CCLXXXII. The *servitutes juris gentium* must, however, be almost always the result either of certain prescriptive customs, or of positive convention. The entire liberty which each State naturally possesses over its own property cannot be curtailed upon presumption. The *jus in re aliena* is a derogation from the general principle of law, and requires, as a special and extraordinary right, the strictest proof of its existence.

CCLXXXIII. History furnishes many examples of these *servitutes voluntariæ*, both as to persons and things. As to *persons*, the stipulations of various Treaties between England and France provide that the Stuart Pretender should not be permitted to reside in France (*m*). And when Spain confirmed by Treaty the acquisition of Gibraltar to England, she stipulated that neither Moors nor Jews should be allowed to reside there (*n*).

As to *places*, there are various instances of *servitutes* both negative and affirmative, but chiefly of the latter description. Of the *negative* kind was the engagement of France, the subject once of so much anxiety and so many conventions, that the port and fortifications of Dunkirk should be destroyed (*o*). British and Dutch Commissioners were empowered by Treaty to superintend the execution of these demolitions, and though ejected in time of war, they

(*m*) *Treaty of Utrecht* (1713), between France and England, *Art.* 4.
(*n*) *Treaty of Utrecht*, between Spain and England, *Art.* 10.
(*o*) *Traité d'Utrecht* (1713), *Art.* 9.
Traité de la Haye (1717), *Art.* 4.

returned with the restoration of peace, and were only finally withdrawn, in compliance with the provisions of the Treaty of Versailles, 1783 (*p*).

By the Treaty of Paris, 1814 (*q*), it was stipulated that Antwerp should be an *exclusively* commercial port; and the stipulation was renewed by the Treaties of 1831–39, which erected Belgium into a separate kingdom (*r*).

By the same Treaty of 1831 (*s*), it was stipulated, *negatively*, that the fortresses of Menin, Ath, Mons, Philippeville, and Marienburg should be demolished before the 1st of December, 1833; and *affirmatively*, that the other Belgian fortresses should be kept in repair by the King of the Belgians.

At one time Holland insisted that the Ostend East India Company, founded in 1723, and abolished by the Treaty of Vienna in 1731, was under a *servitus non navigandi* (*t*).

The Treaty of Vienna (1815), which reinstated the Pope in the possession of the Marches, Camerino, Beneventum, Ponte-corvo, and the Legations of Ravenna, Bologna, and Ferrara, on the right bank of the Po, subjected his Holiness at the same time to the *servitus* of suffering Austrian garrisons "dans les *places* (*u*) de Ferrare et Commachio."

To cite one more instance. In 1856 (March 30), by a convention between England, France, and Russia, the latter Power declared "that the Aland Islands shall not be "fortified, and that no military or naval establishment shall "be maintained or erected there" (*x*).

(*p*) *Koch, Hist. des Tr.* vol. i. pp. 333–4. See, too, the Treaties of Radstadt and Baden between France and the Emperor of Germany, *Arts.* 5, 8, 9.

(*q*) *Art.* 15.

(*r*) *Art.* 14.

(*s*) *Art.* 1.

(*t*) *Klüber*, s. 133, n. c.
Ompteda, tit. ii. 600.

(*u*) The real meaning of this term underwent much discussion during the recent wars in Italy.

(*x*) *Ann. Reg.* 1856, p. 321.

CHAPTER XVI.

EXTINCTION OF DOMINION (*a*).

CCLXXXIV. As Dominion is acquired by the combination of the two elements of *fact* and *intention*, so, by the dissolution of these elements, or by the manifestation of a contrary fact and intention, it may be extinguished or lost (*b*).

In this case the dominion is lost, actually or by presumption, with the consent of the State which loses it.

CCLXXXV. The title of Prescription in another State is often, though not necessarily, founded on the *presumed* dereliction of the possession by the original owner.

It must be borne in mind that this presumption, like all others, is liable to be repelled by proof of sufficient strength (*c*), that is, by evidence of a state of facts wholly inconsistent with such presumption. On the other hand, it should be observed that there is a conduct, and that there are acts on

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(*a*) *Grotius*, l. ii. c. ix.—*Quando imperia vel dominia desinunt*, l. iii. c. ix. 9.

Martens, t. ii. l. ix. pp. 340–4.

Günther, vol. ii. p. 213.

Heffters, 72.

Mühlenbrück, l. ii. c. iii. s. 270.

(*b*) "Ferè quibuscunque modis obligamur, iisdem in contrarium actis liberamur; quum quibus modis acquirimus, iisdem in contrarium actis amittimus. Ut igitur nulla possessio acquiri, nisi animo et corpore potest, ita nulla amittitur, nisi in qua utrumque in contrarium actum est."—*Dig.* L. 17, 153; xli. 2, 8.

(*c*) "Quia verò tempus memoriam excedens quasi infinitum est moraliter, ideo ejus temporis silentium ad rei derelictæ conjecturam semper sufficere videbitur, nisi *validissimæ* sint in contrarium rationes."—*Grotius, De J. B.* l. ii. c. iv. s. 7.

the part of a State, which must be construed as an abandonment of her previous rights. For instance, a State may make herself a party to some convention upon another matter, but in which the possession or right originally belonging to her is indirectly, though of necessity, treated as belonging to the claimant by prescription; and such convention being concluded without any reservation on the part of the nation, would be very strong evidence of the abandonment of her right.

Again, if a nation suffer other nations in their mutual arrangements to deal with the right of possession in question as belonging to one of them, and makes no protest in favour of her claims, she must be held to have acquiesced in the transaction. An individual may indicate his acquiescence by his words or by his deeds. "Recusari hæreditas non tantum "verbis, sed etiam re potest, et alio quovis indicio voluntatis"(*d*) is the doctrine of the Roman Law; and upon it Grotius(*e*) remarks, "Sic si is qui rei alicujus est dominus, "sciens cum altero eam rem possidente tanquam cum domino "contrahat, jus suum remisisse merito habebitur: quod cur "non et inter reges locum habeat, et populos liberos nihil "causæ est." And again: "Venit enim hoc non ex jure civili "sed ex jure naturali, quo quisque suum potest abdicare, et "ex jure naturali præsumptione, qua voluisse quis creditur "quod sufficienter significavit: quo sensu recte accipi "potest quod Ulpianus dixit, juris gentium esse acceptilationem"(*f*).

Heineccius, in his Commentary on Grotius, expresses concisely the same doctrine "inter gentes loco signi est patientia scientia" (*g*).

It is indeed true that, according to Grotius, silence cannot be construed as an assent, unless it be "scientis et liberè

(*d*) *Dig.* xxix. t. 2, s. 95.
(*e*) L. ii. c. iv. s. 4.
(*f*) *Ib.* *Dig.* xlvi. t. 4, s. 8.
(*g*) *Prælect.* l. ii. c. iv. s. 4. See, too, *Mably, Droit public*, t. ii. pp. 21, 22.

" volentis ; " but he adds that " temporis in utrumque magna " vis est ; " and in fact these conditions are presumed after the lapse of time (*h*).

CCLXXXVI. The practice of nations confirms this theory: they have frequently entered protests (*i*) in favour of their alleged rights upon the conclusion of Treaties in which these rights were expressly, or by implication, negatived. It is hardly necessary to add, that a nation, who is herself a party to such a Treaty, without making any protest, has unquestionably abandoned her rights. The Congress of *Aix-la-Chapelle* (1748) was the last in the eighteenth century at which these protests were made. Thus, the Pope has perpetually protested, from the Treaty of Westphalia to the Congress of Vienna, against all Treaties recognizing or confirming the confiscation of Church property effected at or since the time of the Reformation (*k*).

(*h*) *Grotius* (*De Jure Belli*, l. ii. c. iv. ss. 5, 6), says: "Sed ut ad derelictionem præsumendam valeat silentium duo requiruntur, ut silentium sit scientis, et ut sit libere volentis; nam non agere nescientis, caret effectu, et alia causa cum apparet, cessat conjectura voluntatis."

"Ut hæc igitur duo adfuisse censeantur, valent et aliæ conjecturæ: *sed temporis in utrumque magna vis est.* Nam primum fieri vix potest, ut multo tempore res ad aliquem pertinens non aliqua via ad ejus notitiam perveniat, cum multas ejus occasiones subministret tempus. Inter præsentes tamen minus temporis spatium ad hanc conjecturam sufficit, quam inter absentes, etiam seposita lege civili. Sic et incussus semel metus durare quidem nonnihil creditur, sed non perpetuo, cum tempus longum multas occasiones adversus metum sibi consulendi, per se, vel per alios suppeditet, etiam exeundo fines ejus qui metuitur, saltem ut protestatio de jure fiat, aut, quod potius est, ad judices aut arbitros provocetur."

Κάτοχον καὶ βέβαιον τὴν κτῆσιν πεποιηκότος τοῦ χρόνου.—*Dionys. Halicarn.* c. ix. t. ii. p. 155.

Χρόνος γὰρ εὐμαρὴς θεός,

according to the remarkable expression of Sophocles (*Electra*, 179).

(*i*) *Mably*, *Droit public*, t. i. pp. 104, 342; t. ii. pp. 43, 193.

De Rayneval, *Instit. du Droit de la Nature et des Gens*, l. ii. c. ix. s. 2.

(*k*) *Koch*, *Hist. des Tr.* t. i. p. 316.

Mably, t. i. p. 143; t. ii. pp. 50, 130–9, *præsertim* (for History of the Renunciation of France in the Treaties of Utrecht) p. 148.

Wheaton, *Hist.* p. 87.

In 1814 (*l*) the King of Saxony published an admirable protest against the dismemberment of his kingdom. And at the Congress of Vienna (1815) the Pope and Gustavus IV., ex-King of Sweden, delivered protests (*m*).

CCLXXXVII. This dereliction of property is, however, often not left, and where it is possible never should be left, to the inferences of legal presumption. The solemn renunciation of territory and of rights by a State is one of the most important subjects of both Public and International Jurisprudence. Memorable instances of their importance are to be found in the Treaties of Utrecht. In these Treaties the renunciations of the Emperor of Germany, the King of France, and the King of Spain established the separation of the Crowns of France and Spain as a fundamental rule of European International Law, and severed Belgium, Milan, and Naples from the Spanish monarchy.

The States or State interested in the renunciation must take care that it be ratified by the Constitutional Authorities of the renouncing kingdom. We may close this subject with the remark of Mably: "Tous les peuples sentent la nécessité "des renonciations pour établir entre eux la sûreté, l'ordre, "et la paix; ne doit-il pas être absurde de douter de leur "validité?" (*n*)

CCLXXXVIII. Another mode of extinguishing dominion is, as we have seen, by voluntary transfer of the possession; but it is important to observe, that if a part of a territory be alienated, it carries with it to the new owner all the obligations and debts by which it was previously bound; here, as in most cases, the principle of the Roman Law being applicable:—"Id enim bonorum cujusque esse intelligitur quod "æri alieno superest" (*o*). When property has been granted

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(*l*) *Garden, Tr. de Dipl.* t. iii. p. 205, contains the Protest at length. See, too, p. 146—the *Mémoire raisonné.*

(*m*) *Koch,* t. iii. p. 500.

(*n*) *Droit public,* t. ii. p. 140.

(*o*) *D. de V. S. L.* t. xvi. 125; xlix. t. xiv. s. 11. *D. de Jure Fisc.*

under a condition which has not been fulfilled on the part of the grantee, then *redit dominium ipso jure* to the grantor. And in this case it appears consonant to justice that the property should be restored to the grantor with its intermediate fruits and revenues, and without the burdens or obligations imposed on it during its temporary ownership, there being, as Jurists say, a *dominii resolutio ex tunc* (*p*).

CCLXXXIX. The doctrine of *Postliminium* (*q*), in the case of States, is borrowed from the Roman Law, and belongs to the time of Peace as well as War, though properly and chiefly to the latter, where it will be further discussed.

The *jus postliminii*, in the sense in which it is now about to be used, means the right of being reinstated in property (*r*)

(*p*) "Amittimus etiam dominium, quod sub resolvente conditione acquisiveramus, si conditio impletur. Hoc autem duobus modis fieri potest. Aliquando enim ita resolvitur jus nostrum, ut res nunquam nostra fuisse videatur, tum onera ei à nobis imposita evanescunt, et res cum fructibus et omni causa restituenda est. Hæc rescissio accidit, quoties sub casuali conditione res nobis alienata fuerat, veluti si ager sub lege commissoria emptus, ob pretium non solutum inemptus sit. (Exempla extant in fr. iii. s. iii. D. 18, 2 (de in diem addictio.); fr. iii. D. 20, 6 (quibus mod. pign. vel hyp. solv.), c. iv. C. 4, 54 (de pactis inter emt. et venditor.) Redit dominium ipso jure.) Aliis in causis revocatio dominii in præteritum trahenda non est; quo casu res sine fructibus, sed cum oneribus ei à nobis impositis restitui debet. (Exempl. in fr. iii. in f. D. 20, 6 (tit. cit.), fr. iii. D. 18, 6 (de rescind. vend.), c. 2, C. 4, 54 (tit. cit.), Dominium ipso jure non redit, sed tenemur ad rem veteri domino tradendam.) Hodierni illam dominii resolutionem *ex tunc*: hanc vero *ex nunc* appellare consueverunt. Hæc maxime tum obtinet, cum res sub potestativa conditione nobis abalienata erat."—*Warnkönig, Instit. Jur. Rom. Privati*, l. ii. c. ii. tit. viii. s. 378.

(*q*) *Grotius*, l. iii. c. ix., *De Postliminio.*

"Dictum est autem *postliminium* à *limine* et *post*; unde eum, qui ab hostibus captus, in fines nostros postea pervenit, postliminio reversum recte dicimus. Nam limina sicut in domibus finem quendam faciunt. Sic et imperii finem limen esse veteres voluerunt. Hinc et limes dictus est, quasi finis quidam et terminus; ab eo postliminium dictum, quia eodem limine revertebatur, quo amissus fuerat."—*Institut.* l. i. tit. xii. *Quibus modis jus patriæ potestatis solvitur*, s. 5.

Bynkershoek, Q. J. P. l. i. c. xvi., *De Jure Postliminii varia.*

(*r*) *Grotius*, l. ii. c. x., *De obligatione quæ ex dominio oritur*; or, according to Barbeyrac's most correct translation, "De l'obligation que le droit de propriété impose à autrui, par rapport au propriétaire."

and rights which have been accidentally lost or illegally taken away. They must, however, have been at one time *actually*, and not *theoretically* (*s*), possessed,—as was rightly determined in the case of Belgium, which has been already mentioned (*t*).

CCXC. When property, or rights, have been so lost and taken away, it should seem to be the better opinion of jurists, that even a *bona fide* possessor and purchaser must restore them to the rightful owner (*u*),—and, moreover, without compensation for the expenses which he (the *bona fide* possessor) may have incurred in purchasing it. He is not even, according to many jurists, following the doctrines of the Civil Law, entitled to the *εὕρετρα*, the *inventionis præmia* (*x*), except, indeed, in cases in which the rightful owner himself must have paid for the recovery of the goods of a friend from the possession of an enemy (*y*). Salvage on recapture is founded on this principle, and is a part of the Maritime Law, not only of our own, but of all civilized nations. Property recovered from robbers by sea or land falls of course under the same principle.

CCXCI. Upon the question, however, whether the *bona fide* possessor is bound to restore (*z*), not only the possession, but

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(*s*) *Grotius*, l. iii. c. ix., *De Postliminio.*

(*t*) *Wheaton's Hist.* pp. 547–555.

(*u*) *Grotius*, l. ii. c. x. i. 5, *De Obligatione quæ ex dominio oritur*: "Nam ad dominii naturam nihil refert ex gentium an ex civili jure oriatur: semper enim secum habet quæ sibi sunt naturalia, inter quæ est obligatio cujusvis possessoris ad rem domino restituendam. Et hoc est quod ait Martianus *jure gentium* condici posse res ab his qui non ex justa causa possident."

(*x*) *Grotius*, l. ii. c. x.: "Quid ergo, si *εὕρετρα* (id est, inventionis præmia) quæ dicunt, petat? Nec hic videtur furtum facere, etsi non probè petat aliquid."—*Dig.* xlvii. t. ii. 43, 9, *De Furtis.*

(*y*) *Heineccius* indeed thinks this practice "ex regula honesti," but not "ex regula justi;" because no owner ought "res suas *bis* emere."—*Heinec. in Grot.* l. ii. c. x. 9.

(*z*) "Thou shalt not see thy brother's ox or his sheep go astray, and hide thyself from them: thou shalt in any case bring them again unto thy brother.

"And if thy brother be not nigh unto thee, or if thou know him not,

the intermediate fruits and profits which he has derived from it, there is some difference of opinion. Grotius and Puffendorf (*a*) hold that he must restore so much of the fruits of the property as have increased his fortune, though not the value of that which has been consumed by him upon his actual necessities. They found this maxim upon a rule to be found in the Digest: "Jure naturæ æquum est neminem cum alterius detri-"mento et injuria fieri locupletiorem" (*b*). The rigid adoption of this rule has led them both into considerable perplexity, and into the necessity of allowing many exceptions from it, chiefly founded on the doctrine of obligations from implied contracts (*ex quasi contractu* (*c*)). It is difficult not to agree with Barbeyrac, that the rule cited is not necessarily applicable to any cases of this description (*d*): "Mais" (he says) "pour ne pas l'étendre trop loin, il faut considérer si celui "qui profite aux dépens d'un autre n'a pas un droit de faire "ce profit. Car s'il en a un droit, alors on voit bien que c'est "tant mieux pour lui, et tant pis pour l'autre" (*e*). The maxim cited from the Civil Law may indeed be opposed by another derived from the same source: "Bona fides tantundem pos-"sidenti præstat, quantum veritas, quoties lex" (that is, some particular law), "impedimento non est" (*f*), and that the true rule of International Law is, that the peaceable enjoyment of an honest possessor is to be considered as a kind of

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then thou shalt bring it unto thine own house, and it shall be with thee until thy brother seek after it, and thou shalt restore it to him again."—*Deuteronomy* xxii. 1, 2.

(*a*) *Grotius*, l. ii. c. x.

Puffendorf, l. iv. c. 13.

(*b*) *De divers. Reg. Juris. Leg.* ccvi. And so Cicero says: "Detrahere igitur aliquid alteri, et hominem hominis incommodo suum augere commodum, magis est contra naturam, quàm mors, quàm paupertas," &c.—*De Offic.* l. iii. c. v.

(*c*) *Grotius, ib.*, and *Heineccii Prælect*:—"Et quæ sunt alia hujus generis exempla. Innumera enim in jure universo, maxime in materia de quasi contractibus passim occurrunt."

(*d*) It is the doctrine, however, of English Law.

(*e*) *Barbeyrac* on *Grotius*, t. i. l. ii. c. x. p. 391 (note 4).

(*f*) *Dig.* l. 50, 17, *De Div. Reg. Jur. Ant.* 136.

interregnum which has interrupted the power of the true proprietor, but ensures to the putative proprietor the fruits of his management while he was in full authority (*g*).

CCXCII. Günther seems to admit the position of Grotius, but asserts that the honest possessor may set off the costs of the improvements which he has effected, against the emoluments which he has received (*h*). Heffters takes, in effect, the same view of the matter as Barbeyrac, but without referring to him (*i*). Heffters founds his opinion upon the position, that the silence of the true proprietor, during the time the honest possessor was in authority, ought to secure to the latter his gains; and Barbeyrac acutely observes, what Thomasius, who followed in the wake of Grotius and Puffendorf, is obliged in his commentary on Huber's work (*k*) (*De Jure Civitatis*) to admit, "que, quand il "s'agit de voir si un possesseur de bonne foi s'est enrichi "par la possession de la chose même, ou par la jouissance "des revenus qui en proviennent, c'est un examen sujet à "des *difficultés infinies,* et dont on ne peut presque venir "à bout."

CCXCIII. From the practice of nations with respect to this matter in time of peace, but little aid is to be borrowed for either argument. The 13th Article, however, of the Peace of Ryswick, in 1697, though it may be said more properly to refer to indemnification due from a wrong-doer to a lawful owner, may be mentioned here: "Et in quantum, per auctoritatem Domini Regis Christianissimi Dominus Rex Magnæ "Britanniæ impeditus fuerit, quominus frueretur reditibus, "juribus et commodis tam principatûs sui Aransionensis quam "aliorum suorum Dominiorum, quæ post conclusum Tractatum Neomagensem, usque ad declarationem præsentis belli

(*g*) *Barbeyrac* on *Puffendorf, De Jure Nat. et Gent.* l. iv. c. xiii. s. 3. *Ibid.* on *Grotius, De Jure B. et P.* l. ii. c. x. s. 2.

(*h*) *Günther*, vol. ii. p. 214.

(*i*) *Heffters*, 73, n. 1.

(*k*) *Barbeyrac* on *Grotius*, l. ii. c. x. p. 391 (notis).

"sub dominatione prædicti Regis Christianissimi fuerunt, "prædictus Dominus Rex Christianissimus Regi Magnæ "Britanniæ restituit et restitui efficiet realiter cum effectu "et cum interesse debito, omnes istos reditus, jura et com- "moda secundum declarationes et verificationes coram dictis "Commissariis faciendas" (*l*).

CCXCIV. Property may be taken, without consent, from an individual by an act of the law, and a valid title conveyed to another owner; so by conquest—*jure victoriæ*—followed by treaty, property may be taken from one State and conveyed to another: but this will be discussed at greater length in another part of this work.

CCXCV. Property may also become legally extinct by suffering a change of character, by being placed among things *extra commercium*, as will be explained in the next chapter.

(*l*) *Schmauss*, vol. ii. p. 1113.

CHAPTER XVII.

SLAVES AND THE SLAVE TRADE.

CCXCVI. There is a kind of property which it is equally unlawful for States as for Individuals to possess—property in men.

A being endowed with will, intellect, passion, and conscience, cannot be acquired and alienated, bought and sold by his fellow beings, like an inanimate or an unreflecting and irresponsible thing (*a*).

CCXCVII. The Christian world has slowly but irrevocably arrived at the attainment of this great truth; and its sound has at last gone out into all lands, and its voice into the ends of the world (*b*).

International Law has for some time forbidden the captive of war to be sold into slavery. Of late years it has made a further step; it now holds that the colour of the man does not affect the application of the principle. The black man is

(*a*) "Si vinxero hominem liberum ita ut eum possideam, an omnia quæ is possidebat, ego possideam per illum? Respondit si vinxeris hominem liberum *eum te possidere non puto*; quod quum ita se habeat multo minus per illum res ejus à te possidebuntur; neque enim rerum natura recepit, ut per eum aliquid possidere possim quem civiliter in mea potestate non habeo."—*Dig.* xli. 2, 23, 2.

(*b*) "J'ai dit que d'après les principes de l'ancienne constitution romaine la propriété des objets les plus précieux, c'est-à-dire des choses *mancipi*, était censée provenir de l'État. Mais les chrétiens n'avaient jamais cru à cette hypothèse—dans leurs principes la terre *appartenait* à *Dieu avec tout ce qu'elle contient.*"—*Troplong, de l'Infl. du Christ. sur le Droit civil*, p. 121.

no more capable of being a chattel than the white man. The negro and the European have equal rights; neither is among the "*res positæ in commercio*," in which it is lawful for States or individuals to traffic (*c*).

Let us cast our eyes for a moment over the progress of International Jurisprudence upon this subject, for upon none has its melioration been more striking, or more advantageous to humanity. It may be considered, first, with respect to the Slavery of the White Man; and, secondly, with respect to the Dark or Coloured Man.

CCXCVIII. First, with respect to the White Man. Bynkershoek (*d*), in one of his last and ablest works, maintains, even in 1737, that as the conqueror may lawfully do what he pleases with the conquered, he may lawfully put him to death: but the right he admits has become obsolete. A corollary to this absolute power of life and death over enemies is the right, according to this author, of making them Slaves. A German potentate, he says, who served in the British Army in Ireland in 1690, is said to have ordered prisoners to be transported to America, for the purpose of being sold as Slaves, and to have been only deterred by a threat of the Duke of Berwick, Commander of the French Army in Ireland, that, as a retaliatory measure, he would send all his prisoners to the galleys in France. This practice he also admits to have become obsolete amongst *Christians* (*e*). But the Dutch, having

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(*c*) "Regula illa juris naturalis, *cognationem* inter homines quandam esse à natura, ac *proinde nefas* esse alterum ab altero lædi."—*Grotius*, l. ii. c. xv. 5, i.

(*d*) The *Quæstiones Juris Publici* appeared in 1737, when the author was sixty-four years of age; he died in 1743. The doctrine referred to in the text is to be found in the third chapter of the first book.

"Item ea quæ ex hostibus capimus *jure gentium* statim nostra fiunt: adeo quidem ut et liberi homines in servitutem nostram deducuntur: qui tamen, si evaserint nostram potestatem, et ad suos reversi fuerint, pristinum statum recipiunt."—*Instit.* l. ii. t. i. 17.

(*e*) "Sed quia, ipsa servitus *inter Christianos* ferè exolevit ea quoque non utimur in hostes captos."—*Ib.*

"Sic enim jus gentium de servitute captivorum in bello justo, in

themselves no Slaves, except in Asia, Africa, and America, are, he observes, in the habit of selling the Algerines, the Tunisians, and Tripolitans, whom they take in the Atlantic or Mediterranean, to the Spaniards as Slaves.

Bynkershoek certainly did not, by his rather faint acquiescence in the desuetude of the custom of making slaves, advance the march of this sound principle of International Law. Grotius had long ago declared (*f*) that Christendom had abolished this pretended right, as directly at variance with the doctrine of the Founder of their Religion, and remarked, with pious and just exultation, that reverence for the law of Christ had produced that effect for which the teaching of Socrates had laboured in vain. To this prohibition to make captives slaves, like the prohibition to poison the enemy's wells, may be applied his emphatic language with respect to another infamy,—the violation of women,—language which should never be forgotten by those who aspire to render any contribution, however humble, to the great fabric of International Law (*g*)—" Atque id inter Christianos observari par " est, non tantum ut disciplinæ militaris partem, sed et ut " *partem juris Gentium.*"

CCXCIX. The successful efforts made by Christian

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ecclesia mutatum est, et inter *Christianos* id non servatur."—*Suarez, De Leg. ac Deo Legisl.* l. ii. c. xix.

It is remarkable that the very able dissertations of *Suarez*, on Natural, Public, and International Law, are not noticed by Grotius.

See same reasoning for the enfranchisement of bondmen in England, *Sir Thomas Smith, Commonwealth of England*, p. 137.

(*f*) It is a noble passage, worthy of its illustrious author:—" Sed et *Christianis in universum placuit*, bello inter ipsos orto, captos servos non fieri, ita ut vendi possint, ad operas urgeri, et alia pati quæ servorum sunt: merito sane: quia ab omnis caritatis commendatore rectius instituti erant, aut esse debebant quam ut a miseris hominibus interficiendis abduci nequirent, nisi minoris sævitiæ concessione. Atque hoc a majoribus ad posteros pridem transiisse inter eos, qui eandem religionem profiterentur, scripsit Gregoras, nec eorum fuisse proprium qui sub Romano imperio viverent, sed commune cum Thessalis, Illyriis, Triballis, et Bulgaris. Atque ita hoc saltem, quanquam exiguum est, perfecit *reverentia Christianæ legis*, quod, cum Græcis inter se servandum olim diceret Socrates, nihil impetraverat."—L. iii. c. vii. s. 9.

(*g*) Lib. iii. c. iv. s. 19.

Powers to emancipate the *white* Christian from the slavery to which the Infidel Powers of the Levant had too frequently consigned them, seem to claim some notice in this place.

Till the beginning of the present century specific Treaties were constantly concluded between the European and Barbary Powers, binding the latter to abstain from piratical depredations, to restore prisoners, and to conform to the usages of the civilized world. But it was not till after the pacification of the world in 1815 (*h*) that Great Britain bestirred herself to the accomplishment of that glorious enterprise which must for ever entitle her to the gratitude of Christendom. Early in the spring of 1816, Lord Exmouth, the British Commander-in-Chief in the Mediterranean, received, amongst other instructions, the order to procure, if possible, a general abolition of Christian slavery in Barbary.

Lord Exmouth, acting in obedience to these instructions, succeeded in extracting a promise from the Beys of Tunis and Tripoli, that they would not, for the future, make slaves of prisoners of war, but would conform to the practice of European nations (*i*). The Dey of Algiers pretended that he could not join in this promise without the permission of the Sultan, whose subject he was. Shortly afterwards, outrages were committed at Algiers upon the British Consul, and at Bona upon the British flag, and abominable cruelties perpetrated upon divers crews of fishing-boats from the ports of Italy. The consequence of these atrocities, and of the Dey's refusal to acquiesce in the abolition of Christian slavery, was the ever-memorable bombardment of Algiers by the British fleet under Lord Exmouth, gallantly assisted by a Dutch squadron under Vice-Admiral Capellen, on the 27th of August, 1816.

(*h*) *Ann. Reg.* 1816, vol. lxxxv. c. ix. p. 97; *Appendix*, p. 230, etc.

(*i*) *De M. et De C.* t. iii. p. 263: "Déclaration du Bey de Tripoli, en date du 29 avril 1816, portant que l'esclavage des prisonniers de guerre est aboli. Dans les mêmes termes par le Bey de Tunis, 17 avril 1816."

The destruction of nearly half Algiers, and of the whole Algerine navy, achieved a great triumph for civilization and Christianity.

The Dey consented—

1. To the abolition for ever of Christian slavery.

2. To deliver to the British Admiral all slaves in his dominions, to whatever nation they might belong, before the noon of the next day.

3. To deliver at the same time all money received for the redemption of slavery since the beginning of 1816.

4. To make full reparation and a public apology to the British Consul, as will be mentioned elsewhere.

In 1830 the French took possession of Algiers, and concluded with Tunis and Tripoli treaties (9th and 11th August, 1830) for the abolition of Christian slavery, and a conformity to the civilized usages of commerce and war.

In January 1846 the Bey of Tunis addressed a circular to the Consuls of Christendom, announcing the abolition of slavery throughout his kingdom—an act which surely shames the slaveholding States of Christendom (*k*).

CCC. Secondly, with respect to the slavery of the Dark or Coloured Man. Is there really any difference in principle between the two cases? Can it ever have been a sound position of International Law, that a rule of immutable justice and eternal right was rendered inapplicable by the complexion of the person, the region in which he dwelt, or the religion which he professed? At all events, was this ever a sound position of *Christian* International Law? The question, it must be admitted, has been answered in the affirmative by the decision of Courts of Justice, both in England and North America.

According to Lord Stowell, trading in Slaves was neither piracy nor *legally* (*l*) criminal. It was sactioned by ancient

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(*k*) *De M. et De C.* t. v. p. 443.

(*l*) *The Le Louis*, 2 *Dodson's Adm. Rep.* p. 249. It should be observed that this judgment was delivered in 1817. It was in 1818 that

admitted practice, by the general tenor of the laws and ordinances, by the formal transactions of civilized States, and by the doctrine of the Courts of the Law of Nations.

All this was undoubtedly true: but might not all these reasons have been urged at one time in favour of the practice of selling Christian captives into Slavery? Was there not a time when the practice of nations sanctioned the slaughter of captives by sword or poison, and the violation of women in time of war (*m*)? Is not, *pace tanti viri*, the real question whether, *if* the Slave Trade be a *crime*, any *usage*, however general, can alter its character? Are not Natural and Revealed Law the primary sources (*n*) of International Jurisprudence? and though it be true that much which they in the abstract simply *permit* (*o*) is limited or disallowed by the mutual practice of nations, could that practice sanction what the Natural and Religious Law had *absolutely forbidden* (*p*)? Could a Municipal Law sanction homicide or adultery?

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the French law finally rendered the Slave Trade illegal.—*Koch, Hist. des Tr.* t. iii. p. 517.

See, however, also the case of *Madrazzo* v. *Willis*, in the Court of Queen's Bench, *Barnewall and Alderson's Reports*, vol. iii. p. 353. See also *The Antelope, Wheaton's Reports* (*American*), vol. x. p. 66.

(*m*) "Stupra in fœminas in bellis passim legas et permissa et impermissa; atque hoc posterius jus est gentium non omnium, sed meliorum." —L. iii. c. iv. 19.

"Nec tempore ullo excluditur potestas occidendi tales servos, id es bello captos, quantum ad jus gentium pertinet; etsi legibus civitatum hic magis, illic minus adstringitur."—L. iii. c. iv. s. x. 2.

"Jus gentium, si non omnium, certe meliorum, jam olim est, ne hostem veneno interficere liceat."—L. iii. c. iv. s. 15.

It is true that Grotius says: "Sicut autem jus gentium permittit multa, eo permittendi modo quem jam explicavimus, quæ jure naturæ sunt vetita, ita quædam vetat permissa jure naturæ."—L. iii. c. iv. s. xv.; cf. l. iii. c. ii. 1; l. ii. c. xvii. s. xix.; l. iii. c. i. s. i.; l. ii. c. iii. s. x.

(*n*) See Third Chapter of this work.

(*o*) "Sed multa quæ natura permittit, jus gentium ex communi quodam consensu potuit *prohibere*."—*Grotius*, l. ii. c. iii. s. x. 3.

(*p*) "Jeder Handel und Verkehr, welcher den allgemeinen Menschenrechten zuwiderlauft, ist geächtet. Niemand begeht ein Unrecht, wer ihn stört oder vernichtet. Dies ist das Gesetz des Sclavenhandels."—*Heffters*, s. xxxii.

When Grotius treats of the liability which *jure gentium* the goods of subjects incur of being seized by the enemy of their Sovereign, he observes, that this liability is not imposed by a rule of Natural, but of International Law, which latter cannot, in this respect, be said to be at variance with, but rather additional to the former (*q*), "non autem hoc naturæ re- "pugnat, ut non more et tacito consensu induci potuerit." Can this be predicated of the Slave Trade? "No nation," Lord Stowell says (*r*), "can privilege itself to commit a "crime against the Law of Nations by a mere municipal "regulation of its own." Can nations collectively privilege themselves to commit a crime against the law of nature, and of Nature's God? That it was a *crime*, Lord Stowell thought; for in a yet later judgment (*s*), the most questionable, perhaps, which he ever delivered, he said, "It is in a peculiar manner "the crime of this country."

Mr. Dana, in his learned and elaborate note (*t*), points out why, speaking technically and with reference to the practice of the Prize and Municipal Court, the case of *The Amédée*, in which Sir William Grant delivered in 1807 the judgment of the Lords of Appeal in Prize Causes, was not reversed, or rather contradicted, by Lord Stowell in the case of the *Le Louis* in 1817. But I think that the opinion of Sir William Grant (and a higher judicial authority can scarcely be cited) supports the general proposition that the Slave Trade must now be deemed a violation of International Law. The judgment is as follows:—

"This ship must be considered as being employed, at the "time of capture, in carrying slaves from the coast of "Africa to a Spanish colony. We think that this was "evidently the original plan and purpose of the voyage, "notwithstanding the pretence set up to veil the true

(*q*) L. iii. c. ii. s. ii. 2.
(*r*) *The Le Louis*, 2 *Dodson's Adm. Rep.* p. 251.
(*s*) *The Slave Grace*, 2 *Haggard's Adm. Rep.* p. 128.
(*t*) *Dana's Wheaton*, p. 208.

" intention. The claimant, however, who is an American,
" complains of the capture, and demands from us the re-
" stitution of property, of which, he alleges, that he has
" been unjustly dispossessed. In all the former cases of
" this kind which have come before this Court, the Slave
" Trade was liable to considerations very different from
" those which belong to it now. It had, at that time, been
" prohibited (so far as respected carrying slaves to the
" colonies of foreign nations) by America, but by our own
" laws it was still allowed. It appeared to us, therefore,
" difficult to consider the municipal regulations of a foreign
" State, of which this Court could not take any cognizance.
" But by the alteration which has since taken place the
" question stands on different grounds, and is open to the
" application of very different principles. The Slave Trade
" has since been totally abolished by this country, and our
" legislature has pronounced it to be contrary to the prin-
" ciples of justice and humanity. Whatever we might
" think, as individuals, before, we could not, sitting as judges
" in a British Court of Justice, regard the trade in that
" light while our own laws permitted it. But we can now
" assert that this trade cannot, abstractedly speaking, have a
" legitimate existence. When I say *abstractedly speaking*,
" I mean that this country has no right to control any
" foreign legislature that may think fit to dissent from this
" doctrine, and permit to its own subjects the prosecution of
" this trade; but we have now a right to affirm that, *prima*
" *facie*, the trade is illegal, and thus to throw on claimants
" the burden of proof that, in respect of them, by the
" authority of their own laws it is otherwise. As the case
" now stands, we think we are entitled to say that a claimant
" can have no right, upon principles of universal law, to
" claim the restitution in a Prize Court of human beings
" carried as slaves. He must show some right that has
" been violated by the capture, some property of which he
" has been dispossessed, to which he ought to be restored.
" In this case, the laws of the claimant's country allow of

" no property such as he claims. There can, therefore, be " no right to restitution. The consequence is, that the " judgment must be affirmed " (*u*).

CCCI. At all events, the judgment of Lord Stowell in the *Le Louis* was delivered in 1817. Since that period International Law has, on this subject, advanced towards, if it have not yet reached, the elevation of Natural and Revealed Law.

The tide which had begun to flow when that eminent judge adorned the seat of International Justice has ever since set steadily onwards; and were he now alive, he must admit that the Slave Trade, tried by some of his own criteria, measured by " the legal standard of morality " (*v*), is *now* a violation of International Law, if it be not, strictly speaking, Piracy.

By general practice, by treaties, by the law and ordinances of civilized States, as well as by the immutable laws of eternal justice, it is now indelibly branded as a *legal* as well as a natural crime (*x*). I much rejoice to reckon among these States the United States of America. This great boon to suffering humanity would almost justify the remark that if, indeed, there were no other way to its attainment than the recent terrible civil war, even that event was not to be regretted. The abolition of slavery was certainly not the alleged cause or declared object of the war, but was due to the belligerent necessities of the Northern States (*y*).

(*u*) 1 *Acton's Admiralty Reports*, p. 240.

(*v*) *The Lè Louis*, p. 249.

See also *Madrazzo* v. *Willis*, 3 *Barnwall and Alderson's Rep.* p. 353.

(*x*) *Koch, Hist. des Tr.* tom. iii. pp. 427, 432, 516, 533, 562, 570, contains a useful summary of the Slave Trade from its commencement in 1503 to 1815.

Colquhoun's Civil Law, p. 390, s. 413; p. 423, s. 476. *History of the British Slave Trade.*

(*y*) Lord Clarendon, in his despatch of the 6th of November 1869, truly observed:

" But in answer to this, we ask how stand the actual facts? The war waged by the North against the South was not a war against slavery,

CCCII. The eight Powers who signed the Treaty of Paris (1814) engaged to exert themselves for the suppression of this grievous sin, and by an additional article at the Congress of Vienna (*z*) bound themselves to take the most efficacious measures for securing the entire and definitive abolition of "a scourge which has so long desolated Africa, degraded "Europe, and afflicted humanity" (*a*).

CCCIII. By the first additional article to the Treaty of

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but a war to maintain the Union. If the abolition of slavery had been its object, the Border States would have infallibly sided with the South, and the issue of the contest would probably have been very different. In his Inaugural Message in March 1861 President Lincoln said: '*I have no purpose directly or indirectly to interfere with the institution of slavery in the States where it exists.* I believe I have no lawful right to do so, and I have no inclination to do so.' And in a letter written and published by him in the second year of the civil war, the same President said: 'My paramount object in this struggle is to save the Union, *and is not either to save or destroy slavery.* If I could save the Union without freeing any slave, I would do it; and if I could save it by freeing all the slaves, I would do it; and if I could save it by freeing some and leaving others alone, I would also do that. What I do about slavery and the coloured race, I do because I believe it helps to save this Union; and what I forbear, I forbear because I do not believe it would help to save the Union.' "—*Ann. Reg.* 1869, pp. 294–295.

(*z*) *De M. et De C.* t. iii. p. 476.

Report of the House of Lords respecting the African Slave Trade, July 23, 1849.

Report of the Select Committee of the House of Commons on the Slave Trade Treaties, August 12, 1853.

"Whereas that *criminal traffic* is still carried on."—*Treaty of Washington*, August 1842, between Great Britain and the United States.

"Dont le trafic honteux a, durant des siècles, fait gémir l'humanité." —*Martens*, s. 150, b.

"In voller und gerechter Anerkennung der Gesinnungen und Grundsätze *christlicher Menschenliebe*, zur gänzlichen Ausrottung dieses verbrecherischen Handels mitzuwirken, solle der *Negerhandel* gleich der *Seeräuberei* bestraft" u. s. w.—*Resolution of the German Confederation*, June 19, 1845.

De M. et De C. t. v. p. 30.

(*a*) *Koch, Hist. des Tr.* t. iii. p. 428, mentions that Denmark, as early as 1794, passed an ordinance for the abolition of slavery in her colonies after a lapse of ten years; that it took effect in 1804, but was not notified to other States.

Paris (1814) France, "unreservedly participating in the senti-" ment of England, with respect to a species of commerce" opposed to the *principles of natural justice*, and to the en-" lightened opinions (*lumières*) of our time," engaged to co-operate heartily in putting down the Slave Trade (*b*). In 1818 a royal ordinance carried this resolution into practical effect. By treaties in 1831 and 1833, Great Britain and France mutually conceded to each other the *right of search* of suspected vessels within certain localities: by these treaties the captured vessel was to be brought in and tried before the court of the country to which it belonged. France would not, however, consent that her subjects should be amenable to a mixed Commission Court, such as, in the case of Sweden, the Netherlands, and Portugal, had been established by Treaty with Great Britain. In May 1845 a fresh convention was entered into between France and Great Britain, by which each country engaged to keep twenty-two cruisers: but at a conference held in London in May 1849 the number was diminished to twelve, with a condition that, if hereafter requisite, the number should again be increased (*c*).

CCCIV. With regard to Spain, it was not till June 1835 that a Treaty was concluded with Great Britain, which really made effectual the engagements of a Treaty in 1817. In 1853, a select committee of the House of Commons reported: "The Brazilian Government have rendered any " such measure unnecessary, so far as regards Brazil; but as " regards Cuba, it is a matter of great surprise, that whilst " Spain is at this time indebted to England and France for " their efforts to form a tripartite convention with the United " States, in order to protect Cuba from piratical attacks, the " Government of Spain should not take warning from the " fact that one of the reasons alleged by the Government of " the United States for not joining that Convention, is the " continuance of the Slave Trade in that island."

(*b*) *De M. et De C.* t. iii. p. 20.
(*c*) *Hertslet's Treaties*, vol. viii. p. 1061-4.

Mr. Everett, in his letter, dated Washington, 1st December, 1852, to Mr. Crampton, the British Minister at Washington, writes: "I will but allude to an evil of the first "magnitude, I mean the African Slave Trade, in the sup-"pression of which England and France take a lively inter-"est, an evil which still forms a great reproach upon the "civilization of Christendom, and perpetuates the barbarism "of Africa; but for which, it is to be feared, there is no "hope of a complete remedy while Cuba remains a Spanish "colony" (*d*).

CCCV. The Treaties of Portugal with Great Britain of 1810, 1815, 1817 (which last conceded the right of reciprocal *search*), of 1825, followed by an official note from Portugal in 1826, acknowledged the obligation and necessity of suppressing the Slave Trade, but were nevertheless ineffectual for this purpose throughout the Portuguese Colonies. In 1839, a British Act of Parliament was passed, authorizing British cruisers to seize Portuguese vessels suspected to be Slavers. This Act has been vehemently attacked as a violation of International Law (*e*); it must of course be considered with reference to the previous Treaties, upon which its authority was founded. But whatever may be the correct decision upon this point, by a Treaty in July 1842, followed by additional articles in October, a mutual right of *search* and courts of mixed commission have been conceded.

Similar conventions exist between the Netherlands and Great Britain, the last being in February 1837.

CCCVI. Great Britain has entered into various negotiations with the United States of North America, having for their object the suppression of the Slave Trade; but they have not been successful in inducing the United States to join in a league with other Powers for this object: the

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(*d*) *Vide post*, note.

(*e*) *Wheaton's Hist.* p. 605.
De M. et De C. t. v. p. 442.

utmost that has been obtained is to be found in the Treaty of Washington, in August 1842, by which each Power is to maintain a naval force on the coast of Africa, and, if *both* Governments so order, to act in concert with each other, and to use their efforts to induce the African States, that allow Slave Markets, to close them.

The question of the *Right of Visit* has been a matter of sore contention between Great Britain and the North American United States: the latter has refused to distinguish it from the *Right of Search,* which, they justly say, is an exclusively *belligerent* Right. The British Government, on the other hand, has denied the identity of the two Rights, and has claimed merely to ascertain the nationality of ships hoisting, under suspicious circumstances, the flag of the United States, alleging that when once that nationality is ascertained to be that of the United States, they immediately release, whatever be her cargo or destination, the vessel; and that it is manifest, that if the mere hoisting a particular ensign (*f*) was to supersede all inquiry, the Slave Trade might be carried on with impunity (*g*).

This subject has since received an adjustment by the Treaty of the 7th of April, 1862, between England and the United States.

The chief provisions of this Treaty are, as Mr. Dana observes: "The right to detain, search, seize, and send in "for adjudication, is confined to cruisers of either Power, "expressly authorized for that purpose; and is to be exer-"cised only over merchant-vessels, and only within a distance "of two hundred and twenty miles from the coast of Africa, "and to the southward of thirty-two degrees north latitude,

(*f*) This fact appears to be fully admitted in the Treaty of Washington, 9th article: "Whereas, notwithstanding all efforts which may be made on the coast of Africa for suppressing the Slave Trade, the *facilities for carrying on that traffic and avoiding the vigilance of cruisers by the fraudulent use of flags, is so great,*" &c.

(*g*) *Wheaton's Hist.* ss. 33, 34, pp. 585, 749. The subject is very elaborately discussed.

"and within thirty leagues from the island of Cuba, and
"never within the territorial waters of either contracting
"Power. The right to visit is to be exercised when there
"is 'reasonable ground' to suspect a vessel of having been
"fitted out for, or engaged in, the trade. The only trade
"referred to is the 'slave trade upon the coast of Africa,'
"or the 'African slave trade.' To secure responsibility and
"freedom from vexation, special provisions are made as to
"exhibiting written authority, with names of the cruiser and
"her commander; entries on log-books; requiring the board-
"ing officers and commanders of authorized cruisers to be
"of a certain rank in the navy; providing exchange of
"notifications between the two Powers of the names of
"vessels and commanders employed, and as to the course to
"be pursued in case of convoy, etc.; and stipulations that
"each Power will make indemnification for losses to vessels
"arbitrarily and illegally detained. As to what shall con-
"stitute reasonable suspicion, certain articles or arrange-
"ments found on board are specified as authorizing a bringing
"in for adjudication, and as affording protection against
"claims for damages, and as *prima facie* evidence of being
"in the trade, and as authorizing condemnation of the vessel,
"unless clear and incontrovertible evidence is adduced that
"they were engaged in legal business. Mixed tribunals are
"constituted for adjudication upon the vessels, but persons
"are to be sent home to their respective jurisdictions to be
"tried. Vessels condemned by the tribunals are to be
"broken up, unless either Government takes them for its
"navy, at an appraisement; and the negroes found on board
"are to be delivered to the State whose cruiser made the
"capture, and to be by that State set free" (*h*).

CCCVII. On this subject, of Visit, the stipulations in the Treaty of May 1845, between Great Britain and France, two Powers as jealous as any that exist of national honour

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(*h*) *Dana's Wheaton*, p. 203, note. *U. S. Laws*, xii. 279.

and national right, may be cited as most fair, reasonable, and worthy of imitation (*i*). The Eighth Article of that Treaty is as follows:—

"Whereas experience has shown that the traffic in Slaves, "in those parts of the world where it is habitually carried "on, is often accompanied by acts of piracy dangerous to "the tranquillity of the seas and to the safety of all flags: "and considering at the same time that if the flag carried by "a vessel be *prima facie* evidence of the national character "of such vessel, this presumption cannot be considered as "sufficient to forbid in all cases the proceeding to the veri-"fication thereof, since otherwise all flags might be exposed "to abuse, by their serving to cover piracy, the Slave Trade, "or any other illegal traffic, it is agreed, in order to prevent "any difficulty in the execution of the present Convention, "that instructions, founded on the Law of Nations and on "the constant usage of maritime Powers, shall be addressed "to the commanding officers of the British and French "squadrons and stations on the coast of Africa. The two "Governments have accordingly communicated to each other "their respective instructions, which are annexed to this "Convention."

Among other instructions to the cruisers were the following upon the delicate question of visit:—

"You are not to capture, visit, or in any way interfere "with vessels of France, and you will give strict instructions "to the commanding officers of cruisers under your orders "to abstain therefrom. At the same time you will remember "that the King of the French is far from claiming that the "flag of France should give immunity to those who have no "right to bear it, and that Great Britain will not allow ves-"sels of other nations to escape visit and examination by "merely hoisting a French flag, or the flag of any other na-"tion, with which Great Britain has not by existing Treaty

(*i*) *De M. et De C.* t. v.

" the right of search. Accordingly, when from intelligence
" which the officer commanding her Majesty's cruiser may
" have received, or from the manœuvres of the vessel, or
" other sufficient cause, he may have reason to believe that
" the vessel does not belong to the nation indicated by her
" colours, he is, if the state of the weather will admit of it,
" to go ahead of the suspected vessel, after communicating
" his intention by hailing, and to drop a boat on board of her
" to ascertain her nationality, without causing her detention,
" in the event of her really proving to be a vessel of the
" nation the colours of which she has displayed, and there-
" fore one which he is not authorized to search; but should
" the strength of the wind or other circumstance render such
" mode of visiting the stranger impracticable, he is to require
" the suspected vessel to be brought to, in order that her
" nationality may be ascertained, and he will be justified in
" enforcing it if necessary, understanding always that he is
" not to resort to any coercive measure until every other
" shall have failed; and the officer who boards the stranger
" is to be instructed merely in the first instance to satisfy
" himself, by the vessel's papers or other proof, of her nation-
" ality, and if she prove really to be a vessel of the nation
" designated by her colours, and one which he is not au-
" thorized to search, he is to lose no time in quitting her,
" offering to note on the papers of the vessel the cause of his
" having suspected her nationality, as well as the number of
" minutes the vessel was detained (if detained at all) for the
" object in question; such notation to be signed by the board-
" ing officer, specifying his rank and the name of her Ma-
" jesty's cruiser, and whether the commander of the visited
" vessel consent to such notation on the vessel's papers or not
" (and it is not to be done without his consent): all the said
" particulars are to be immediately inserted in the log-book
" of her Majesty's cruiser, and a full and complete statement
" of the circumstances is to be sent, addressed to the Secretary
" of the Admiralty, by the first opportunity direct to England,
" and also a similar statement to you as senior officer on the

"station, to be forwarded by you to our secretary, accom-
"panied by any remarks you may have reason to make
"thereon. The commanding officers of her Majesty's vessels
"must bear in mind that the duty of executing the instruction
"immediately preceding, must be discharged with great care
"and circumspection. For if any injury be occasioned by ex-
"amination without sufficient cause, or by the examination
"being improperly conducted, compensation must be made
"to the party aggrieved; and the officer who may cause an
"examination to be made without sufficient cause, or who may
"conduct it improperly, will incur the displeasure of her
"Majesty's Government. Of course, in cases when the sus-
"picion of the commander turns out to be well founded, and
"the vessel boarded proves, notwithstanding her colours, not
"to belong to the nation designated by those colours, the
"commander of her Majesty's cruiser will deal with her as
"he would have been authorized and required to do had she
"not hoisted a false flag."

At the Congress of Vienna in 1815, of Aix-la-Chapelle in 1818, of Verona in 1822, the abolition of the Slave Trade as a *principle of Public Law* was formally adopted.

Since these periods the principle has been carried into execution by Special Treaties (*k*) between Great Britain and the different States of Christendom, both in the new and the old world, and also with various Heathen potentates on the southern coast of Africa. Many countries have stamped the character of piracy upon this horrible traffic, so far as the authority of their own Municipal Laws may extend. When the Brazilian Empire became separated from Portugal, it acknowledged itself bound by the Treaties of the latter kingdom; but the Treaties favourable to the abolition of the Slave Trade met with much opposition in the new king-

(*k*) "Ils [that is, these Congresses] ont, *en principe,* adopté son abolition; depuis des traités particuliers sont venus donner la vie à la lettre morte du principe, et *fonder le droit international.*"—*De M. et De C.* t. v. p. 437: Traité des Noirs.

dom. In November 1826 the Brazils adopted the Portuguese Treaty with Great Britain of 1817, and in 1835 two articles were added to it; but the trade continued nevertheless. In August 1845 a British Act of Parliament (8 & 9 Victoria, c. 122) was passed, declaring Brazilian slavers justiciable in the British Courts of Admiralty. Against this Act the Brazilian Government formally protested, as a violation of International Law (*l*).

But whoever will read the correspondence between Lord Aberdeen, the then English Foreign Minister, with the Brazilian Government in 1845, will be satisfied that the charge is unfounded (*m*). A great and most beneficial change has since that period taken place in the councils and policy of the Brazilian Empire, such as, if persisted in, as there is every reason to suppose will be the case, leaves nothing to desire on the part of the British Government.

In December 1841 Austria, Prussia, and Russia, the only great Powers who had not before that period entered into Conventions on this subject, concluded a Treaty, which was ratified in February 1842, which placed the Slave Trade in the category of Piracy, and by which they bound themselves to exert every effort for the repression of this abominable offence.

CCCVIII. If Great Britain was deeply dyed by her *assiento* contract and her colonial slavery in this accursed commerce, her worst enemies must admit that she has, since the beginning of this century, been indefatigable in her efforts to wipe away the stain. She has made it "her own cause," to borrow the expression of the great foreign publicists of our day (*n*). Nor can the disinterested character of her righteous exertions be denied, since the statute of the 3rd & 4th William IV. c. 73, by which she has, at no small risk, and with no common

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(*l*) *Vide post*, the case of the *Crown* v. *Da Serva*; the date of the last trial is February 1845.

(*m*) Report from the Select Committee of the House of Commons on the Slave Trade Treaties, August 12, 1853.

(*n*) *De M. et De C.*, "sa propre cause," t. v. p. 440, and elsewhere.

amount of pecuniary sacrifice, abandoned domestic slavery in her colonies.

To be cognizant of the Treaties (*o*) entered into between Great Britain and other States, is to be apprised of all that have been concluded upon this subject; to know their contents is to be acquainted with the international history of the abolition of the Slave Trade.

The Catalogue of them is as follows (*p*):—

1814.	January 14	Treaty of peace with Denmark.
—	March 30	„ „ France.
—	August 28	„ „ Spain.
1815.	January 22	„ „ Portugal.
—	February 8	Declaration signed at the Congress of Vienna.
1817.	July 28	Treaty with Portugal.
—	September 23	„ Spain.
1818.	May 4	„ Netherlands.
1822.	November 28	Declaration signed at the Congress of Verona.
—	December 10	Treaty with Spain (supplementary article to the Treaty of September 23, 1817).
—	December 31	Treaty with the Netherlands (additional article to the Treaty of May 4, 1818).
1823.	January 25	Treaty with the Netherlands.
1824.	November 6	„ Sweden.
1825.	February	„ Buenos Ayres or Rio de la Plata.
—	April 18	„ Columbia (since divided into three Republics, New Granada, Equator, and Venezuela).
1826.	October 2	Treaty with Portugal (engagement of Portugal by an official Note sent to the English ambassador at Lisbon).

(*o*) "Depuis cette époque, les efforts du Cabinet de Saint-James ont été incessants; ils ont été (en point de droit du moins) couronnés par le succès: si *la traite* n'a pas entièrement disparu, le principe de son abolition, toutefois, a été généralement adopté: il est inscrit désormais dans le code des nations chrétiennes, qui, toutes, ont flétri un trafic reprouvé par l'humanité, la morale et la philanthropie,—trafic exercé trop souvent avec une cruauté inouie et avec un barbare mépris pour la race humaine, —trafic auquel les progrès de la civilisation devaient fixer un terme, dût sa suppression devenir, pendant quelque temps, une cause de souffrance pour les colonies dans leur culture et leur prospérité."—*De M. et De C.* t. v. p. 436.

(*p*) *De M. et De C.* t. v. p. 440.

1826.	November 23	Treaty with Brazil.
—	December 26	„ Mexico.
1831.	November 30	„ France.
1833.	March 22	„ France.
1834.	July 26	„ Denmark (her accession to the conventions of 1831 and 1833).
—	August 4	Treaty with Sardinia (ditto).
—	December 8	„ Ditto (additional article to the Treaty of August 8).
1835.	June 28	Treaty with Spain.
1837.	February 7	„ The Netherlands.
—	June 5	„ The Confederation of Peru, Bolivia.
—	June 9	Treaty with the Hanseatic Towns (accession to the conventions of 1831 and 1833).
—	November 24	Treaty with Tuscany (ditto).
1838.	February 14	„ Two Sicilies (ditto).
1839.	January 19	„ Chili.
—	March 25	„ Venezuela.
—	May 24	„ Rio de la Plata.
—	July 13	„ Uruguay (ratified January 21, 1842).
—	December 17	Treaty with the Imaum of Muscat.
—	December 23	„ Hayti (accession to the conventions of 1831 and 1833).
1840.	September 25	Treaty with Bolivia.
—	December 16	„ Texas.
1841.	February 24	„ Mexico.
—	August 7	„ Bolivia.
—	December 20	„ Austria, Prussia, and Russia (ratified February 19, 1842).
1842.	February 19	(See December 20, 1841.)
—	July 3	Treaty with Portugal.
—	August 9	„ The United States.
1845.	May 29	„ France.
1846.		„ The King and the Chiefs of Cape Mount (in Africa).
1848.	April 24	Treaty with Belgium.
—	September 4	„ Equator.
—	September 5	„ Muscat.
1849.	August 1	„ Arabs in the Persian Gulf.
1850.	April 2	„ New Granada.
1862.	April 7	„ United States.

The whole matter was thus summed up in a Report of a Committee of the House of Commons :—

"The attention of your Committee has been directed, by

" the instructions of the House, chiefly to the state of the
" Slave Trade in the *Brazils* and in *Cuba*; in the Colonial
" Possessions of *Portugal, Mozambique* on the East, and
" *Loanda* and *Angola* on the West Coast of Africa; and
" they have also briefly inquired into the state of the other
" parts of the West Coast of Africa, along the principal seats
" of the Slave Trade.

" The great interest which the people of this country have
" taken in the abolition of the Slave Trade appears in the
" very voluminous details laid annually before Parliament
" since the year 1815; and the Reports of both Houses of
" Parliament in the years 1849–50 have rendered it need-
" less, in the opinion of your Committee, to pursue the in-
" quiry beyond the last three years.

" By these Reports, it appears that there were, in 1849–50,
" twenty-four treaties in force, between Great Britain and
" foreign civilized Powers, for the suppression of the Slave
" Trade; ten of which give the right of search and mixed
" courts; twelve give the right of search and national tri-
" bunals; and two (with the United States and France)
" grant no right of search, but do contain a mutual obliga-
" tion to maintain squadrons on the Coast of Africa. There
" were also at that time forty-two treaties for the suppres-
" sion of the Slave Trade existing between Great Britain
" and native chiefs on the Coast of Africa.

" Since May 1850 two treaties have been concluded with
" civilized Governments, under which captured vessels are
" to be adjudicated upon by tribunals of their own countries;
" and twenty-three more treaties with native chiefs of Africa
" for the suppression of the Slave Trade." The Treaty of
1862 with the United States could not be included in this
recital.

CCCIX. Nevertheless, the English Law does not yet
hold Slave-trading to be *jure gentium* piracy, and in the case
which is about to be cited gave a very extraordinary proof
of the jealousy with which it regards any invasion of the
strictest provisions, both of International and Municipal

Law, even when the lives not only of British subjects, but of British officers and seamen, are concerned.

" On 26th February, 1845, the *Felicidade* (q), a *Brazilian* " schooner fitted up as a slaver, surrendered to the armed " boats of H. M. S. *Wasp*. She had no slaves on board. " The captain and all his crew, except *Majavel* and three " *others*, were taken out of her and put on board the *Wasp*. " On the 27th February the three others were taken out and " put on board the *Wasp* also. *Cerqueira*, the captain, was " sent back to the *Felicidade*, which was then manned with " sixteen British seamen, and placed under the command of " Lieutenant *Stupart*. The lieutenant was directed to steer " in pursuit of a vessel seen from the *Wasp*, which even- " tually turned out to be the *Echo*, a *Brazilian* brigantine, " having slaves on board, and commanded by *Serva*, one of " the prisoners. After a chase of two days and nights, the " *Echo* surrendered, and was then taken possession of by Mr. " *Palmer*, a midshipman, who went on board her, and sent " *Serva* and eleven of the crew of the *Echo* to the *Felicidade*. " The next morning Lieutenant *Stupart* took command of the " *Echo*, and placed Mr. *Palmer* and nine British seamen on " board the *Felicidade* in charge of her and of the prisoners.

" The prisoners shortly after rose on Mr. Palmer and his " crew, killed them all, and ran away with the vessel. She " was recaptured by a British vessel, and the prisoners brought " to this country to take their trial for murder. The Jury " found them guilty."—A case was reserved for the opinion of the Judges as to the legality of the conviction.

The majority of the Judges who were present at the argument (r) were of opinion that the conviction was wrong, on the ground of want of jurisdiction in an *English* Court to try an offence committed on board the *Felicidade*, and that if the lawful possession of that vessel by the *British* Crown,

(q) *The Queen* v. *Serva and others, Denison's Crown Cases Reserved*, vol. i. (1844–1850) p. 104.

(r) *Ibid.* p. 154.

through its officers, would be sufficient to give jurisdiction, there was no evidence brought before the Court at the trial to show that the possession was lawful.

This decision must have been founded on the two propositions, that, *jure gentium*, the Slave Trade was not Piracy, and that unless it were so, the British Courts had, under the circumstances, no jurisdiction over an offence committed on board the *Felicidade*. It is impossible, however, to be much surprised, after this trial, and the facts revealed during its pendency, at the statute of the British Parliament in August 1845.

CCCX. The illegality of Slavery, however, according to the Municipal Law, has a very important effect upon the international relations of the State in which such law prevails. If the *moveable property* of the subjects of a State find its way within the limits and jurisdiction of a Foreign State, it may be claimed by and must be restored to the *lawful* owners. In parts of the American Continent, though no longer in the United States, slaves are, unhappily, by Municipal Law considered as chattels or moveable property; a slave escapes or arrives in a country where slavery is illegal; he is claimed by his master; must he be restored? Unquestionably not; upon what ground? Upon the ground that the *status* of Slavery is contrary both to good morals and to the fundamental policy. This has been the doctrine of English Law from the date of the famous case of Somersett the negro, in 1771; and such it was declared to be in the more recent case of *the Creole*. The doctrine is not affected by the judgment of Lord Stowell, whether right or wrong, in the case of the *Slave Grace*; for that was founded on the alleged principle that the freedom incident to all who touch British soil might be obliterated in the case of a slave, although a British subject or chattel, who returned to the place in which Slavery was legal; his or her liberty had been (said that great judge) placed "into a sort of parenthesis" (*s*).

(*s*) *Haggard's Admir. Rep.* ii. p. 131.

CCCXI. The English cases on this subject (*t*) are few, but clear and quite decisive on the point.

The earliest case in which the doctrine appears to have been judicially laid down was that of *Shanley* v. *Harvey*, before Lord Chancellor Northington, in 1762. In that case a bill was filed against Harvey, a negro, and others for an account of the personal estate of a deceased person; and the question turned upon whether Harvey, to whom had been given a sum of money by the deceased on her death-bed, was a free man: he had been brought to England before this event happened. Lord Northington dismissed the bill with costs, observing, "as soon as a man sets foot on English ground he is free" (*u*). The case (*x*) next in date was that of *Knight* the negro, in 1770, tried before the Scotch Court, in which the same principle of law was acted upon. But the leading case is that of *Somersett the negro*, in 1771. In this case a *habeas corpus* was granted against a *Captain Knowles*, to bring up the body of Somersett, who was in his possession in irons, and the cause of his detention. It appeared that Somersett had been bought in Virginia, brought to England by his master, and, on refusing to return, was sent by his master on board Captain Knowles' ship to be carried to Jamaica and sold as a slave.

"The only question (Lord Mansfield said) before us is, "whether the cause on the return (to the writ of *habeas corpus*) "is sufficient? If it is, the negro must be remanded; if it is "not, he must be discharged. Accordingly the return states "that the slave departed and refused to serve, whereupon he "was kept to be sold abroad—*so high an act of dominion must* "*be recognized by the law of the country where it is used.* The "power of a master over his slave has been extremely different

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(*t*) See the argument of Mr. Hargrave, before Lord Mansfield, *Howell's State Trials*, vol. xx. p. 1; and the judgment in the case of the *Slave Grace.* A pamphlet by the author on the *Case of the Creole*, which is mentioned below, contains a summary of these cases.

(*u*) *Eden's Chancery Reports*, p. 126.

(*x*) *Fergusson on Divorce*, App. 396.

" in different countries. *The state of slavery is of such a nature*
" *that it is incapable of being introduced on any reasons, moral*
" *or political, but only by positive law,* which preserves its force
" long after the reasons, occasion, and time itself from whence
" it was ever created is erased from memory. *It is so odious*
" *that nothing can support it but positive law.* Whatever
" inconveniences therefore may follow from the decision, I
" cannot say this case is allowed or approved of by the law of
" England, and therefore the black must be discharged" (*y*).

In 1824 (*z*) this doctrine was upheld to its fullest extent by the Court of Queen's Bench. A British merchant, of the name of Forbes, was proprietor of a cotton plantation near the river St. John, in the Spanish province of East Florida, on which he employed one hundred Slaves, whom he had *legally* purchased. In 1815 thirty-eight of these Slaves escaped from their master, and took refuge on board a British man-of-war, commanded by Sir George Cockburn, who, with Sir Alexander Cochrane, was at that time in command of a squadron on the North American station. Spain was in amity with Great Britain, and Mr. Forbes prayed Sir G. Cockburn " to order the said thirty-eight slaves to be " forthwith delivered to him, their *lawful* proprietor." The Spanish Governor of East Florida made also an application to the same effect. But the Admiral replied, that the Slaves having reached the deck of a King's ship, were become free agents, and that he had no power or right to exercise any control over them. The proprietor, Mr. Forbes, afterwards brought an action against Sir Alexander Cochrane and Sir George Cockburn, in the Court of Queen's Bench at Westminster. The action altogether failed. Upon the trial, Mr. Justice Holroyd said: " Now it appears, from the facts " of the case, that the plaintiff had no right in these persons, " except in their character of Slaves, for they were not serving

(*y*) The Negro case, *Howell's State Trials,* vol. xx. p. 82.

(*z*) The following remarks on the English and French Law on this subject are taken from the pamphlet on *the Creole,* already referred to.

" him under any contract; and, according to the principles of
" the English law, such a right cannot be considered as war-
" ranted by *the general law of nature.* I do not mean to say
" that particular circumstances may not introduce a legal re-
" lation to that extent; but assuming that there may be such
" a relation, it can only have a local existence, where it is
" tolerated by the particular law of the place, to which law all
" persons there resident are bound to submit. Now, if the
" plaintiff cannot maintain this action under the general Law
" of Nature, independently of any positive institution, then his
" right of action can be founded only upon some right which
" he has acquired by the law of the country where he is
" domiciled. . . . . Here the plaintiff, a British subject,
" was resident in a Spanish colony, and perhaps it may be in-
" ferred, from what is stated in the special case, that by the
" law of that colony Slavery was tolerated. I am of opinion
" that, according to the principles of the English law, the
" right of Slaves, even in a country where such rights are
" recognized by law, must be considered as founded not upon
" the Law of Nature, but upon the particular law of that
" country. And, supposing that the law of England would
" give a remedy for the violation of such a right by one British
" subject to another (both being resident in, and bound to obey
" the laws of that country), still the right of these Slaves,
" being founded upon the law of Spain as applicable to the
" Floridas, must be co-extensive with the territories of that
" State. I do not mean to say, that if the plaintiff, having the
" right to possess these persons as his Slaves there, had taken
" them into another place, where, by law, Slavery also pre-
" vailed, his right would not have continued in such a place,
" the laws of both countries allowing a property in slaves.
" The law of Slavery is, however, a law *in invitum*; and when
" a party gets out of the territory where it prevails, and out
" of the power of his master, and gets under the protection
" of another Power, without any wrongful act done by the
" party giving that protection, the right of the master, which
" is founded on the Municipal Law of the particular place

" only, does not continue, and there is no right of action
" against a party who merely receives the Slave in that
" country, without doing any wrongful act."

And the same learned judge further observed: "In this
" case the Slaves belonged to the subject of a foreign State.
" The plaintiff, therefore, must recover here upon what is
" called the *comitas inter communitates*; but it is a maxim
" that cannot prevail in any cases where it violates the law
" of our own country, the Law of Nature, or the Law of
" God."

Chief Justice Best expressed himself, during the trial of
the same cause, in the following emphatic language:—

" Slavery is a local law, and therefore, if a man wishes to
" preserve his Slaves, let him attach them to him by affection,
" or make fast the bars of their prison, or rivet well their
" chains, for the instant they get beyond the limits where
" Slavery is recognized by the local law, they have broken
" their chains, they have escaped from their prison, and are
" free. These men, when on board an English ship, had all
" the rights belonging to Englishmen, and were subject to
" all their liabilities. If they had committed any offence,
" they must have been tried according to English laws. If
" any injury had been done to them they would have had a
" remedy by applying to the laws of this country for redress.
" I think that Sir G. Cockburn did all that he lawfully
" could do to assist the plaintiff; he permitted him to en-
" deavour to persuade the Slaves to return, but he refused
" to apply force. I think that he might have gone further,
" and have said that force should not be used by others; for
" if any force had been used by the master or any person in
" his assistance, can it be doubted that the Slaves might
" have brought an action of trespass against the persons
" using that force? Nay, if the Slave, acting upon his
" newly recovered right of freedom, had determined to
" vindicate that right, *originally the gift of nature*, and had
" resisted the force, and his death had ensued in the course of
" such resistance, can there be any doubt that every one who

" had contributed to that death would, according to our laws,
" be guilty of murder? That is substantially decided by
" Somersett's case, from which it is clear, that such would
" have been the consequence had these Slaves been in Eng-
" land; and, so far as this question is concerned, there is no
" difference between an English ship and the soil of Eng-
" land; for are not those on board an English ship as much
" protected and governed by the English laws as if they
" stood upon English land? If there be no difference in
" this respect, Somersett's case has decided the present:
" he was held to be entitled to his discharge, and, con-
" sequently, all persons attempting to force him back into
" Slavery would have been trespassers, and if death had
" ensued in using that force, would have been guilty of
" murder. It has been said that Sir G. Cockburn might
" have sent them back. *He certainly was not bound to*
" *receive them into his own ship in the first instance; but*
" *having done so, he could no more have forced them back*
" *into Slavery than he could have committed them to the deep.*
" There may possibly be a distinction between the situation
" of these persons and that of Slaves coming from our own
" islands, for we have unfortunately recognized the existence
" of Slavery there, although we have never recognized it in
" our own country. The plaintiff does not found his action
" upon any violation of the English laws, but he relies
" upon the *comity of nations.* I am of opinion, however,
" that he cannot maintain any action in this country by the
" comity of nations. Although the English law has recognized
" Slavery, it has done so within certain limits only; and I
" deny that in any case an action has been held to be main-
" tainable in the municipal courts of this country, founded
" upon a right arising out of Slavery.

" When they got out of the territory where they became
" Slaves to the plaintiff, and out of his power and control,
" they were, by *the general Law of Nature,* made free,
" unless they were Slaves by the particular law of the place
" where the defendant received them. They were not

"Slaves by the law which prevailed on board the British "ship of war. I am therefore of opinion, that the defen-"dants are entitled to the judgment of the Court."

CCCXII. This doctrine, it is right to say, however agreeable to the genius, is not peculiar to the free constitution of Great Britain.

In the year 1738, this generous maxim of French jurisprudence was put to its severest test in the case of "Jean "Borcaut," a "nègre créole," which will be found reported in the thirteenth volume of the "Causes célèbres," the substance of which was as follows:—When France became possessed of colonies in the West Indies, she shared the guilt of Christian Europe in permitting Slavery in her colonies. The first edict by which it was authorized was issued in 1615; but, nevertheless, till 1716 the slaves of French colonists became free when they touched the soil of France. A royal ordonnance of that date, the provisions of which were explained and confirmed by one issued in 1738, permitted, under certain provisions ensuring their good treatment and restricting the time of their Slavery, Slaves from the French colonies to be brought by their masters into France without acquiring their freedom. One of the conditions, however, was, that the master should duly register at the first port the arrival of the Slave, the probable time of his stay, &c., &c., according to certain prescribed formalities; in any case where these conditions had not been literally and strictly fulfilled, the ancient law of France resumed its operation. There had been some omission of these prescribed formalities of registry in the case of the slave *Jean Borcaut*, who accordingly claimed, and after a trial before "l'Audience "d'Amirauté" obtained, his liberty. In the report of the trial will be found the *plaidoyers* for the negro, for the Crown, and for the master: and in the speech of the advocate for the master there is this remarkable passage:—

"*On ne connoît point, il est vrai, d'esclave en France, et "quiconque a mis le pied dans ce Royaume est gratifié de la "liberté.*

"Mais quelle est l'application, et quelle est la distinction "du principe?

"*Le principe est vrai dans le cas où tout autre esclave "qu'un esclave nègre arrivera dans ce Royaume.*

"*Par exemple, qu'un étranger, qu'un négociant françois "arrive dans ce Royaume avec des sauvages qu'il prétendra "être ses esclaves; qu'un Espagnol, qu'un Anglois vienne en ce "Royaume avec des esclaves nègres dépendans des colonies de "sa nation; voilà le cas dans lequel par la loi, par le privilège "de la franchise de ce Royaume, la chaîne de l'esclavage se "brisera, et la liberté sera acquise à de pareils esclaves.*

"Voilà le cas dans lequel il faut appliquer l'art. 6 du "Tit. 1, liv. i. des Instituts de Loysel. Voilà les cas où "il faut dire avec M. de René Chopin, que l'entrée dans la "ville de Paris assure le maintien, et devient l'asile de la "liberté.

"*Lutetiam velut sacro-sanctam civitatem omnibus præbere "libertatis atrium quoddam asiliumque immunitatis*" (*a*).

Another instance may be added of the jealousy with which France regarded this partial abrogation of her general law in favour of liberty.

In 1758, "Francisque," a negro slave bought by his master in *Hindostan,* was brought by him to France. Francisque claimed his liberty: his master contended that he had carefully fulfilled the formalities prescribed by the "Code "noir;" it was answered that this law only affected African and American Slaves, and could not be extended to the East Indies. The Slave obtained his liberty (*b*). The force of these examples is not weakened by the reflection that they are furnished by what was at the time an undeniably despotic State. Such was the law in favour of liberty, passed even by an absolute monarchy during what would now be designated the comparatively dark ages.

CCCXIII. The same doctrine was maintained by Poland

(*a*) *Causes célèbres,* tom. xiii. p. 562.

(*b*) *Denisart, Décisions nouvelles,* tom. iii. p. 406, tit Nègre, n. 45.

during the period of her existence as an independent kingdom.

Wicquefort (*c*), in that part of his treatise on the functions of ambassadors in which he discusses the privileges of their residence, tells the story of a certain Pole who, having left his country and gone into Muscovy, had there sold himself into Slavery, but afterwards, being in Holland, he fled to the house of the Polish Ambassador: "Les Moscovites "en firent tant de bruit, que les estats de Hollande, après "avoir fait occuper toutes les avenues de la maison, y firent "entrer quelques officiers et soldats pour faire la recherche "du fugitif. Ils n'y trouvèrent personne, et cependant ils "firent cet affront au ministre public du roy de Pologne. Le "Polonois n'estoit point esclave né du Czaar; et s'il l'estoit "devenu en allant demeurer en Moscovie, *il recouvra sa liberté "naturelle en mettant le pié dans un païs qui ne nourrit point "d'esclaves, et où on ne devroit point sçavoir ce que c'est que "de servitude ou d'esclavage. Les Jurisconsultes françois "disent, que l'air de France est si bon et si bénin, que dès "qu'un esclave entre dans le Roïaume, mesme à la suite d'un "ambassadeur, il ne respire que liberté, et la recouvre aussi-"tost.*"

CCCXIV. The last occasion upon which an international question of this kind was raised happened in 1841.

A brig belonging to a subject of the United States, called *the Creole*, of Richmond in Virginia, sailed on the 27th of October, 1841, with a cargo of merchandise, and one hundred and thirty-five slaves, from the Hampton Roads, for New Orleans. During the passage, the Slaves mentioned killed a slave-owner, who resisted their attempt to free themselves, wounded the captain, and compelled the rest of the crew to take the vessel into the port of Nassau in New Providence Island, in possession of the British Crown. On their arrival, the American Consul requested that a guard might be placed to prevent the escape of persons charged with a piratical act:

(*c*) *L'Ambassadeur et ses Fonctions, par M. de Wicquefort,* t. i. p. 418.

the request was acceded to. An investigation was made into the circumstances by two British magistrates, the result of which was, that nineteen persons were imprisoned as being connected with the murder, the remainder being allowed to stay or depart as they pleased. The British authorities further refused to deliver up the nineteen until they should have received instructions to that effect from England.

The claim of the Government of the N. A. United States, that the *coloured persons*, as the slaves were called, should be restored to their master, was not acceded to on the part of the British Government (*d*). It would only have been necessary to cite, in answer to such demands, the language of Mr. Justice Story: "*So the state of Slavery* "*will not be recognized in any country whose institutions* "*and policy prohibit Slavery*" (*e*).

Bodinus, in his first book, "De Republica" (*f*), testifies that such had been from early times the law and custom of France. He illustrates it by two examples. The first was the case of a Spanish Ambassador who brought with him a Slave in his retinue. The Slave, in spite of all remonstrance, claimed and obtained his freedom on entering the French dominions. In the second instance, a Spanish merchant happened to touch at Toulon on his way to Genoa, with a domestic Slave among his servants, when "hospes, re intellecta, servo persuasit ut "ad libertatem provocaret;" the merchant complained that he had *bona fide* purchased the slave, that he was not bound by the law of France, that he was not resident there, but happened only to touch at a French port on his passage to Genoa, and that at least he ought to be remunerated for the purchase-money of the slave; but he found that his remon-

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(*d*) See pamphlet on the case of *The Creole*, already referred to, and opinion of the Law Lords in the House of Lords, February 1842.

(*e*) *Story's Conflict of Laws*, p. 97. See also *Mr. Wheaton's Treatise on International Law*, vol. i. p. 146, exception 2.

(*f*) L. i. *de Rep.* p. 41. *Bod. de Rep.* libri sex: Paris, 1586.

strance was fruitless, and made a private bargain with his slave for the continuance of his services.

CCCXV. The Constitution of the United States recognized the relation of Master and Slave where it existed by the local law of a particular State, but the Convention inserted, at the instance of the Southern States, the following clause:—

"No person held to service or labour in one State, under "the law thereof, escaping into another, shall in consequence "of any law or regulation therein be discharged from such "service or labour, but shall be delivered up on claim of "the party to whom such service or labour may be due."

Subsequent Acts were passed to give effect to this clause, and the Supreme Court held that laws made by the States to prevent, or even to assist, the arrest and recovery of fugitive slaves were unconstitutional and void (*g*).

But the law was regarded with increasing disgust by the inhabitants of the free-labour States, and in 1858 Mr., afterwards President, Lincoln said:

"I believe this Government cannot permanently endure "half slave and half free. I do not expect the Union to be "dissolved; I do not expect the house to fall; but I do "expect that it will cease to be divided. It will become "all one thing, or all the other. Either the opponents of "slavery will arrest the further spread of it, and place it "where the public mind shall rest in the belief that it is in "the course of ultimate extinction, or its advocates will push "it forward till it shall become alike lawful in all the States, "old as well as new, North as well as South" (*h*).

In 1865 the *status* of Slavery was formally abolished in the United States.

CCCXVI. I may now, therefore, with increased confi-

(*g*) *Prigg* v. *Commonwealth of Pennsylvania, Peters's R.* xvi. 539–632.

(*h*) *The Neutrality of Great Britain during the American Civil War*, by M. Bernard, Professor of International Law at Oxford, pp. 24–27.

dence repeat the opinion expressed in the former edition of this work, that, on the whole, it seems not unreasonable to hope, that before many more years have elapsed, both Municipal and International Law will be brought into harmony with the Law of Nature; and that, to the question of the abolition both of Slavery and the Slave Trade, the emphatic language of Grotius may be applicable—"*humano* "*generi placuit*" (*i*).

(*i*) L. ii. c. x. 2, 1.

CHAPTER XVIII.

RIGHT OF JURISDICTION OVER PERSONS.

CCCXVII. We have now to consider the right incident to a State of absolute and uncontrolled power of jurisdiction over all Persons, and over all Things, *within* her territorial limits, and, as will be seen in certain specific cases, *without* them.

CCCXVIII. First, as to the Right of Territorial Jurisdiction over Persons: they are either

1. Subjects, or
2. Foreigners commorant in the land.

CCCXIX. 1. With regard to the jurisdiction and authority of States over their own proper subjects, no doubt can be raised; under the term *subject* may be included both *native* and *naturalized* citizens. With respect to *native* citizens, the right of which we are speaking is manifestly essential to the independence of the State. "Sanè "(Grotius observes) ex quo civiles societates institutæ sunt, "certum est rectoribus cujusque speciale quoddam *in suos* "jus quæsitum" (*a*).

The native citizens of a State are those born within its dominions (*b*), even including, according to the law of England (*c*), the children of alien friends. So are all those born on board the ships of the *navy*, or within the lines of the *army*, or in the house of the Ambassador, or of the Sove-

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(*a*) L. ii. c. xxv. 8.

(*b*) *Günther*, vol. ii. p. 261.

(*c*) *Stephen's* (*Blackstone's*) *Commentaries*, vol. ii. p. 4. *Calvin's case*, 7 *Coke's Reports*, 18 a.

reign (*d*) if he should happen to be sojourning in a foreign country.

Every State has an undoubted claim upon the services of all its citizens. Every State has, strictly speaking, a right of prohibiting their egress from their own country (*e*), a right still exercised by some of the continental Powers of Europe. These rights are subject to no control or directions as to their exercise from any foreign State.

CCCXX. Every State has a right of recalling (*jus avocandi*) its citizens from foreign countries (*f*), especially for the purpose of performing military services to their own country. Great difficulty, however, necessarily arises in the enforcement of this right. No foreign nation is bound to publish, much less enforce, such a decree of revocation. No foreign State can legally be invaded for the purpose of forcibly taking away subjects commorant there. The high seas, however, are not subject to the jurisdiction of any State; and a question therefore arises whether the State seeking its recalled subjects can search for them in the vessels of other nations met with on the high seas? This question, answered in the affirmative by Great Britain, and in the negative by the United States of North America, has led to very serious quarrels between the two nations (*g*)—quarrels which it may be safely predicted will not arise again. For I cannot think that it would be now contended that the claim of Great Britain was founded upon International Law. In my opinion it was not.

(*d*) *Vide post.*

(*e*) "Solet hic illud quæri, an civibus de civitate abscedere liceat, venia non impetrata. Scimus populos esse ubi id non liceat, ut apud Moschos: nec negamus talibus pactis iniri posse societatem civilem, et mores vim pacti accipere."—*Grot.* l. ii. c. v. 24.

Wheaton, Élém. tom. i. p. 135.

(*f*) *Günther*, vol. ii. p. 309.

Heffters, s. 59.

(*g*) See correspondence between Mr. Webster and Lord Ashburton. *Wheaton's Hist.* p. 737, &c.

Vide post, as to jurisdiction over ships of war, and merchant vessels in foreign harbours.

CCCXXI. 2. It has been said that these rules of law (*h*) are applicable to *naturalized* as well as *native* citizens. But there is a class which cannot be, strictly speaking, included under either of these denominations, namely, the class of those who have ceased to reside in their native country, and have taken up a permanent abode (*domicilium sine animo revertendi*) in another (*i*). These are domiciled inhabitants; but they have not put on a new citizenship through some formal mode enjoined by the law of the new country. They are *de facto* though not *de jure* citizens of the country of their domicil (*k*).

CCCXXII. It was a great maxim of the constitutional policy of ancient Rome not to allow her citizenship to be shared with that of any other State (*l*). A different custom prevailed in Greece and in other States; but the Roman citizen who accepted another citizenship became *ipso facto* disfranchised of his former rights.

CCCXXIII. It is sometimes said that a different rule prevails in modern times, and that a man can be at one and the same time the citizen of two States (*m*). In truth, however, this must depend upon the civil policy and domestic regulations of each State. But it is true, as a general proposition, that a man can have only *one allegiance* (*n*). The State

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(*h*) *Story, Conflict of Laws*, s. 48, c. iii.; *ib.* s. 540, c. xiv.
Fœlix, l. i. t. i. s. 2, *Du Changement de Nationalité.*
Heffters, s. 58.
Colquhoun's Civil Law, s. 393, vol. i. p. 377; *ib.* s. 389, p. 373.
Günther, vol. ii. p. 267.

(*i*) *Vide post*, chapters on DOMICIL, under COMITY.
Vattel, l. i. c. xix. s. 211, &c.

(*k*) See a later part of this work, on COMITY, for further remarks on Domicil.

(*l*) *Vide Cicer. Orat. pro Balbo, passim*, especially s. 12. See *Zouche's* remarks thereupon, p. 2, s. ii. xiii. *De Jure Feciali.*

(*m*) *Heffters* (s. 59) maintains this ground in opposition to *Zouche*, cited above.
Günther, vol. ii. p. 325, *Einheimischen.*

(*n*) The law is laid down with great perspicuity by *Zouche*. Speaking of a decision of the French tribunals on a question of Domicil, and

may, as Russia has done, forbid her subjects to be domiciled elsewhere, or may permit it as England has done; but in either case, if a collision between the two *allegiances,* so to speak, should arise, the latter would be obliged to yield to the former. For instance, if the two countries were at war, the citizen who was taken in arms on behalf of the country of his naturalization against the country of his birth would, strictly speaking, be guilty of treason. In these times, probably, most States would take into consideration the length of time during which the new domicil had been acquired, whether offences against the original State were to be punished, or her protection invoked by her long-absent citizen.

CCCXXIV. All strangers *commorant* in a land owe obedience, as subjects for the time being (*subditi temporanei*), to the laws of it. The limitation sometimes incident to this proposition will be stated in a subsequent section, in which the right of protecting subjects in a foreign land is discussed.

CCCXXV. *Naturalized* foreigners are in a very different position from merely *commorant* strangers (*o*). It has been the policy of wise States, it was especially the policy of Rome, to open wide the door for the reception and naturalization of foreigners (*p*).

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vindicating it from the charge of private partiality, he says: "Fortassis vero id respexerunt, quod quamvis incolatus et *Domicilium* in externo regno sufficiunt ad constituendum aliquem *subditum jurisdictioni et præstandis muneribus obnoxium* non tamen sit satis ad constituendum *Civem,* ut eorum *privilegiorum civilium* sit particeps quæ in *regno natis* competunt nisi specialis allectio supervenerit."—*De Judicio inter Gentes,* pars ii. s. ii. 14.

(*o*) *Günther,* vol. ii. pp. 267, 316, n. *e.*

(*p*) "Illud vero sine ulla dubitatione maximè nostrum fundavit imperium, et populi Romani nomen auxit, quod princeps ille, creator hujus urbis, Romulus fœdere Sabino docuit, etiam hostibus recipiendis augeri hanc rempublicam oportere: cujus auctoritate et exemplo nunquam est intermissa a majoribus nostris largitio et communicatio civitatis."—*Cic. pro L. Corn. Balbo.* "Malè qui peregrinos urbibus uti prohibent, eosque exterminant, ut Pennus apud patres nostros, Papius nuper."—*De Off.* l. iii. c. xi.

Naturalization is usually called a change of nationality. The naturalized person is supposed, for the purposes of protection and allegiance at least, to be incorporated with the naturalizing country.

This proposition is, generally speaking, sound; but it must admit of one qualification similar to that already mentioned with respect to the domiciled subject, if the naturalized person should have been the original subject of a country which did not allow him to shake off his allegiance (*exuere patriam*). In this event, if he should find himself placed in a situation—the breaking out of war, for instance—in which his duties to the country of his birth and of his adoption are at variance, the former country would not regard him as a lawful enemy, but as a rebel; nor could the *jus avocandi* already spoken of be legally denied to her by the adopting or naturalizing country, though the enforcement of the right could not be claimed. Banishment itself does not destroy the original tie of allegiance.

The Letter of Sir L. Jenkins, from Nimeguen, to Sir William Temple, at the Hague, contains the opinion of a most careful, learned, and practical jurist upon this question.

"My Lord,

"To the question you were pleased to send me, about the three "*Scotchmen*, and the objection of the States to your memorial, that after "a sentence of banishment, the allegiance of a subject is extinguished; "I have this with submission to offer, that there are several things in "the Practice of Nations (which is the law in the question) that make "it impossible for subjects, in my poor opinion, to renounce or divest "themselves of the allegiance they were born under.

"For instance, no subject of our master's (we'll put the case at home) "can by the Law go out of his dominions without his leave; nor is "this leave, whether it be expressed or by implication (as in the case "of merchants and sea-faring men), granted, but there is a time always "supposed for his return; I mean when the King had need of his "service; and in the case of every man of quality it is always prefixed. "Besides there is no doubt, and we see it is a frequent practice in *Eng-* "*land, France*, &c., to call back the subjects from foreign services and "residences within a time prefixed, and that upon pain of death; in "which case, if they return not, the pain is well executed upon them, "(provided they lie not under any impediment), if they afterwards fall "into the hands of their master: and I think the Court of Constable

" and Marshal in *England* would be the proper judicature in such a
" case.

" 2. Though my Prince should give his leave to settle myself for
" instance, in *Sweden*, and that I should purchase and have land given
" me in *Sweden*, upon condition, and by the tenure of following the
" King in his wars; if my king should afterwards have a war with
" *Sweden*, that king cannot command me to follow him against my
" natural and original master. The reason of it is, he cannot command
" me to expose myself more than his own natural-born subjects do;
" which yet would be my case, if I should appear with him in the field
" against my Natural Liege Lord; into whose hands, if I should happen
" to fall alive, he would have a right to punish me as a traitor and a
" rebel, and put me to the torture and ignominy of his laws at home,
" which he cannot pretend to do when he takes those that are not his
" born subjects, nor inflict anything upon them but what is agreeable to
" the permissions of war.

" 3. Nay, which is more, in the case of Reprisals, if I live in *Sweden*,
" a Burgher, Officer, or what you please, and a *Dane*, for instance, hath
" Letters of Reprisals against the *English* nation, if my goods fall into
" the *Dane's* hands, they are lawful prize, though I be never so much
" habituated in *Sweden*; unless it proves, that I am so transplanted
" thither *cum pannis*, that I have neither goods nor expect them in *England*,
" and have resolved never to return thither; which is an exception that
" some learned men allow of, but not all: these things show that the
" quality of a natural-born subject is tied with such indissoluble bonds
" upon every man, that he cannot untie all by any means.

" I am, &c.,

" L. JENKINS " (q).

CCCXXVI. A change (r) of nationality is effected by the operation of the law upon the acts of the individual. The wife by her marriage acquires the nationality of her husband; the naturalization of the husband carries with it, *ipso facto*, that of the wife. " C'est la conséquence du lien " intime qui unit les époux, consacré par toutes les législa- " tions, et passé ainsi en principe du droit international " (s).

(q) *Life of Jenkins*, vol. ii. p. 713.

(r) *Vide post*, chapters on DOMICIL, under COMITY.

Fœlix, l. i. t. i. s. 2. My obligations to this work are very great, though in the present instance there is a departure from the division of the subject adopted by its erudite author; of whose untimely death, during the progress of this work, I have heard with sincere regret.

(s) *Fœlix*, ib. s. 40.

Upon the same principle, the naturalization of the father carries with it that of his minor children; and *M. Fœlix* is of opinion that the naturalization of a widow has the same effect upon her minor children (*t*). It is clear that in neither case are children, *majors* by the law of the land of their birth, affected by the act of their parents.

CCCXXVII. A collective naturalization of all the inhabitants is effected when a country or province becomes incorporated in another country by conquest, cession, or free gift (*u*). Under the old law of France, the Dutch and Swiss and other nations had, by virtue of Treaties, the rights of natives (*indigenatûs*); and by the Bourbon Family Compact of 1761, a similar privilege was conceded to Spanish subjects.

CCCXXVIII. The laws of *France* since 1790 have contained a variety of provisions upon the means of *acquiring* and *losing* naturalization (*x*).

By the law now in force, a Frenchman loses his native character by naturalization, or by accepting office without the permission of the State, in a foreign country, or by so establishing himself abroad as to evidence an intention of never returning to his country. He may, however, at any time recover his native character by renouncing his foreign office and domicil, and making due application to the State (*y*).

(*t*) *Fœlix*, l. i. t. i. s. 41.

(*u*) *Günther*, vol. ii. p. 268, n. *e*.

(*x*) *Fœlix*, l. i. t. i. s. 2.

(*y*) *Code civil*, l. i. t. i. c. ii. (De la Privation des Droits civils) s. 17: "La qualité de Français se perdra :—1. Par la naturalisation acquise en pays étranger; 2. Par l'acceptation, non autorisée par le roi, de fonctions publiques conférées par un gouvernement étranger; 3. Enfin, par tout établissement fait en pays étranger, sans esprit de retour.

"Les établissemens de commerce ne pourront jamais être considérés comme ayant été faits sans esprit de retour.

18. "Le Français qui aura perdu sa qualité de Français pourra toujours la recouvrer en rentrant en France avec l'autorisation du roi, et en déclarant qu'il veut s'y fixer, et qu'il renonce à toute distinction contraire à la loi française."

In the *Austrian* dominions the stranger acquires rights of citizenship by being employed as a public functionary. The superior administrative authorities have the power of conferring these rights upon an individual who has been previously authorized, after ten years' residence within the empire, to exercise a profession. Mere admission into the military service does not bring with it naturalization. Emigration is not permitted without the consent of the proper authorities; but the emigrant who has obtained permission, and who quits the empire *sine animo revertendi,* forfeits the privileges of an Austrian citizen. The wife of an Austrian citizen acquires citizenship by her marriage.

In *Prussia* the stranger acquires the right of citizenship by his nomination to a public office; and by a recent law (1842) the superior administrative authorities are empowered to naturalize any stranger who satisfies them as to his good conduct and his means of existence. Certain exceptions are made with regard to Jews, to subjects of another State belonging to the Germanic Confederation, to minors, and to persons incapable of disposing of themselves. The same rule as in Austria applies to the emigrant. The wife of a Prussian citizen acquires citizenship by her marriage (*z*).

In *Bavaria,* by the law of 1818, the *jura indigenatûs* are acquired in three ways:—

1. By the marriage of a foreign woman with a native.
2. By a domicil taken up by a stranger in the kingdom, who at the same time gives proof of his freedom from personal subjection to any foreign State.
3. By royal decree.

The Bavarian citizenship is also lost in three ways:—

1. By the acquisition, without the special permission of the king, of *jura indigenatûs* in another kingdom.
2. By emigration.
3. By the marriage of a Bavarian woman with a stranger.

(*z*) *Fœlix,* l. i. t. i. s. 2.

In the kingdom of *Wurtemberg*, a stranger must belong to a *commune* in order to acquire citizenship, unless he be nominated to a public function. The citizenship is lost by emigration authorized by the Government, or by the acceptance of a public office in another State.

CCCXXIX. In the kingdom of the *Netherlands* the power of conferring naturalization rests with the Crown by the 9th and 10th articles of the Fundamental Law of 1815.

CCCXXX. In *Russia*, naturalization is effected by taking an oath of allegiance to the Emperor; but naturalized strangers may, at any time, renounce their naturalization and return to their country.

In the *United States of North America*, the constitution confers on Congress the power to establish a uniform rule of naturalization (*a*); and it has been held by the tribunals of the highest authority in that country, that the power so vested in Congress is exclusive, and that it cannot be exercised by any one of the Federal States.

In 1868 the United States passed an Act of Naturalization, in which, among other things, it was enacted, "That "all naturalized citizens of the United States, while in "foreign States, shall be entitled to and shall receive pro-"tection of persons and property that is accorded to native-"born citizens in like situations and circumstances.

"And whenever it shall be duly made known to the Pre-"sident that any citizen of the United States has been "arrested, and is detained by any foreign Government in "contravention of the intent and purposes of this Act, upon "the allegation that naturalization in the United States "does not operate to dissolve his allegiance to his native

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(*a*) *Vide suprà*, ch. v. cxix.

1 *Kent*, p. 422, pt. 2, l. xix. (5). 2 *Ib.* p. 50, uniform rule of naturalization established by Act of 1802.

2 *Dallas, Rep.* 370.

3 *Washington Circuit Rep.* 313.

2 *Wheaton's Rep.* 269.

5 *Wheaton's Rep.* 49.

2 *Kent*, 63.

"Sovereign, or if any citizen shall have been arrested and "detained, whose release upon demand shall have been un-"reasonably delayed or refused, the President shall be and "hereby is empowered to suspend in part or wholly com-"mercial relations with the said Government, or, in case no "other remedy is available, order the arrest, and to detain "in custody, *any subject or citizen of the said foreign Go-"vernment* who may be found within the jurisdiction of the "United States, except Ambassadors and other public "Ministers, and their domestics and domestic servants, and "who has not declared his intention to become a citizen "of the United States; and the President shall, without "delay, give information to Congress of any such proceed-"ings under this Act" (*b*).

CCCXXXI. In *Great Britain*, the Law relating to Naturalization is governed by a recent statute (*c*), which provides for the *status* of Aliens in the United Kingdom, and contains provisions which enable, for the first time, a British subject to renounce allegiance to the Crown, and also to resume his British nationality; also with respect to the National *status* of married women and children. The statute also gives power to the British Colonies to legislate with respect to naturalization, such legislation, however, being subject to be confirmed or disallowed by the Crown.

This important statute will be found printed at length in the Appendix to this volume.

It may be well to observe that a foreigner naturalized in a British colony is generally entitled to the protection of the British Government beyond the precincts of that colony,

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(*b*) *Ann. Reg.* 1868, p. 250.

This strange reprisal, after the fashion of the First Napoleon, of seizing and imprisoning innocent foreign subjects, is novel in modern public law. It would be equivalent to a declaration of war against the State to which the subject belonged. No State has a right to dissolve the relations of native allegiance between a foreign subject and his State without that State's consent.

(*c*) 33 *Vict.* ch. xiv., An Act to amend the Law relating to the legal condition of Aliens and British Subjects, May 12, 1870.

but not if he be at the time of invoking such protection in the State in which he was born.

CCCXXXII. A great difficulty has arisen with respect to the legal *status* of *liberated Africans,* who reside and trade and acquire property in the British territory at Sierra Leone; but who, not being naturalized subjects, frequently commit with impunity the offence of buying and selling slaves without the boundary of the territory. An ordinance passed the legislature of Sierra Leone (June 8, 1852) "to secure and confer "upon liberated Africans the civil and political rights of "natural-born British subjects;" but it was disallowed by the Crown of England, as it would appear, upon the ground that, by the instrumentality of Treaties more amply worded with the African chiefs, the provisions of the stat. 6 & 7 Victoria, c. 98, might be made applicable to liberated Africans, though not British subjects, within the Queen's territories (*d*).

CCCXXXIII. The *Right of Jurisdiction* (*e*), Civil and Criminal, over all Persons and Things within the territorial limits, which is incident to a State relatively to its own subjects and their property, extends also, as a general rule, to *foreigners* commorant in the land (*f*). This subject has been

(*d*) See *Papers relative to the rights of liberated Africans, and the prevention of Slave-dealing at Sierra Leone; laid before Parliament, August* 12, 1853, p. 30, &c.

(*e*) "Ad gubernationem populi moraliter necessarium est, ut qui ei vel ad tempus se admiscent, quod fit intrando territorium, ii conformes se reddant ejus populi institutis."—*Grotius,* l. ii. c. ii. s. v. p. 191.

"Pro subjectis imperii habendi sunt omnes qui intra terminos ejusdem reperiuntur, sive in perpetuum sive in tempus commorantur."—*Huberus, de Conflictu Legum,* l. i. t. iv. s. ii.

"In regard to foreigners resident in a country, although some jurists deny the right of a nation generally to legislate for them, it would seem clear upon general principles that such a right did exist."—*Story, Conflict of Laws,* s. 541.

Wheaton, Élém. t. i. p. 2, c. ii. pp. 137–8.

See *Correspondence between some of the Continental Powers and Great Britain respecting the Foreign Refugees in London, presented to both Houses of Parliament by command of her Majesty,* 1852.

De delictis Peregrinorum, eaque puniendi ratione (Diss. Jurid. Inaug.): *Homan,* Gröning. 1823, p. 33, &c.

(*f*) *The Peninsular and Oriental Company* v. *Shand,* 3 *Moore's P. C. Rep.* N. S. pp. 390–1.

already touched upon under the title of RIGHT TO SELF-PRESERVATION, and will be again considered in the chapter on EXTRADITION.

CCCXXXIV. With respect to the administration of Criminal Law, it must be remembered that every individual, on entering a foreign territory, binds himself by a tacit contract to obey the laws enacted in it for the maintenance of the good order and tranquillity of the realm (*g*), and it is manifestly not only the right, but the duty of a State to protect the order and safety of the society entrusted to its charge, equally against the offences of the foreigner as of the native (*h*). This proposition, it should be observed, must not be confounded with another, namely, the alleged right or duty of a State to punish a *citizen* for an offence committed *without* its territory,—this is a proposition of Municipal, the

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(*g*) "Quare etiamsi peregrinus cum cive paciscatur, tenebitur, illis legibus, quia qui in loco aliquo contrahit, tanquam *subditus temporarius* legibus loci subjicitur."—*Grotius*, l. ii. c. xi. 5, 2.

"Quia actiones peregrinorum quamdiu in alieno territorio versantur, vel commorantur, subjacent legibus loci in quo sunt, si peregrini in territorio alieno delinquunt juxta leges loci puniendi sunt."—*Wolff, Jus Gent.* s. 301.

Vattel, l. c. 8, 101.

Rocco, Dell' Uso delle Leggi delle Due Sicilie, p. 161.

Martens, s. 99.

Klüber, s. 62.

Massé, Le Droit commerc., etc.: Devoir des étrangers, t. ii. p. 53,

(*h*) *Martens*, s. 97.

Tittman, Die Strafrechtspflege in völkerrechtlicher Rücksicht, 11 (Dresden, 1817).

Feuerbach, Lehrbuch, 31.

Portalis: "Chaque État a le droit de veiller à sa conservation, et c'est dans ce droit que réside la souveraineté. Or comment un État pourrait-il se conserver et maintenir, s'il existait dans son sein des hommes qui pussent impunément enfreindre sa police et troubler sa tranquillité? Le pouvoir souverain ne pourrait remplir la fin pour laquelle il est établi, si des hommes étrangers ou nationaux étaient indépendants de ce pouvoir. Il ne peut être limité, ni quant aux choses, ni quant aux personnes. Il n'est rien s'il n'est tout. La qualité d'étranger ne saurait être une exception légitime pour celui qui s'en prévaut contre la puissance publique, qui régit le pays dans lequel il réside. Habiter le territoire, c'est se soumettre à la souveraineté."—*Code civ.*: suivi de l'exposé des Motifs, t. ii. p. 12.

other is one of International Law. The strict rule of Public Law undoubtedly is, that a State can only punish for offences committed within the limits of its territory: this is, at least, the natural and regular consequence of the territorial principle.

Nevertheless it is a pretty general maxim of European Law, that offences committed against their own country, by citizens in a foreign country, are punishable by their own country when they return within its confines. It is, however, clearly within the *competence* of the State, within whose territories the offence has been committed, to punish the offender, and especially if the offence has not been of a *public* character against the foreign State, but of a *private* character against a brother citizen of the offender. But in cases of a *public* character, a *double* offence is committed; *one* against the State of which the offender is a subject, *another* against the general law of the land within which the offence is devised and perpetrated. There is a *maleficiorum concursus.* Whether the State of the offender will punish him after he had been punished by the State within whose limits he committed the offence, is, as indeed the whole question is, a matter of Public rather than of International Law (*i*).

The French Law, as a general maxim, holds that *penal justice* is confined within territorial limits, but with the following exceptions (*j*):—I. If the offence be against the

(*i*) *H. A. M. Van Asch Van Wijck, De delictis extra Regni territorium admissis.* Cf. *præsert.* cap. i. s. 4, cap. ii. s. 3, cap. iii. s. 3. (Utrecht, 1839.)

(*j*) "5. Tout Français qui se sera rendu coupable, hors du territoire de France, d'un crime attentatoire à la sûreté de l'État, de contrefaction du sceau de l'État, de monnaies nationales ayant cours, de papiers nationaux, de billets de banque autorisés par la loi, pourra être poursuivi, jugé et puni en France, d'après les dispositions des lois françaises" (I. 7, 24).

"6. Cette disposition pourra être étendue aux étrangers qui, auteurs ou complices des mêmes crimes, seraient arrêtés en France, ou dont le gouvernement obtiendrait l'extradition" (I. 24).

"7. Tout Français qui se sera rendu coupable, hors du territoire du royaume, d'un crime contre un Français, pourra, à son retour en France, y être poursuivi et jugé, s'il n'a pas été poursuivi et jugé en pays étranger, et si le Français offensé rend plainte contre lui" (I. 24).

French Code. "*Code d'Instruction criminelle,*" p. 1.

welfare and safety of the State, whether it has been committed by a Frenchman or a foreigner. II. With respect to *private offences* in cases where the following conditions are combined:—

1. That the offence be of sufficient gravity to constitute a crime.

2. That it has been committed by a Frenchman against a Frenchman.

3. That the offender has returned to France.

4. That he has been indicted in France by the injured party.

In the United States of North America, and in the British dominions, the rule of confining penal justice to the territory in which the offence has been committed (*k*) has been most rigidly adhered to. But the latter country has so far relaxed the severity of her adherence to this strict rule of International Law as to allow crimes of murder and manslaughter committed out of England, when both the *offender* and the *offended* are subjects of the British Crown, and when this fact has been averred in the indictment, to be tried in England. Whether they must be British-*born* subjects appears to be a doubtful point; but, in spite of one decision in the affirmative, the better construction of the statutes affecting this matter would appear to be, that a foreigner, owing *allegiance* in return for *protection*, would be within the scope of their provisions (*l*).

All indictable offences committed within the Admiralty Jurisdiction, that is, on the *high seas*, are offences of the same

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(*k*) "Delicta puniuntur juxta mores loci commissi delicti, et non loci ubi de crimine cognoscitur."—*Bartolus*, ad § *final. lex saccularii citat. ob. in l.* I., *cunctos populos; C. de summo trinit. in l. questionem*; and *Henry on Foreign Law*, p. 47.

(*l*) Statutes relating to offences committed by British subjects in foreign States:

33 Hen. VIII. c. 23, repealed by 9 Geo. IV. c. 31, ss. 7, 8; latter section applies to cases where the death, or the cause of the death only, happens in England.

Cases under 33 Henry VIII. c. 23:

Governor Wall's case, 28 *State Trials*, p. 51, A.D. 1802.

Rex v. *Lepardo*, 1 *Taunton's Rep.* p. 26; *Russell and Ryan's Crown*

nature, and liable to the same punishment, as if they had been committed on land (*m*). These *Statutes* were necessary because, by the *Common Law*, the grand jury are sworn to inquire only for *the body of the county*, and cannot, without the help of an Act of Parliament, inquire of a fact done out of that *county* for which they are sworn (*n*).

CCCXXXV. The exercise of *Civil* Jurisdiction over foreigners will be chiefly considered under the subsequent title of COMITY (*o*).

Cases Reserved, p. 134, A.D. 1807. Offender *Lepardo* discharged because he was a foreigner.

Rex v. *Sawyer, Russell and R.* p. 294, A.D. 1815.

Cases under 9 Geo. IV. c. 31 :

Rex v. *Helsham*, 4 *Carrington and Payne's Rep.* p. 294.

Rex v. *M. A. de Mattos*, 7 *Carrington and Payne*, p. 458.

See remarks of Solicitor-General as to preceding case, and Mr. Justice Vaughan's charge to the jury.

In *Regina* v. *Lewis*, the prisoner and deceased being foreigners, the latter died at Liverpool from injuries inflicted by the prisoner on board a foreign ship on the high seas. Held that the prisoner had committed no offence cognizable by the law of this country.

The object of 9 Geo. IV. c. 31, s. 8, is to remove difficulties of trial in cases of homicide which would have been cognizable by our law if the death had occurred where the blow was struck, and not to give jurisdiction by reason of the death ensuing in England, where otherwise there would be none.—5. *Weekly Reporter*, p. 572.

See 7 *Cox's Criminal Law Cases*, p. 277 ; 2 *Dearsly & Bell's Rep.* p. 182.

(*m*) Statutes relating to offences on the high seas, or in slavers, &c. :—

15 Rich. II. c. 3.
28 Hen. VIII. c. 15, s. 1.
46 Geo. III. c. 54.
9 Geo. IV. c. 31, s. 32.
4 & 5 W. IV. c. 36, s. 22.

Statutes relating to offences committed out of England, in particular places :—

10 & 11 W. III. c. 25.
59 Geo. III. c. 75.

(*n*) *Stephen's Blackstone*, vol. iv. p. 370. (Bk. vi. ch. 18.)

Russell on Crimes, ed. *Greaves* (1843), vol. i. p. 549, &c. (Bk. iii. ch. 1, s. 6.)

(*o*) The Merchant Shipping Act cannot be applied by an English Court to a collision between a British and Foreign vessel in the Atlantic. —*The Chancellor*, 14 *Moore, P. C. Rep.* p. 202.

It will be sufficient to remark here that the Right of Jurisdiction and authority over a merely *commorant foreigner,* though he be *subditus temporarius,* does not extend to compelling him to render civil or military services; or to the power of trying or punishing a foreigner for an offence committed in a foreign land. This remark applies even where the offence has been committed against the State in which the foreign offender is now commorant; and much more forcibly against an extravagant pretension sometimes put forth, to the effect that the general powers of a State extend to punish all wrongdoers wheresoever the wrong may have been done (*p*). So long as there are different States with different laws, no single State can have a right to punish, by its own laws, citizens of another State, for offences committed in places over which it has no jurisdiction; or to punish according to what it may conceive to be the law of the place where the offence was committed.

This assumed Jurisdiction is doubly reprehensible:—First, as being a usurpation of the Rights of another State; and Secondly, as being a violation of what *Heffters* justly calls a ruling maxim (*herrschende Grundsatz*) of all constitutional States,—that no man can be withdrawn from the tribunal to which he is naturally and legally subject, and compelled to plead before another (*q*).

(*p*) Lord Stowell, speaking of slavery, says that it has been suggested to the Court "that this trade, if not the crime of Piracy, is nevertheless *crime*, and that every nation, indeed every individual, has not only a right, but a duty, to prevent in every place the commission of crime. It is a sphere of duty (he adds) sufficiently large that is thus opened out to communities and their members."—*The Le Louis,* 2 *Dodson's Adm. Rep*. p. 248.

(*q*) *Heffters,* s. 36, n. 4.

CHAPTER XIX.

EXCEPTIONS TO THE TERRITORIAL RIGHT OF JURISDICTION.

CCCXXXVI. We have now to consider certain exceptions to the sound and important rule laid down in the last chapter, which is built upon the maxim of the Roman Law, "*extra territorium jus dicenti impunè non paretur*" (*a*).

The *First* class of exceptions to this rule is founded upon long usage and the reason of the thing, and relates principally to the *status* of Christians in Infidel countries.

So early, indeed, as the sixth century, a derogation from the rule of European International Law began to develop itself.

After the fall of the Eastern Empire, the Code of the Visigoths, not the least remarkable monument of the Middle Ages, conceded to foreign merchants the privilege of being tried by judges selected from among their own countrymen (*b*). But after the Ottoman power became established in Europe, Christian nations trading with the territories subject to that Power, obtained from it, at different periods,

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(*a*) *Dig.* ii. 1, 20.

(*b*) *Miltitz, Manuel des Consuls,* i. l. i. ch. iv. s. 2, p. 161, l. ii. ch. i. s. 1, p. 4, n. 2.

"Dum transmarini negotiatores inter se causam haberent nullus de sedibus nostris eos audire præsumat, nisi tantummodo suis legibus audiantur apud *telonarios* suos." These *Telonarii* were in fact *Prætores Peregrini.*

Montesquieu, Esp. des Lois, l. xxi. ch. 19.

Amasis (579 A. J. C.) is said to have permitted the Greeks established at *Naucratis* in Egypt to choose magistrates from their own nation for the decision of disputes among themselves (*Herod.* ii. 179).

a concession of exclusive authority over their own subjects, nearly identical with that which the Christian *jus commune* (*c*) had conceded to foreign ships of war in their ports.

The vital and ineradicable differences (*d*) which must always separate the Christian from the Mahometan or Infidel, the immiscible character which their religion impresses upon their social habits, moral sentiments, and political institutions, necessitated a departure from the strict rule of Territorial Jurisdiction, in the case of Christians who founded commercial establishments in Ottoman or Infidel dominions.

With reference to this subject, however, it was observed by their Lordships of the Privy Council that, "though "the *Ottoman Porte* could give, and has given, to the "Christian Powers of Europe authority to administer "justice to their own subjects according to their own laws, "it neither has professed to give, nor could give, to one such "Power any jurisdiction over the subjects of another Power. "But it has left those Powers at liberty to deal with each "other as they may think fit, and if the subjects of one "country desire to resort to the tribunals of another, there "can be no objection to their doing so, with the consent of "their own Sovereign, and that of the Sovereign to whose "tribunals they resort.

"There is no compulsory power in an English Court in "*Turkey* over any but English subjects; but a Russian or "any other foreigner may, if he pleases, voluntarily resort "to it with the consent of his Sovereign, and thereby submit "himself to its jurisdiction" (*e*).

(*c*) See this phrase frequently in the letters of Sir L. Jenkins, which contain *responsa* upon questions of Public and International Law.—*Life*, vol. ii. pp. 719–20.

(*d*) *Vide antè*, p. 86.

Vide post, Consuls.

(*e*) *The Laconia*, 2 *Moore, P. C. Rep.* N. S. p. 185.

The peculiar character of the British settlement in India, as distinguished from the ordinary case of the occupation of a barbarous country by Europeans, is clearly stated in the following judgment of the same tribunal:— "Where Englishmen establish themselves in an uninhabited or barbarous

CCCXXXVII. France, as early as the beginning of the sixteenth century, stipulated that her subjects throughout those districts, generally known as the *Échelles du Levant*, should be exclusively *justiciable* in criminal and civil matters before their own tribunals, and according to their own laws (*f*); and this privilege has been continued by a series of subsequent capitulations or diplomas of concession.

CCCXXXVIII. The concessions by the Porte to the British Crown (*g*) began in the reign of Queen Elizabeth.

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country, they carry with them not only the laws, but the sovereignty of their own State; and those who live amongst them, and become members of their community, become also partakers of, and subject to, the same laws.

"But this was not the nature of the first settlement made in *India*—it was a settlement made by a few foreigners for the purpose of trade in a very populous and highly civilized country, under the government of a powerful Mahometan ruler, with whose sovereignty the English Crown never attempted nor pretended to interfere for some centuries afterwards.

"If the settlement had been made in a Christian country of Europe, the settlers would have become subject to the laws of the country in which they settled. It is true that in *India* they retained their own laws for their own government within the factories which they were permitted by the ruling powers of *India* to establish; but this was not on the ground of general international law, or because the Crown of *England* or the laws of *England* had any proper authority in *India*, but upon the principles explained by Lord Stowell in a very celebrated and beautiful passage in the case of *The Indian Chief* (3 *Rob. Adm. Rep.* p. 28).

"The laws and usages of Eastern countries, where Christianity does not prevail, are so at variance with all the principles, feelings, and habits of European Christians, that they have usually been allowed by the indulgence or weakness of the potentates of those countries to retain the use of their own laws, and their factories have for many purposes been treated as part of the territory of the sovereign from whose dominions they come. But the permission to use their own laws by European settlers does not extend those laws to natives within the same limits, who remain to all intents and purposes subjects of their own sovereign, and to whom European laws and usages are as little suited as the laws of the Mahometans and Hindoos are suited to Europeans. These principles are too clear to require any authority to support them, but they are recognized in the judgment to which we have above referred."

Adv.-Gen. of Bengal v. *R. S. Dossee*, 2 *Moore, P. C. Rep.* N. S. pp. 59, 60.

(*f*) *Ortolan, Dipl. de la Mer*, t. i. pp. 311–14.

(*g*) *Miltitz*, t. ii. 779, &c. (l. iii. c. 1, s. v. par. 29).

A Treaty in 1675 (art. 18) recited that British enjoyed the same privilege as French, Venetian, and other subjects. Orders of Council (*h*) and Acts of Parliament (*i*) have, at different times, prescribed the manner in which the Crown shall exercise this jurisdiction. The latest and most important statute was passed in the sixth and seventh years of the present Queen, and enables her to exercise any power or jurisdiction which she now has, or hereafter may have, within any country out of her dominions, in the same manner as if her Majesty had acquired such power and jurisdiction by the cession or conquest of territory.

Generally (*k*), it may be said, that the Consuls of Christian Powers residing in Turkey, and the Mahometan countries of the Levant, exercise an exclusive Criminal and Civil Jurisdiction over their fellow-countrymen. The Criminal Jurisdiction is usually limited to the infliction of a pecuniary fine; in graver cases, the Consul exercises the functions of a *juge d'instruction*, collecting evidences of the crimes, and transmitting them to the tribunals of their own country (*l*).

CCCXXXIX. The Order of her Majesty in Council, amending and repealing former Orders, concerning the jurisdiction over British subjects in the Ottoman dominions, was passed March 9, 1865, and rules issued for the execution of this Order on May 4, 1865.

A Supreme Consular Court is established at Constantinople, and Provincial Consular Courts are created, with rules for the exercise of Civil and Criminal jurisdiction.

An Order in Council also provides for the exercise of Civil and Criminal jurisdiction over British subjects in the dominions of the Sultan of Zanzibar.

An Order in Council was also issued March 9, 1865, and

(*h*) *Hertslet's Treaties*, vol. vi. Orders in 1830, 1839, 1843.

(*i*) 6 & 7 W. IV.

6 & 7 Vict. c. 94.

(*k*) *Wheaton, Élém.* i. 136.

(*l*) The laborious and valuable work of *Miltitz*, cited above, contains a mine of historical information upon this subject.

rules for the execution of it May 4, 1865, concerning British subjects in China and Japan.

A Supreme Court at Shanghai, and Provincial Courts, are established by it. Regulations are made for restraint of British subjects in the cases of war, insurrection, and rebellion (*m*).

Punishment is provided for levying war or taking part in any operation of war against the Emperor of China or the Tycoon of Japan. Penalties are enacted for the violation of Treaties with these Sovereigns, and punishment is provided for piracy (*n*). Jurisdiction is conferred over offences committed by British subjects on board Chinese or Japanese vessels, on board British vessels, on board vessels not entitled to hoist the flag of any State, within 100 miles of the coast of China (*o*).

CCCXL. The whole question of Consular Jurisdiction will be discussed in a later part of this work, under the title CONSULS.

CCCXLI. The *Second* class of recognized exceptions, which entitle foreigners who are the subjects of them, to be considered as morally *without*, though physically *within*, the territorial limits, relate to Foreign Sovereigns passing through or temporarily residing in the territory of another State: they are held not to be amenable to the jurisdiction, civil or criminal, of its tribunals. They represent the nation of which they are sovereigns, and being permitted to enter a foreign State are entitled, by International Law, to be considered, both as to their own person and effects, and as to those of their attendants, as being still within their own dominions (*p*).

Thirdly. The same immunity is applicable to the Ambassador or duly accredited Public Minister of a foreign

(*m*) S. vi. regs. 81, 82.

(*n*) S. x. regs. 98, 99.

(*o*) S. xii. reg. 101.

(*p*) *Vide post*, chapters on the subject of SOVEREIGNS and AMBASSADORS.

State, as will be considered more at length in a later part of this work.

Fourthly. If a foreign army be permitted to pass through, or be stationed in, the territories of another State, the persons composing that army, or being within its lines, are entitled to exterritorial privileges.

Fifthly. All ships, public or private, upon the high seas, are subject only to the jurisdiction of the country to which they belong (*q*). This last subject requires a fuller discussion.

CCCXLII. The nature and extent of these exterritorial privileges will be discussed at length hereafter; it is enough, therefore, to have given a brief summary of them in this place. Those entitled to such privileges retain the domicil of their own country, with all the incidental rights affecting their persons or property (*r*). This rule may not in every conceivable case exclude the possibility of a domicil in the country where the privileged person is residing—a domicil for certain purposes, at least. For instance, it is possible that an ambassador may be sent to the place of his *native* (*s*), or of a subsequently *acquired* (*t*) domicil; but the general rule is as has been stated (*u*).

(*q*) *Wheaton, Élém.* i. 119, citing *Casaregis Discurs.* pp. 136-174 "Exceptis tamen ducibus et generalibus alicujus exercitûs, vel classis maritimi, vel ductoribus alicujus navis militaris, nam isti in suos milites, gentem et naves, liberè jurisdictionem sive voluntariam, sive contentiosam, sive civilem, sive criminalem, quod occupant *tanquam in suo proprio* exercere possunt." See the case of the *Cagliari, Dana's Wheaton,* 688–9. *Ann. Reg.* 1858, pp. 63–181.

As to yachts, or *bâtiments de plaisance,* see a form of International "declaration" as to their exemption from payment of duties, *Martens, cont. par Samwer,* t. xvii. 258.

(*r*) *Heffters,* s. 42.

Vide post, vol. ii., chapters on SOVEREIGNS and AMBASSADORS.

(*s*) As in the case of M. Rossi.—*Guizot's Mém.* t. vii. p. 393.

(*t*) *Heffters,* s. 42, i. n. 3, citing Treaty of Westphalia, v. 28: "Nisi forte in quibusdam locis ratione bonorum et respectu territorii vel *domicilii* aliis statibus reperiantur subjecti."

(*u*) *Bynkershoek, De Foro Leg.* c. xi. 5, c. xviii. 6.

When a person is admitted to exterritorial (*x*) privileges, the things that belong to him, and the persons that form part of his household or suite, are, generally speaking, sheltered under the same immunities. These privileges exempt them from liability to the civil or criminal tribunals. It is, however, possible, that even privileged persons, by mixing themselves up with the trade or commerce of the country, or by becoming owners of immovable property therein, might of necessity be in some measure amenable to the civil tribunals.

The privilege does not extend to real or immovable property. This, like the property of a native, is subject to the municipal law of the land (*y*). The privileged person is free from the payment of taxes or duties of any kind; but not from paying the tolls upon the public ways over which he travels, or any public impost attached to the use of a public institution or thing.

CCCXLIII. The important exception (*z*) to the rule of International Law respecting territorial jurisdiction afforded in the instance of Foreign Ships lying in the harbours and ports of another State, requires a twofold consideration—as to

1. Foreign Ships of War.
2. Foreign Ships of Commerce.

(*x*) See vol ii. pt. vi. for privileges of ambassadors.

(*y*) *Heffters*, s. 42, vi.

Wiquefort, L'Ambassadeur, i. 28, p. 422.

Bynkershoek, de Foro Leg. c. xv. 6, c. xvi.

Merlin, Rep. Ministre public, s. 4, 5, Art. 6, 8.

It has been recently decided, that personal property situated in Great Britain, of a person dying domiciled abroad, does not pay legacy duty to the Crown.—*Vide post*, chapter on DOMICIL, in vol. iv.

(*z*) *Grotius.*

Vattel, l. i. c. xix. s. 216.

Günther, ii. 257–8, note.

Martens.

Ortolan, Diplomatie de la Mer, l. ii. ch. 9, 10, 13.

The Schooner Exchange v. *M'Faddon and others*, 7 *Cranch's* (*American*) *Reports*, pp. 135-147.

Wheaton, Élém., pp. 124–134.

Kent's Commentaries, i. 157, note *e* (ed. 1851).

Heffters, s. 78.

CCCXLIV. First, with respect to Foreign Ships of War (*a*).—Long usage and universal custom entitle every such ship to be considered as a part of the State to which she belongs, and to be exempt from any other jurisdiction; whether this privilege be founded upon strict International Right, or upon an original concession of Comity, with respect to the State in its aggregate capacity (*b*), which, by inveterate practice, has assumed the position of a Right (*c*), is a consideration of not *much* practical importance. But it is of *some* importance, for, if the better opinion be, as it would seem to be, that the privilege in question was originally a concession of Comity, it may, on due notice being given, be revoked by a State, so ill advised as to adopt such a course, which could not happen if it were a matter of Natural Right. But, unquestionably, in the case of the Foreign Ship of War,

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(*a*) *Klüber*, s. 55 (5): "Bei Kriegsschiffen in fremden Seegebiet, welchen nach allgemeinem Herkommen die Ausübung der Gerichtbarkeit nach den Gesetzen ihres Staates über ihre Gerichtpflichtigen zukommen."

"Si les enfants sont nés dans *un vaisseau de la nation* [*ship of war*], ils peuvent être réputés nés dans le territoire, car il est naturel de considérer les vaisseaux de la nation comme des portions de son territoire, surtout quand ils voguent sur une mer libre, puisque l'État conserve sa juridiction dans ces vaisseaux. Et comme, suivant l'usage communément reçu, cette juridiction se conserve sur le vaisseau, même quand il se trouve dans les parties de la mer soumises à une domination étrangère, tous les enfants nés dans les vaisseaux d'une nation seront censés nés dans son territoire. Par la même raison, ceux qui naissent sur un *vaisseau étranger* seront réputés nés en pays étranger, à moins que ce ne fût dans le port même de la nation; car le port est plus particulièrement du territoire, et la mère, pour être en ce moment dans *le vaisseau étranger* [this must mean *merchant ship*] n'est pas hors du pays."—*Vattel*, l. c. xix. s. 216.

In another place, speaking of what is contained under the word *domaine d'une nation*, he says, "et par ses possessions, il ne faut pas seulement entendre ses terres, mais *tous les droits* dont elle jouit."—L. ii. ch. vii. s. 80.

It is remarkable that *Vattel* should not furnish more authority on this point than is to be found in the passages cited above.

(*b*) *Vide antè*, p. 182.

(*c*) *Ib.* p. 183.

as of the Foreign Sovereign and Ambassador, every State which has not formally notified its departure from this usage of the civilized world, is under a tacit convention to accord this privilege to the Foreign Ship of War lying in its harbours (*d*).

CCCXLV. The authority of so great a jurist as Dr. Story, delivering the sentence of the Supreme Court of the United States, is of great weight in this matter. He expresses his opinion as follows:

"In the case of the *Exchange* (*e*), the grounds of the ex-
" emption of public ships were fully discussed and expounded.
" It was there shown that it was not founded upon any notion
" that a foreign Sovereign had an absolute right, in virtue of
" his sovereignty, to an exemption of his property from the
" local jurisdiction of another Sovereign, when it came within
" his territory; for that would be to give him sovereign
" power beyond the limits of his own empire. But it stands
" upon principles of public comity and convenience, and
" arises from the presumed consent or licence of nations, that
" foreign public ships coming into their ports, and demeaning
" themselves according to law, and in a friendly manner, shall
" be exempt from the local jurisdiction. But as such consent
" and licence is implied only from the general usage of nations,
" it may be withdrawn upon notice at any time, without just
" offence; and if, afterwards, such public ships come into our
" ports, they are amenable to our laws in the same manner as
" other vessels. To be sure, a foreign Sovereign cannot be
" compelled to appear in our courts, or be made liable to
" their judgment, so long as he remains in his own dominions;
" for the sovereignty of each is bounded by territorial limits.
" If, however, he comes personally within our limits, although
" he generally enjoy a personal immunity, he may become
" liable to judicial process in the same way, and under the

(*d*) *Vide post*, AMBASSADORS.
Vattel, l. iv. c. vii. s. 92.

(*e*) *The Schooner Exchange* v. *M'Faddon and others*, 7 *Cranch's* (*American*) *Reports*, p. 1151.

" same circumstances, as the public ships of the nation. But
" there is nothing in the Law of Nations which forbids a
" foreign Sovereign, either on account of the dignity of his
" station, or the nature of his prerogative, from voluntarily
" becoming a party to a suit in the tribunals of another
" country, or from asserting there any personal, or proprietary,
" or sovereign rights, which may be properly recognized and
" enforced by such tribunals. It is a mere matter of his own
" good will and pleasure; and if he happens to hold a private
" domain within another territory, it may be that he cannot
" obtain full redress for any injury to it, except through the
" instrumentality of its Courts of Justice. It may therefore
" be justly laid down as a general proposition, that all persons
" and property within the territorial jurisdiction of a Sove-
" reign, are amenable to the jurisdiction of himself or his
" Courts: and that the exceptions to this rule are such only
" as, by common usage and public policy, have been allowed,
" in order to preserve the peace and harmony of nations, and
" to regulate their intercourse in a manner best suited to their
" dignity and rights. It would, indeed, be strange, if a
" licence, implied by law from the general practice of nations,
" for the purposes of peace, should be construed as a licence
" to do wrong to the nation itself, and justify the breach of
" all those obligations which good faith and friendship, by
" the same implication, impose upon those who seek an
" asylum in our ports" (*f*).

CCCXLVI. The privilege is extended, by the reason of the thing, to boats, tenders, and all appurtenances of a ship of war, but it does not cover offences against the territorial law committed upon *shore*, though the commanders of vessels are entitled to be apprised of the circumstances attending and causes justifying the arrest of any one of their crew, and to secure to them, through the agency of diplomatic or consular ministers, the administration of justice (*g*).

(*f*) *The Santissima Trinidad*, 7 *Wheaton's* (*American*) *Reports*, pp. 352-3-4.

(*g*) *Ortolan, Dipl. de la Mer*, vol. i. pp. 291-2.

CCCXLVII. *Bynkershoek* maintains that the property of a sovereign cannot be distinguished from that of a private individual, and that the tribunals of his country have laid down the law to that effect (*h*); and by way of confirmation of this doctrine, he cites a case in which certain Spanish men-of-war were seized in 1668, in the Port of Flushing, as a reimbursement for certain debts of the Spanish Crown. It appears that, on the remonstrance of the Spanish ambassador, they were set free, with an intimation to the Spanish Crown that, if the debts of the Dutch subjects were not discharged, *reprisals* might not improbably be granted to them.

Whether the proposition of Bynkershoek, with respect to the debts of Sovereigns, be a sound maxim of International Law, will be considered in a later part of this work; but even assuming for the present a premiss which will be hereafter disputed, it is manifestly neither a logical nor a moral consequence, that because the *private property* of the sovereign may be seized, therefore the *public ships of the nation* over which he rules may be also apprehended. The case cited appears to be a solitary instance of a national violation of the general International rule, as to the immunity of foreign ships of war.

CCCXLVIII. In the case of the *Prins Frederik*, brought into the British High Court of Admiralty, the question was raised, whether a foreign ship of war was liable to be sued for salvage. Lord Stowell said: "I have considered the "evidence respecting the *Dutch* line-of-battle ship belonging

(*h*) "Sæpe cum injuria subditorum ordines decreverunt, quod e republica esse videretur. Quo refero hanc speciem: Anno 1668, privati quidam Regis Hispanici creditores tres ejus Regni naves bellicas, quæ portum Flissingensem subiverant, arresto detinuerant, ut inde ipsis satisfieret, Rege Hispan. ad certum diem per epistolam in jus vocato ad Judices Flissingenses, sed ad legati Hispanici expostulationes Ordines Generales 12 Dec. 1668 decreverunt, Zelandiæ Ordines curare vellent, naves illæ continuo dimitterentur liberæ, admoneretur tamen per litteras Hispaniæ Regina, ipsa curare vellet, ut illis creditoribus, in causa justissima, satisfieret, ne repressalias, quas imploraverant, largiri tenerentur." —*Bynkershoek, De Foro Legatorum*, c. iv.

"to his Majesty the King of the *Netherlands, armée en flute,*
"and carrying a valuable cargo of spices, &c., from *Batavia*
"to the *Texel,* called the *Prins Frederik,* which was brought
"into *Mount's Bay* by the assistance of persons belonging to
"the *British* brig *Howe,* of the port of *Penzance.* These
"persons have since arrested this ship and cargo, by a war-
"rant issued from the High Court of Admiralty, in a cause
"of salvage, on account of essential services rendered to
"them in a situation of imminent danger. . . . . I think
"that the first application for a recompense, in the nature of
"salvage, ought, in the case of a ship of war belonging to
"a foreign State, to have been made to the representative of
"that State resident in this country. In the present case
"no doubt can be entertained, that just attention would have
"been paid to the application, and due care taken, after
"proper information obtained, to have answered the claim in
"some form or other, as substantial justice might appear to
"require; for it is not reasonable to suppose, that private
"individuals in this country should go unrewarded, for
"services performed to the ships of foreign Governments,
"when they would have been liberally rewarded for similar
"services performed for such ships belonging to their own.
"At the same time, the valuation of those services is proper
"to be obtained, at least, in the first instance, from those
"Governments themselves; and it is not till after their denial
"of justice that recourse should be had elsewhere. Instead
"of this, the application is made direct to the captain of this
"ship, who treats it with undue disregard and defiance. I
"say *undue,* because at any rate some salvage was due; and
"if he personally was not liable, he ought, at least, to have
"informed them where the demand was to be made. On his
"refusal, a warrant of detainer is sued out of the Court of
"Admiralty, and this begets a delicate question of juris-
"diction in International Law, which the Court was disposed
"to treat with all necessary caution. The vessel is said to
"have been detained, under the authority of this warrant,
"for six months.

"Why she was not released upon bail, on an application "to the Court, I know not; the Court would certainly have "decreed it, if any such application had been made, *but* "*without prejudice to the depending question of jurisdic-* "*tion*" (*i*).

The question was eventually settled by arrangement; but during the course of the argument, the Queen's Advocate of that day insisted forcibly upon the general principle of International Law, which exempted all foreign ships of war from all private claims (*k*).

CCCXLIX. The privilege or right does not extend in time of war to prize ships or prize goods captured by vessels fitted out in a neutral port in violation of its neutrality (*l*); and it has been asserted on high authority, that, according to the law of the United States of North America, a writ of *habeas corpus* may be lawfully awarded to bring up a subject illegally detained on board a foreign ship in American waters (*m*). The same doctrine would probably be held by the Courts of Great Britain.

CCCL. It is important to observe that, if any question arise as to the nationality of a ship of war, the *commission* is held to supply adequate proof. In a part of the judgment already cited, Dr. Story observes: "In general "the commission of a public ship, signed by the proper "authorities of the nation to which she belongs, is complete "proof of her national character. A bill of sale is not "necessary to be produced. Nor will the courts of a foreign

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(*i*) *The Prins Frederik*, 2 *Dodson's Adm. Rep.* pp. 482, 484-5.

(*k*) *Ib.* p. 457, &c.

(*l*) *The Exchange* v. *M'Faddon and others*, 7 *Cranch's Reports*, 116.
The Arrogante Barcelones, 7 *Wheaton's Reports*, 496.
The Monte Allegro, *ib.* 520.
Vattel, l. i. c. xix. s. 216.

(*m*) *Opinions of the American Attornies-General*, vol. i. pp. 25, 55, 57.
Kent, *Comment.* 158, note.
See *De M. et De C. Tr.*, *Index*, xxxvi., tit. *Nationalité*, for catalogue of Treaties on this subject.
Ortolan, i. 302, &c.

" country inquire into the means by which the title to the " property has been acquired. It would be to exert the " right of examining into the validity of the acts of the " foreign sovereign, and to sit in judgment upon them in " cases where he has not conceded the jurisdiction, and " where it would be inconsistent with his own supremacy. " The commission, therefore, of a public ship, when duly " authenticated, so far at least as foreign courts are con- " cerned, imports absolute verity, and the title is not exa- " minable. The property must be taken to be duly acquired, " and cannot be controverted. This has been the settled " practice between nations; and it is a rule founded in " public convenience and policy, and cannot be broken in " upon, without endangering the peace and repose, as well of " neutral as of belligerent sovereigns. The commission in " the present case is not expressed in the most unequivocal " terms; but its fair purport and interpretation must be " deemed to apply to a public ship of the Government. If " we add to this the corroborative testimony of our own, " and the British Consul at Buenos Ayres, as well as that of " private citizens, to the notoriety of her claim of a public " character; and her admission into our own ports as a public " ship, with the immunities and privileges belonging to such " a ship, with the express approbation of our own Govern- " ment, it does not seem too much to assert, whatever may " be the private suspicion of a lurking American interest, " that she must be judicially held to be a public ship of the " country whose commission she bears" (*n*).

CCCLI. Secondly, with respect to merchant or private vessels, the general rule of Law is, that, except under the provisions of an express stipulation, such vessels have no exemption from the territorial jurisdiction of the harbour or port, or, so to speak, *territorial* waters (*mer littorale*), in which they lie (*o*).

(*n*) *The Santissima Trindidad*, 7 *Wheaton's* (*American*) *Reports*, pp. 335–6–7. "Schip is territoir."—*Philipson*, Zwolle, 1864.

(*o*) *Wheaton*, *Élém.* t. i. pp. 119-20.

Wheaton, *Hist.* p. 739, *Letter of Mr. Webster to Lord Ashburton.*

The doctrine is clearly expounded by the American Chief Justice Marshall, as follows:—

"When private individuals of one nation spread them-"selves through another, as business or caprice may direct, "mingling indiscriminately with the inhabitants of that "other, or when merchant vessels enter for the purposes of "trade, it would be obviously inconvenient and dangerous to "society, and would subject the laws to continued infraction, "and the Government to degradation, if such individuals or "merchants did not owe temporary and local allegiance, and "were not amenable to the jurisdiction of the country. "Nor can the foreign sovereign have any motive for wishing "such exemption. His subjects thus passing into foreign "countries are not employed by him, nor are they engaged "in national pursuits. Consequently, there are powerful "motives for not exempting persons of this description from "the jurisdiction of the country in which they are found, "and no one motive for requiring it. The implied licence, "therefore, under which they enter, can never be construed "to grant such exemption" (*p*).

CCCLII. The jurisprudence of France upon this subject requires special notice (*q*).

That jurisprudence recognizes a distinction between—

1. On the one hand, acts relating solely to the internal discipline of the ship, or even to offences committed by one of the crew against another, but which do not affect generally the peace and good order of the port.

2. On the other hand, offences and crimes (*crimes ou délits*) committed by a stranger against one of the crew, or by one of the crew against the other, in a manner to disturb the peace and good order of the port.

Facts belonging to this latter class, as well as civil contracts

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(*p*) *The Schooner Exchange* v. *M'Faddon and others,* 7 *Cranch's* (*American*) *Rep.* p. 144.

(*q*) *Massé, Le Droit comm.* t. i. pp. 61–65.

Ortolan, Dipl. de la Mer, t. i. pp. 292–310.

between the crew and persons who do not belong to the crew, are clearly cognizable by the territorial tribunals.

The following instances illustrate the practical application of these principles of jurisprudence.

In 1806, *The Newton*, an American merchantman, being in the port of Antwerp, a quarrel arose between two of the crew, who were in a boat belonging to the vessel, and cognizance of the dispute was claimed by the local authorities and by the American Consul. At the same time a quarrel arose between certain of the crew of *The Sally*, an American merchantman lying in the port of Marseilles. In this case a severe wound had been inflicted by an officer of *The Sally* upon one of the men for disobedience to orders. In this case a similar conflict as to jurisdiction took place. The superior tribunal (*le Conseil d'État*) decided in both cases in favour of the jurisdiction of the American Consul (*r*).

In 1837, the Swedish vessel *Forsattning* was anchored in the Loire, in the Paimbœuf roads, and on board this vessel the crime of poisoning was committed. The Court at Rennes had some doubt as to the competence of the American authority on these three grounds:—(1) that the vessel was a merchantman; (2) that she was anchored in French waters; (3) that there was no reciprocity between France and Sweden on the subject; and consulted the Government, which sent an answer, drawn up under the joint authority of the *garde des sceaux* and the *ministre des affaires étrangères*, to the effect that the criminal was to be delivered up to the proper authority on board of his own ship (*s*).

These examples support the former of the two propositions of French jurisprudence stated above. The latter, which sustains the territorial jurisdiction, is illustrated by a case which happened in 1845.

In the winter of that year the *Tribunal correctionnel* at

(*r*) *Ortolan, ubi supra*, and Appendix, annexe H, for judgment at length and see Appendix to this work.

(*s*) *Revue de Législ. et de Jurisprud.* février 1843, tome xvii. p. 143. *Massé, Le Droit comm.* t. ii. p. 63.

Marseilles declared itself competent to punish the captain of an English merchantman for an attack upon the master of a French vessel in the port (*t*). In harmony with these principles, the French Law gives power to French consuls to adjudicate on disputes arising on board French merchantmen when lying in foreign *ports*, but when at anchor in a foreign *roadstead* this power is given to French men-of-war, if there be any present, and if not to French consuls; with an express reservation, however, of the rights of the local authorities. The power given to their own officers they consider as belonging to the category of *droits de police*, incident to every State over its merchant vessels; the power of the local authority as belonging to the distinct category of *droits de juridiction* (*u*).

CCCLIII. These *droits de police et de juridiction* over merchantmen in foreign parts have been the subject of various Treaties, and, though differing in various respects from each other, make on the whole an approach to a pretty general adoption of the principles laid down in the preceding paragraphs.

M. Ortolan (*x*) considers the eleventh article of the Treaty between France and the United States of North America (November 14, 1788), and the twenty-sixth article of the Treaty between Denmark and the Republic of Genoa (July 30, 1789), as containing maxims of International Law on this subject worthy of general adoption (*y*).

M. Massé (*z*), no mean authority, thinks, with M. Ortolan, that the distinction between the two kinds of offences is rightly taken and ought to be generally observed. He admits, however, that it is not generally in force, but that the simpler distinction between men-of-war and merchant-

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(*t*) *Ortolan, ib.* p. 297.
(*u*) *Ortolan,* t. i. p. 300.
(*x*) *Ib.* pp. 391–2.
(*y*) See Appendix to this work; *et post,* CONSULS.
(*z*) *Le Droit comm.* t. ii. pp. 63–4.

men obtains; offences on board the former being left to the jurisdiction of the ship, on board the latter to the local or territorial authority (*a*).

CCCLIV. Great Britain has made arrangements with certain foreign Powers for the recovery of seamen who *desert* from the ships of such Powers in *British* ports, and for the recovery of seamen deserting from *British* ships when in the ports of such Powers; and the hands of the British Executive have been strengthened by an Act of Parliament for such purpose; and it is competent to the Queen to declare by Order in Council that deserters from foreign ships may be apprehended and given up. Upon the publication of this order, justices of the peace must aid in the recovery of such deserters, and a penalty is imposed upon persons who harbour them (*b*).

CCCLV. In one event the difference between the mercantile and military marine does not affect the question of jurisdiction; that is, when the offence has been committed on board a vessel navigating the *open sea*. In this case all authorities combine with the reason of the thing, in declaring that the territory of the country to which the vessel belongs is to be considered as the place of the offence, and in pronouncing that the offender must be tried before the tribunals of his country (*c*). It matters not whether the injured person or the offender belong to a country other than that of the vessel. The rule is applicable to all *on board*.

(*a*) *Klüber*, s. 53.
Wheaton, Elém. t. i. p. 126.
Casaregis Disc. 136, n. 9.
(*b*) 15 Victoria, c. 26.
(*c*) *Vattel*, l. i. c. xix. s. 216.
Fœlix, s. 506.
Ortolan, t. i. p. 282.
Wheaton, Elém. t. i. p. 134.
Kent, Comm. i.
See, too, as affecting merchant vessels, *The French Ordonnance*, 29th October, 1833, *Art.* 15, cited by *Ortolan*, i. 283, n. Case of *The Cagliari*, *Dana's Wheaton*, pp. 688–9.

The principle of this rule has been carefully preserved in the conventions between France and England, which have made the Slave Trade illegal, so far as relates to their respective subjects (*d*).

The English law provided originally for the trial of such offences by the general jurisdiction of the High Court of Admiralty; but during and subsequent to the reign of Henry VIII., various statutes have been passed, appointing and regulating the tribunals which have cognizance of this crime, the last of which was passed in the reign of the late King William IV. (*e*). Particular provisions are contained in a recent statute as to the extradition of fugitive criminals, where the crime has been committed on board a vessel on the high seas, which vessel afterwards comes into a British port (*f*).

(*d*) *Art.* 7 of the Convention of 30th November, 1831.

(*e*) 4 & 5 William IV. c. 36, s. 22, the Central Criminal Court Act. *Russell on Crimes*, vol. i. pp. 104, 552–5.

(*f*) 33 & 34 Victoria, c. 52, s. 16.

CHAPTER XX.

RIGHT OF JURISDICTION.—PIRATES.

CCCLVI. To whatever country the Pirate may have originally belonged, he is *justiciable* everywhere (*a*); his detestable occupation has made him *hostis humani generis*, and he cannot upon any ground claim immunity from the tribunal of his captor. "With professed Pirates" (Lord Stowell says) "there is no state of peace. They are the enemies of every "country, and at all times; and therefore are universally "subject to the extreme rights of war" (*b*). The Pirate has, in fact, no national character. No captures made by them affect ownership, the rule of law being that "à piratis capta "dominium non mutant." Piracy is an assault upon vessels navigated on the high seas, committed *animo furandi*, whether the robbery or forcible depredation be effected or not, and whether or not it be accompanied by murder or personal injury. If a ship belonging to an independent nation, and not a professed buccanier, practises such conduct on the high

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(*a*) *Vide antè*.

Grotius, l. iii. c. iii. 1, 2, 3; l. iii. c. ix. 16; l. ii. c. xviii. 1, 2, 3; l. ii. c. xxi. 5; l. ii. c. 17, 19–29; l. ii. c. xiii. 15; l. ii. c. xvii. 20.

Bynkershoek, *Quest. J. P.*, *De Piratica*, *etc.* l. i. c. xvii. xv. *in fine.*

Loccen, *De Jure Marit.* l. ii. c. iii.

Ortolan, t. i. c. xii. p. 249. *Des Pirates.*

Dig. L. 16, 118, xlix. 15, 19, 2; 15, 21, 2.

Kent's Comm. i. 186.

Cicero, *De Off.* l. iii. 29, *in fine*: "Nam pirata non est in perduellionum numero definitus, sed communis hostis omnium, cum hoc nec fides debet, nec jusjurandum esse commune."

(*b*) *The Le Louis*, 3 *Dodson's Adm. Rep.* pp. 244, 246.

seas, she is liable to the pains and penalties of Piracy. The law is very clearly stated by Sir L. Jenkins in a letter of advice to Mr. Secretary Williamson (1675).

"His Majesty had, when I came from home, a controversy "with *France*, in a case not much unlike yours. A French "merchantman had gone out from *Rochel* to the *West Indies*, "and had committed many robberies and great cruelties "upon those of his crew in the voyage. He, in his return, "put in at *Kingsale* for refreshment; his company accuse "him; he flies, his ship and goods are confiscated *as the* "*goods of Pirates*. This sentence was opposed by the "*French* Ambassador, *M. Colbert*, and the cause desired to "be remanded to the natural judge (as was pretended), in "*France*. This produced several memorials and several "answers, in which my little service was commanded; and "the King and his Council were pleased to adjudge, he was "sufficiently founded in point of jurisdiction, to confiscate "that ship and goods, and to try capitally the person him-"self, had he been in hold; the matter of *Renvoy* being a "thing quite disused among princes; and as every man, by "the usage of our European nations, is justiciable in the "place where the crime is committed, so are Pirates, being "reputed out of the protection of all laws and privileges, "and to be tried in what ports soever they are taken" (*c*).

Dr. Story, in his judgment in *United States* v. *Smith*, says: "There is scarcely a writer on the Law of Nations "who does not allude to Piracy as a crime of a settled and "determined nature; and whatever may be the diversity of "definitions in other respects, all writers concur in holding "that robbery or forcible depredations upon the sea, *animo* "*furandi*, is *Piracy*" (*d*).

The same very learned and able judge guards, however,

(*c*) *Life of Jenkins*, vol. ii. p. 714.

(*d*) 5 *Wheaton's* (*American*) *Reports*, p. 163: the note (*a*) to this page contains a most learned and careful accumulation of all the authorities on the subject of Piracy.

carefully against the notion, that a mere excess of power by a lawfully commissioned ship would place her in the category of a Pirate. As to the tribunal, the mode of trial, and the punishment, it is of course competent to each country to make its own regulations. By the laws of most States Piracy is punishable by death (*e*).

CCCLVII. It has been observed in a former chapter that the municipal laws of a State, or of a number of States, cannot constitute that offence to be Piracy which is not so characterized by International Law; and memorable instances of the scrupulous severity with which this doctrine is upheld by Great Britain were adduced in the cases of the *Le Louis*, and of the *Queen* v. *Da Serva and others* (*f*).

Piracy has indeed become infrequent in its former haunts, and, both in the Mediterranean and the West Indian Seas, appears to be nearly extinct; but in the waters of China and the Eastern Archipelago (*g*) it is continually carried on; and even if it were not, the law relating to it would form an important chapter in International Jurisprudence, as will be seen in the observations which follow upon the different kinds of privateers.

CCCLVIII. That law has been laid down with great learning and care by the Judges of the British Admiralty Courts, which are, it will be remembered, also Courts of International Law.

In a charge given at a session of Admiralty within the Cinque Ports, Sept. 2, 1668, Sir Leoline Jenkins expressed himself as follows :—

"There are some sorts of *felonies* and *offences*, which "cannot be committed any where else but upon the sea,

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(*e*) See generally, 1 *Kent, Comm.* p. 187, for N. American U. S. Law. 1 *Russell on Crimes*, ch. viii. p. 94, for English Law.

Ortolan, l. ii. c. xii. for French Law; and *Valin*, ii. p. 236: "Quant à la peine due aux pirates et fourbans, elle est *du dernier supplice suivant l'opinion commune*," &c.

(*f*) *Vide antè*, p. 390.

(*g*) *The Serhassan*, 2 *W. Robinson's Adm. Reports*, pp. 354-358.

" within the jurisdiction of the Admiralty. These I shall
" insist upon a little more particularly, and the chiefest in
" this kind is *Piracy*.

" You are therefore to inquire of all *Pirates* and *sea-rovers*;
" they are in the eye of the law *hostes humani generis*,
" enemies not of one nation or of one sort of people only,
" but of all mankind. They are outlawed, as I may say, by
" the laws of all nations, that is, out of the protection of all
" princes and of all laws whatsoever. Everybody is com-
" missioned, and is to be armed against them, as against
" rebels and traitors, to subdue and to root them out.

" That which is called robbing upon the highway, the
" same being done upon the water is called Piracy. Now
" robbery, as 'tis distinguished from thieving or larceny,
" implies not only the actual taking away of my goods,
" while I am, as we say, in peace, but also the putting me
" in fear, by taking them away by force and arms out of my
" hands, or in my sight and presence; when this is done
" upon the sea, without a lawful commission of war or
" reprisals, it is downright Piracy.

" And such was the generosity of our ancient *English*,
" such the abhorrence of our laws against Pirates and sea-
" rovers, that if any of the King's subjects robbed or mur-
" dered a foreigner upon our seas or within our ports, though
" the foreigner happened to be of a nation in hostility against
" the King, yet if he had the King's passport, or the Lord
" Admiral's, the offender was punished, not as a felon only,
" but this crime was made high treason, in that great Prince
" Henry the Fifth's time; and not only himself, but all his
" accomplices, were to suffer as traitors against the crown
" and dignity of the King" (*h*).

And in a subsequent charge given at the Admiralty Sessions held at the Old Bailey, Sir Leoline Jenkins said:

" The next sort of offences pointed at in the statute, are
" *robberies*; and a robbery, when 'tis committed upon the

(*h*) *Life of Sir L. Jenkins*, vol. i. p. lxxxvi.

" sea, is what we call *Piracy*. A robbery, when 'tis com-
" mitted upon the land, does imply three things:—1. That
" there be a violent assault. 2. That a man's goods be
" actually taken from his person, or possession. 3. That he
" who is despoiled be put in fear thereby.

" When this is done upon the sea, when one or more
" persons enter on board a ship, with force and arms, and
" those in the ship have their ship carried away by violence,
" or their goods taken away out of their possession, and are
" put in a fright by the assault, this is *Piracy* (*i*); and he that
" does so is a *Pirate*, or a *robber*, within the statute.

" Nor does it differ the case, though the party so assaulted
" and despoiled should be a foreigner, not born within the
" King's allegiance; if he be *de amicitia Regis*, he is *eo*
" *nomine* under the King's protection; and to rob such a one
" upon the sea is *Piracy*.

" Nor will it be any defence to a man, who takes away by
" force another's ship or goods at sea, that he hath a com-
" mission of war from some foreign prince, unless the person
" he takes from be a lawful enemy to that prince. 'Tis a
" crime in an *Englishman* to take commission from any
" foreign prince, that is in open war with another prince
" or State. 'Tis *felony* in some cases, 'tis always punishable
" as a great *misprision*, since his Majesty hath forbid it by
" various proclamations. Yet if a man do take such a com-
" mission, or serve under it, then 'tis no robbery to assault,
" subdue, and despoil his lawful enemy, nor yet to seize and
" carry away a friend, supposed to be an enemy, provided he
" do bring that friend, without pillaging or hurting him, or
" taking any composition from him, to judgment, in some
" port of that prince, whose commission he bears. 'Tis not
" only *Piracy*, when a man robs without any commission at
" all, but 'tis *Piracy*, when a man, having a commission, de-
" spoils and robs those which his commission warrants him

(*i*) *Farinac*, tom. vii. *Qu.* 166, *de Furtis* n. 7. *Vide Novell.* 134, *cap. ult. Farin. ib.* n. 29, *de Pœna, ib.* c. 167, part i. n. 32, 3 *Jac.* c. iv.

" not to fight or meddle with; such, I mean, as are *de Li-*
" *geantia vel Amicitia Domini Nostri Regis*, and also *de*
" *Ligeantia vel Amicitia* of that prince or State that hath
" given him his commission.

" You are therefore to inquire, if any persons have com-
" mitted robbery upon the sea, entering with force and arms
" into any ship or vessel belonging to the King's subjects,
" or to the subjects of any prince or State in amity with
" the King, and not in war with any prince that hath given
" a commission to such aggressor. Or if, after such en-
" tering and boarding the ship or vessel, they have felo-
" niously carried and sailed away with the ship itself, or
" taken away any merchandises, or goods, tackle, apparel,
" or furniture out of it, thereby putting the master of
" such ship and his company in fear.

" You are carefully to present such persons, their names,
" surnames, and additions, their places of abode and occu-
" pation, the ships and the goods they have spoil'd and
" robb'd; the persons they have so assaulted and despoiled;
" the kinds, quantities, values of the goods they have taken
" away; the names and burdens of the ships or vessels they
" committed the *Piracy* in; and where those vessels, the
" goods, and the *Pirates* themselves now are; together with
" the time, place, manner, and circumstances, as distinctly as
" you can.

" You are to inquire of all such as have been accessaries
" to such robbers, in aiding, abetting, comforting, or re-
" ceiving them (*k*). For there may be accessaries in this as
" well as in other felonies, and they are punishable here;
" *Piracy* being now made *felony* by a Statute Law, and when
" any offence is felony, either at the Common Law or by
" Statute, all accessories, both before and after, are inciden-
" tally included" (*l*).

In 1696 Sir Charles Hedges, Judge of the High Court of

(*k*) *Jac. Gothofred. de famosis Latronibus investigandis*, p. 23.
(*l*) *Life of Sir L. Jenkins*, vol. i. p. xciv.

Admiralty, during the course of his charge to the Grand Jury, made the following observations:—

"The King of England hath not only an empire and "sovereignty over the British Seas, but also an undoubted "jurisdiction and power, in concurrency with other princes "and States, for the punishment of all piracies and robberies "at sea, in the most remote parts of the world; so that if "any person whatsoever, native or foreigner, Christian or In-"fidel, Turk or Pagan, with whose country we have no war, "with whom we hold trade and correspondence, and are in "amity, shall be robbed or spoiled in the Narrow Seas; the "Mediterranean, Atlantic, Southern, or any other seas, or "the branches thereof, either on this or the other side of the "line, it is *Piracy* within the limits of your inquiry and the "cognizance of this Court (*m*). . . . . . . Since foreigners "look upon the decrees of our courts of justice as the sense "and judgment of the whole nation, our enemies will be "glad to find an occasion to say, that such miscreants as "are out of the protection of all laws and civil government, "are abetted by those who contend for the sovereignty of "the seas. The barbarous nations will reproach us as being "a harbour, receptacle, and a nest of pirates; and our "friends will wonder to hear that the enemies of mer-"chants and of mankind should find a sanctuary in this "ancient place of trade. Nay, we ourselves cannot but "confess, that all kingdoms and countries who have suffered "by English pirates, may, for want of redress in the ordinary "course, have the pretence of justice, and the colour of the "laws of nations to justify their making reprisals upon our "merchants, wheresoever they shall meet them upon the "seas (*n*). . . . . . It should be considered likewise, on "the other side, that he who brings a notorious *pirate*, or "common malefactor, to justice, contributes to the safety

(*m*) "*Trial of Joseph Dawson and others,*" *Howell's State Trials* (A.D. 1696), vol. xiii. p. 455.

(*n*) *Ibid.* p. 456.

"and preservation of the lives of many, both bad and "good; of the good, by means of the assurance of pro- "tection; and of the bad too, by the terror of justice. "It was upon this consideration that the Roman Emperors "in their edicts made this piece of service for the public good "as meritorious as any act of piety, or religious worship.

"Our own laws demonstrate how much our legislators, "and particularly how highly that great prince King Henry "the Fifth, and his parliament, thought this nation concerned "in providing for the security of traders, and scouring the "seas of rovers and freebooters. Certainly there never was "any age wherein our ancestors were not extraordinarily "zealous in that affair, looking upon it, as it is, and ever "will be, the chief support of the navigation, trade, wealth, "strength, reputation, and glory of this nation" (*o*).

CCCLIX. In 1718, the Judge of the Vice-Admiralty Court at Charlestown, in South Carolina, laid down the law as to Piracy as follows:—

"Now (*p*) as this is an offence that is destructive of all "trade and commerce between nation and nation, so it is "the interest of all sovereign princes to punish and suppress "the same.

"And the King of England (*q*) hath not only an empire "and sovereignty over the British sea, but also an undoubted "jurisdiction and power, in concurrency with other princes "and States, for the punishment of all piracies and robberies "at sea, in the most remote parts of the world.

"Now as to the nature of the offence: Piracy is a robbery "committed upon the sea, and a pirate is a sea-thief.

"Indeed, the word 'pirata,' as it is derived from πειρᾶν, "'transire, à transeundo mare,' was anciently taken in a good

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(*o*) "*Trial of Joseph Dawson and others,*" *Howell's State Trials* (A.D. 1696), vol. xiii. p. 456.

(*p*) "*Trials of Major Bonnet and others for Piracy* (A.D. 1718)," *Howell's State Trials*, vol. xv. pp. 1234–37.

(*q*) See "*Sir Charles Hedges' Charge at the Trial of Dawson, &c.,*" *State Trials*, vol. xiii. p. 455.

" and honourable sense (r), and signified a maritime knight, " and an admiral or commander at sea; as appears by the " several testimonies and records cited to that purpose, by " that learned antiquary Sir Henry Spelman in his *Glos- " sarium.* And out of him the same sense of the word is " remarked by Dr. Cowel, in his *Interpreter* (s); and by " Blount in his *Law Dictionary* (t). But afterwards the " word was taken in an ill sense, and signified a sea rover " or robber; either from the Greek word *πεῖρα*, deceptio, " dolus, deceit (u); or from the word *πειρᾶν*, transire, of their " wandering up and down, and resting in no place, but " coasting hither and thither to do mischief; and from this " sense, *οἱ κατὰ θάλασσαν κακοῦργοι*, sea-malefactors, were " called *πειραταί*, pirates."

This learned Judge also cited various authorities from the Civil Law, and from jurists, from the Statute and Common Law, and commentators thereon, the most important of which will be found in the note (x); and he observed that

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(r) "Pirata pro milite maritimo, *ἀπὸ τοῦ πειρᾶν*, *i.e.* transire vel pervagari. Asser. Menevens. Epist. in vit. Ælfredi: Rex Ælfredus jussit cymbas et galeas, *i.e.* longas naves, fabricari per regnum, ut navali prælio hostibus adventantibus obviaret. Impositisque piratis in illis, vias maris custodiendas commisit. Hoc sensu archipiratam dici censeo pro nautarum præfecto, vel quem hodie admirallum nuncupamus. In quadam enim Charta Regis Edgari Cœnobio Glastoniensi confecta, an. Dom. 971, testium unus Martusin archipiratam se nominat. Annal. Gisburnenses, in Will. Rufo, cap. 1: Robertus vero comes (Normaniæ) attemptavit venire in Angliam cum magno exercitu; sed à piratis regis, qui curam maris à rege (Willielmo) susceperant, repulsus est."—*Spelman, Glossar.* in voce "Pirata," p. 460.

Vide etiam *Selden, Mare Claus.* l. ii. c. x. p. 257.

Engl. et Godolph. Admir. Jurisd. c. iii. p. 25.

(s) In the word "Pirata."

(t) In the word "Pirate."

(u) See *Ridley's View of the Civil Law*, p. ii. c. i. s. 3, p. 127.

(x) 3 *Inst.* c. xlix. p. 113. And on *Littleton*, f. 391, a.

And see *Bridal's Jus. Criminis*, pp. 70, 71.

Coke, 3 *Inst.* c. xlix. p. 113.

Molloy, de Jure Marit. l. i. c. iv. s. 1, p. 51.

See *Laws of Oleron*, c. 47, in *Godolph.* in p. 211.

Molloy, ib. s. xii. p. 57.

"In odium piratarum, præter alias pœnas, statutum est ut eorum

Piracy remained a felony by the Civil Law (*y*); and therefore, though the Statute of 28 Hen. VIII. gave a trial by the course of the Common Law, yet it altered not the nature of the offence; and the indictment must mention the same to be done "super altum mare," upon the high sea, and must have both the words "felonicè" and "piraticè" (*z*), and therefore that even a pardon of all felonies did not extend to this offence, but ought to be specially named.

In 1802 Lord Stowell addressed the Grand Jury as follows:—

"You are called upon to discharge the office of grand "jurors for the jurisdiction of the Admiralty of England— "an office of great extent in point of local authority, and of "great importance to its operation. It extends over all "criminal acts done by the King's subjects upon the sea, "in every part of the globe. You have to inquire of such "acts committed, wherever the ocean rolls; and in the "beneficial intercourse which now connects all the nations of "the world, and of which your own country enjoys so fair a

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navigia cuivis deripere liceat."—*Zouch, De Jure Nautico*, pt. i. s. x. p. 400.

"A piratis aut latronibus capti liberi permanent."—*Dig.* xlix. t. xv. xix. s. ii.

"Qui a latronibus captus est, servus latronum non est: nec postliminium illi necessarium est."—*Ib.* 24.

"Et quæ piratæ aut latrones nobis eripuerunt non opus habent postliminio, quia jus gentium illis non concessit ut jus Domini mutare possint. Itaque res ab illis captæ ubicunque reperiuntur vindicari possunt."—*Grot. de Jur. Bel. ac Pac.* l. iii. c. ix. s. xvi. p. 561.

See 27 Edw. III. c. xiii. p. 128.

1 *Croke*, p. 685, Anonym.

Hobart, pp. 78, 79, *Sir R. Bingley's Case*, and *Edmian and Smith's Case*, 29 Car. II.

3 *Keble*, p. 744, pl. 11.

Hale, Pl. Cr. p. 77.

Molloy, p. 56.

Hawkins, Pl. Cr. l. i. c. xxxvii. s. ii. p. 98.

28 Hen. VIII. c. xv. s. 3.

(*y*) *Coke*, p. 112.

Hale, p. 77.

Molloy, b. i. c. iv. s. xxv. xxvi. p. 62.

(*z*) *Leach's Hawk. Pl. Cr.* b. i. c. 37, s. 15.

"portion, it is not needful that I should enlarge upon the "necessity of preventing, by a vigilant civil discipline, all "disorders which, by obstructing its peace and freedom, "might endanger its existence" (*a*).

CCCLX. The English High Court of Admiralty is held before a judge who is the lieutenant of the Lord High Admiral, and it is a court, as appears from the foregoing extracts from the charges of judges, of criminal as well as civil jurisdiction. The authority of this Court is supported by various statutes, but the *offences* cognizable by it have been by recent statutes (*b*) made also triable by a Central Criminal Court in London, of which the Judge of the Admiralty is made, with other judges, a member, and also power has been given (*c*) to any judge of assize, oyer and terminer, or gaol delivery, without the issuing of a special commission required by an earlier statute (*d*), to inquire of and determine all *offences* committed at sea or within the Admiralty jurisdiction. The jurisdiction of the High Court of Admiralty however still remains, fortified indeed in some respects by a very recent statute (*e*), and it has been recently exercised in a most important case of piracy, called "*The Magellan Pirates.*"

Towards the latter end of 1851, there was an insurrection in some of the dominions belonging to the State of Chili. General Cruz was at the head of this insurrection, failed, and retired into the country. There was a Chilian convict settlement, at a place called Punta Arenas, the garrison of which consisted of 160 soldiers and 450 male convicts. An officer in that garrison raised an insurrection, and murdered the governor. In conjunction with those who conspired with him, he seized a British vessel, called *The Eliza Cornish*, and

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(*a*) "*Trial of William Codling and others,*" *Howell's State Trials* (1802), vol. xxviii. p. 178.

(*b*) 4 & 5 William IV. c. 36.

7 & 8 Victoria, c. 2.

(*c*) 7 & 8 Victoria, c. 2.

(*d*) 28 Henry VIII. c. 15.

(*e*) 13 & 14 Victoria, c. 26 (15 June, 1850).

also an American vessel, called *The Florida.* They murdered the master, and *Mr. Deane,* part-owner of *The Eliza Cornish,* and also the owner of *The Florida.* These facts coming to the knowledge of Admiral *Moresby,* the commander-in-chief of that station, he despatched the *Virago,* a British steamer, under the command of Captain *Houlston Stewart,* to the *Straits of Magellan.* On January 28, 1852, a vessel which proved to be *The Eliza Cornish,* was descried working out of the Straits; chase was made, and a shot fired across her bow, which brought her to. She was boarded, and seized by orders of Captain *Stewart.* She was at that time in the possession of a large number of the persons who had raised the insurrection at *Punta Arenas*; there were found on board her 128 men, 24 women, and 18 children. The guns were loaded, and the men were armed; they were under the command of a man named *Bruno Brionis,* who held a commission from *Cambiaso,* the leader of the insurrection. These men were afterwards delivered up to the Chilian authorities at Valparaiso. Captain Stewart proceeded in search of Cambiaso and the other insurgents, and he secured 56 at Wood's Bay. On Feb. 15th, Captain Stewart discovered *The Florida* in possession of a large number of insurgents; it was said that these insurgents had, whilst at sea, risen against Cambiaso and five others, and, with the aid of the American master and crew, brought the vessel to the port where Captain Stewart had found her. On board *The Florida* was found treasure which had been plundered from *The Eliza Cornish.* All the persons on board *The Florida,* not American, were given up to the Chilian authorities. Upon this state of facts, Captain Stewart and the officers and crew of H.M.S. *Virago,* applied to the Court of Admiralty for a certificate, according to a provision of a recent statute, in order that they might obtain the payment of bounty for capturing these pirates in the Straits of Magellan. The Judge (*f*) of the High Court of Admiralty said:—

(*f*) Dr. Lushington.

" As to the general character of these transactions, I really " entertain no doubt that they were piratical acts, in no " degree connected either with insurrection or rebellion. In " one sense they were acts of wanton cruelty in the murder " of foreign subjects, and in the indiscriminate plunder of " their property. I am of opinion that the persons who did " these acts were guilty of piracy, and were to be deemed " pirates unless some of the other objections which have been " urged ought to prevail. It has been said that these acts " were not committed on the high seas, and therefore this " murder and robbery not properly or legally piratical. But " in this case the ships were carried away and navigated by " the very same persons who originally seized them. I con- " sider the possession at sea to have been a piratical pos- " session, and the carrying away the ships on the high seas " to have been piratical acts" (*g*).

With respect to the general character of piratical acts the learned Judge observed:—

" I apprehend that in the administration of our criminal " law, generally speaking, all persons are held to be pirates

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(*g*) A question arose as to the construction of 13 & 14 Vict. c. 26 (which had repealed 6th Geo. IV. c. 49).

16 *Jurist*, p. 1145, *The Magellan Pirates*, contains a report of this preliminary objection. The *second section* of the Act enacts "That whenever any of her Majesty's ships or vessels of war, or hired armed vessels, or any of the ships or vessels of war of the East India Company, or their boats, or any of the officers and crews thereof, shall, after the said first day of June, attack or be engaged with any persons alleged to be pirates afloat or ashore, it shall be lawful for the High Court of Admiralty of England, and for all courts of Vice-Admiralty in any dominions of her Majesty beyond the seas, including those courts of Vice-Admiralty within the territories under the government of the East India Company, to take cognizance of and to determine whether the persons or any of them so attacked or engaged were pirates, and to adjudge what was the total number of pirates so engaged or attacked, specifying the number of pirates captured, and what were the vessels and boats engaged." At the hearing of the case the learned judge said: "It appears to me, that in affixing a construction to this statute, I am entitled to hold that the intention of the legislature was, that acts of piracy might constitute pirates."

"who are found guilty of piratical acts, and piratical acts "are robbery and murder upon the high seas. I do not "believe that, even where human life was at stake, our "courts of common law ever thought it necessary to extend "their inquiry further. If it was clearly proved against the "accused that they had committed robbery and murder "upon the high seas, they were adjudged to be pirates, and "suffered accordingly. It was never deemed necessary to "inquire whether the parties so convicted had intended to "rob or to murder on the high seas indiscriminately. Though "the municipal law of different countries may and does "differ in many respects as to its definition of piracy, yet I "apprehend that all nations agree in this, that acts such as "robbery and murder on the high seas are piratical acts, and "contrary to the law of nations. It does not follow that, "because rebels and insurgents may commit against the "ruling powers of their own country acts of violence, they "may not commit piratical acts against the subjects of other "States, especially if such acts are in no degree connected "with the insurrection or rebellion. Even an independent "State may be guilty of piratical acts. What are many "of the African tribes at this moment? Is it not no-"torious that tribes now inhabiting the African coast of "the Mediterranean will send out their boats and catch "any ships becalmed upon their coasts? Are they not "pirates because, perhaps, their sole livelihood may not "depend upon piratical acts? I am aware that it has "been said that a State cannot be piratical, but I am "not disposed to assent to such dictum as a universal pro-"position" (*h*).

CCCLXI. Special provisions are contained in the Order in Council of March 9, 1865, with respect to the punishment

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(*h*) *The Shipping and Mercantile Gazette* of Wednesday, 27th July, 1853.

of piracy where the British subject is, in China or Japan, or in the Ottoman dominions (*i*).

It should be here observed that in time of war vessels sailing under letters of marque or a *national* commission, and within the terms of that commission, are not and never have been considered as pirates by International Law (*k*). And even if they exceed the limits of their commission and commit unwarrantable acts of violence, if no *piratical* intention can be proved against them, they are responsible to and punishable by the State alone from which their commission has issued (*l*). A vessel which takes commissions from *both belligerents* is guilty of piracy, for the one authority conflicts with the other. But a nicer question has arisen with respect to a vessel which sails under two or more commissions granted by *allied Powers* against a *common enemy*. The better opinion seems to be that such practice is irregular and inexpedient, but does not carry with it the substance or the name of Piracy.

"The law" (Sir Leoline Jenkins says in the letter already cited) "distinguishes between a pirate who is a highwayman "and sets up for robbing, either having no commission at "all, or else hath two or three, and a lawful man-of-war that "exceeds his commission."

(*i*) Sec. x. rules 98–9.

The recent Extradition Statute, 33 & 34 Vict. c. 52, s. 16, contains special provisions with respect to the surrender of fugitive criminals who have committed crimes on the high seas.

See the Act in the Appendix to this volume.

(*k*) *Vattel*, l. iii. c. xv. s. 229.

Klüber, s. 260.

(*l*) *Wheaton*, *Élém.* i. 141.

Bynkershoek, *Q. J. P.* i. c. xvii.: "Qui autem nullius principis auctoritate sive mari sive terra rapiunt piratorum prædonumque vocabulo intelliguntur. Unde, ut piratæ puniuntur, qui ad hostem deprædandum enavigant sine mandato præfecti maris et non præstitis quæ porro præstari desiderant. . . . Sed Pirata quis sit, nec ne, inde pendet an mandatum prædandi habuerit, si habuerit et arguatur id excessisse non continuo eum habuerim pro Pirata."

The question remains, what is the character affixed by the law to the vessel of a *neutral* State armed as a privateer, with a commission from the belligerent? That such a vessel is guilty of a gross infraction of International Law (*m*), that she is not entitled to the liberal treatment of a vanquished enemy, is wholly unquestionable; but it would be difficult to maintain that the character of piracy has been stamped upon such a vessel by the decision of International Law. M. Ortolan admits that this position cannot be, though he desires that it should be maintained (*n*). At the same time States have covenanted that they will prevent their subjects, under heavy penalties, from accepting such commissions, as is seen in the Treaty of 1786 (26th September) between Great Britain and France (*o*); and have even cove-

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(*m*) See the law laid down to this effect in the following American cases, viz.:—

"*Trial of Gideon Henfield, for illegally enlisting in a French Privateer.*" In the Circuit Court of the United States for the Pennsylvanian District. Philadelphia, 1793, p. 49.

"*Trial of John Etienne Guinet, et al., for fitting out and arming a French armed vessel.*" In the Circuit Court of the United States for the Pennsylvanian District. Philadelphia, 1795, p. 93.

"*Trial of Francis Villato, for entering on board a French Privateer.*" In the Circuit Court of the United States for the Pennsylvanian District. Philadelphia, 1797, p. 185.

"*Trial of Isaac Williams, for accepting a Commission in a French armed vessel and serving in same against Great Britain.*" In the Circuit Court of the United States for the Connecticut District. Hartford, 1799, p. 652.—*State Trials of the United States* (*by Wharton*), published at *Philadelphia*, 1849.

(*n*) *Ortolan*, pp. 260–1: "Mais qu'il y ait là un véritable crime de piraterie de droit des gens, c'est qui n'est pas encore universellement reconnu."

(*o*) *Art.* III.: "On est aussi convenu, et il a été arrêté, que les sujets et habitans des royaumes, provinces et États de leurs Majestés, n'exerceront à l'avenir aucuns actes d'hostilité ni violences les uns contre les autres, tant sur mer que sur terre, fleuves, rivières, ports et rades, sous quelque nom et prétexte que ce soit; en sorte que les sujets, de part et d'autre, ne pourront prendre aucune patente, commission, ou instruction pour armemens particuliers, et faire la course en mer, ni lettres vulgairement appelées de représailles, de quelques princes ou États, ennemis de l'un ou de l'autre, ni troubler, molester, empêcher ou endommager, en quelque manière que ce soit, en vertu ou sous prétexte

nanted that it shall be considered by their municipal law as Piracy. Among the articles of the French *Ordonnance de la Marine*, collected by Valin, is the following :—

" Défendons à tous nos sujets de prendre commissions " d'aucuns Rois, Princes ou États étrangers, pour armer des " vaisseaux en guerre, et courir la mer sous leur bannière, " si ce n'est par notre permission, à peine d'être traités " comme pirates " (*p*). Treaties between France and Holland, in 1662, and between France and the United States of North America, in 1778, declare such privateering carried on by the subjects of either nation to be Piracy (*q*). A similar Treaty was entered into between the North American United States and Prussia (*r*) in 1785. A Treaty between

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de telles patentes, commissions ou lettres de représailles, les sujets et habitans susdits du roi de la Grande-Bretagne, ou du Roi Très-Chrétien, ni faire ces sortes d'armemens, ou s'en servir pour aller en mer. Et seront à cette fin toutes et quantes fois, qu'il sera requis de part et d'autre, dans toutes les terres, pays, et domaines quels qu'ils soient, tant de part que d'autre, renouvelées et publiées, des défenses étroites et expresses d'user, en aucune manière, de telles commissions ou lettres de représailles, sous les plus grandes peines qui puissent être ordonnées contre les infracteurs, outre la restitution et la satisfaction entière, dont ils seront tenus envers ceux auxquels ils auront causé quelque dommage."—*Martens, Rec. de Tr.* vol. iv. pp. 156–7.

(*p*) L. iii. t. ix. art. iii. t. ii. p. 235.

(*q*) " Aucun sujet du Roi Très-Chrétien ne prendra de commission de lettres de marque pour armer quelque vaisseau ou vaisseaux, à l'effet d'agir comme corsaire contre les dits États-Unis ou quelques-uns d'entr'eux, ou contre les sujets, peuples ou habitans d'iceux, ou contre leur propriété, ou celle des habitans d'aucun d'entr'eux, de quelque prince que ce soit, avec lesquels les dits États-Unis seront en guerre. De même, aucun citoyen, sujet ou habitant des susdits États-Unis et de quelqu'un d'entr'eux, ne demandera ni n'acceptera aucune commission ou lettre de marque pour armer quelque vaisseau ou vaisseaux, pour courre sus aux sujets de S. M. T. C., ou quelqu'un d'entr'eux, ou leur propriété, de quelque prince ou États que ce soit, avec qui sa dite Majesté se trouvera en guerre; et si quelqu'un de l'une ou de l'autre nation prenoit de pareilles commissions ou lettres de marque, il sera puni comme *pirate.*" —*Martens, Rec. de Tr.* (1778), vol. ii. p. 597 (*Art.* xxi.).

(*r*) Art. XX. " Aucun citoyen ou sujet de l'une des deux parties contractantes n'acceptera d'une puissance avec laquelle l'autre pourroit être en guerre, ni commission ni lettre de marque pour armer en course

Denmark and the Republic of Genoa, concluded on the 30th July, 1789, contained a similar provision (*s*). And all the Treaties contracted by France with the American Republics contain a provision, of which the 16th article of the Treaty with Venezuela (25th March, 1843) may serve as a sample:—

" 16. S'il arrive que l'une des deux parties contractantes " soit en guerre avec quelque autre pays tiers, l'autre partie " ne pourra, dans aucun cas, autoriser ses nationaux à prendre " ni accepter des commissions ou lettres de marque, pour " agir hostilement contre la première, ou pour inquiéter le " commerce et les propriétés de ses sujets ou citoyens " (*t*).

CCCLXII. Soon after the abdication of James II. an International question of very great importance arose, namely, what character should be ascribed to *Privateers* commissioned by the monarch, who had abdicated, to make war against the adherents of William III., or rather against the English

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contre cette dernière, sous peine d'être puni comme pirate. Et ni l'un ni l'autre des deux États ne louera, prêtera ou donnera une partie de ses forces navales ou militaires à l'ennemi de l'autre pour l'aider à agir offensivement ou défensivement contre l'État qui est en guerre."—(10 Sept. 1785.) *Martens, Rec. de Tr.* iv. p. 45.

(*s*) "Les sujets de part et d'autre ne pourront prendre ni recevoir patentes, instructions, ni commissions pour armemens particuliers, et pour faire la course en mer, ni lettres patentes appelées vulgairement lettres de représailles d'aucun prince, ou État ennemi de l'une ou de l'autre partie contractante. Ils ne devront jamais, en quelque manière que ce puisse être, faire valoir des semblables patentes, commissions, ou lettres de représailles d'une puissance tierce, pour troubler, molester, empêcher, ou endommager les sujets respectifs, ni faire de tels armemens et courser, sous peine d'être regardés et traîtés comme pirates.

"A cette fin les hautes parties contractantes promettent réciproquement de faire publier, le cas avenant, des défenses à leurs sujets, sous les plus rigoureuses peines, d'exercer de pareilles pirateries, et si au mépris de ces mêmes défenses quelqu'un n'en commet pas moins de semblables contraventions, il sera puni des peines préscrites suivant l'ordonnance émanée, et il indemnisera et dédommagera entièrement celui ou ceux, sur lesquels il auroit fait des prises."—*Martens, Rec. de Tr.* (1789), vol. iv. pp. 447-8 (*Art.* xii.).

(*t*) *Martens, Rec. de Tr.* (1843), vol. xxxiv. p. 170.

See *Manning's Law of Nations,* for other Treaties on this subject, p. 111.

while under his rule? The question in fact involved a discussion of the general principle, whether a deposed sovereign, claiming to be sovereign *de jure*, might lawfully commission privateers against the subjects and adherents of the sovereign *de facto* on the throne; or whether such privateers were not to be considered as Pirates, inasmuch as they were sailing *animo furandi et deprædandi*, without any *national* character. The question, it should be observed, did not arise in its full breadth and importance until James II. had been expelled from Ireland as well as England, until, in fact, he was a sovereign, claiming to be such *de jure*, but confessedly *without territory*. It appears that James, after he was in this condition, continued to issue letters of marque to his followers. The Privy Council of William III. desired to hear civilians upon the point of the piratical character of such privateers. The arguments on both sides are contained in a curious and rather rare pamphlet, published by one (*u*) of the counsel (Dr. Tindal) for King William, in the years 1693-4 (*x*). The principal arguments for the piratical character of the privateers appear to have been—

1. That International Law is chiefly built upon the general good of all the societies which are members of the universal community.

2. That long custom, in things indifferent, is not binding upon nations after they have publicly declared that they intend no longer to be bound by them,—instanced in the case of resident ambassadors, whom a nation might, without violation of Law, refuse to receive.

3. That nothing can more diminish from the sacredness of the Law of Nations than to allow it no other foundation than the *practice* of the generality of *sovereigns*, who often

(*u*) The other was Dr. Littleton.

(*x*) An edition was printed in 1734 at London, "for the proprietors," after his death, to which I have referred,—"*An Essay concerning the Laws of Nations and the Rights of Sovereigns, by Matthew Tyndal, LL.D.*"

sacrifice the happiness of their own nation to the gratification of their passions.

4. That the Laws of Nations relate to their mutual commerce and correspondence, which cannot be maintained but by having recourse to those *who have the power* of making *Peace* and *War*, and all *Contracts* for the nations which they represent, whose acts are the acts of the whole body, and bind the members as much as if each particular person had assented. That, *on account of this power*, the governors of each society are allowed certain *prerogatives* by other nations over whom they have no authority and who are no otherwise concerned with them, but as they have the power of making contracts for the nation which they govern; that therefore *de facto* Governors are recognized, as Cromwell had recently been, by other States.

5. That the leagues which princes make with one another do not oblige them to one another longer than they are in possession of their Government, because they are made on account of the power which each nation has to afford mutual assistance and benefit to another, and this reason still continues, though the person who was entrusted with authority to make them be different, the former person being then no further concerned therein than according to the Civil Law a proctor would be with a cause after the revocation of his proxy.

6. That though the sovereign of a country in which a deposed prince took refuge, might accord to him what *national* privileges he pleased, yet that he could not accord to him international privileges, which belong to those who have *summum imperium*, and not to a titular prince who in the eye of International Law is regarded as a private person. That such titular prince was in fact a subject—*subditus temporarius*—of the sovereign. What right could he claim by the *Law of Nations*, when no *nations* were in any way concerned with his actions? Because, as to foreign nations, they had only recognized him as having power to make national contracts, which power and the consequent privileges he had

ceased to have. As to his own nation, that had entrusted its affairs to other hands, and was no more concerned with him than a foreign State.

7. That a necessary consequence of his being reduced to the *status* of a private person, and of not having any of the privileges which belong to those who possess *summum imperium,* was an incapacity of granting commissions to private men-of-war to disturb the trade of any nation.

8. That therefore they who acted under such commission may be dealt with as if they acted under their own authority or the authority of any private person, and therefore might be treated as pirates.

9. That if such a titular prince might grant commissions to seize the ships and goods of all or most trading nations, he might derive a considerable revenue as a chief of such freebooters, and that it would be madness in nations not to use the utmost rigour of the law against such vessels.

10. That if he could grant a commission to take the ships of a single nation, it would in effect be a general licence to plunder, because those who were so commissioned would be their own judges of whatever they took, whether it were lawful prize or not, because, in another prince's territories, whither the pretended prize must be brought, the titular and ousted prince could erect no court of judicature to judge according to Maritime and International Law concerning the property so taken. He could neither enforce the attendance of witnesses, nor the restitution of ships unjustly taken, nor provide any of the essential requisitions of justice. His own residence in the country is precarious, and at any moment he might be banished from it.

11. The sovereign into whose ports the pretended prizes would be taken, would have no legal right to adjudicate upon them, and assuming that he had the right—what if he refused to exercise it?

12. That the reason of the thing which pronounced that Robbers and Pirates, when they formed themselves into a civil society, became *just enemies*, pronounced also that a

king without territory, without power of protecting the innocent or punishing the guilty, or in any way of administering justice, dwindled into a Pirate if he issued commissions to seize the goods and ships of nations; and that they who took commissions from him must be held by legal inference to have associated *sceleris causa*, and could not be considered as members of a civil society.

13. Lastly, that besides all these reasons the persons being Englishmen were morally incapable to take, from any king whatever, a commission to attack, in a hostile manner, the goods and ships of their fellow-subjects. The argument on the other side is thus stated by the author :—

" The occasion of sending for the civilians, after some of " them that were consulted had given their opinions in " writing, was, as the Lords told Sir *Thomas Pinfold* and " Dr. *Oldys* (who had declared that they were not pyrates, " without offering to shew the least reason why they were " of that mind) to hear what reason they had to offer for " their opinion.

" Then Sir *Thomas Pinfold* said, it was impossible they " should be pyrates, for a pyrate was *hostis humani generis*, " but they were not enemies to all mankind; therefore they " could not be pyrates. Upon which all smiled, and one of " the Lords asked him, *Whether there ever was any such* " *thing as a pyrate, if none could be a pyrate but he that was* " *actually in war with all mankind*? To which he did not " reply, but only repeated what he had said before. *Hostis* " *humani generis* is neither a definition, nor so much as a " description of a pyrate, but a rhetorical invective to show " the odiousness of that crime. As a man, who, tho' he " receives protection from a government, and has sworn to " be true to it, yet acts against it as much as he dares, may " be said to be an enemy to all governments, because he de-" stroyeth, as far as in him lieth, all government and all " order, by breaking all those ties and bonds that unite " people in a civil society under any government: so a man " that breaks the common rules of honesty and justice, which

" are essential to the well-being of mankind, by robbing but
" one nation, may justly be termed *hostis humani generis*;
" and that nation has the same right to punish him, as if he
" had actually robbed all nations.

" Dr. *Oldys* said, that the late king, being once a king,
" had, by the Laws of Nations, a right to grant commissions;
" and that, tho' he had lost his kingdoms, he still retained a
" right to the privileges that belong to Sovereign Princes.
" It was asked him by one of the Lords, whether he could
" produce an author of any credit, that did affirm, that he
" who had no kingdom, nor right to any, could grant com-
" missions; or had a right to any of those privileges, that
" belong to Sovereign Princes? And that no king would
" suffer those privileges to be paid to CHRISTINA, when she
" ceased to be Queen of *Sweedland*; and that it was the
" judgment of all the lawyers that ever mentioned that point,
" that she had no right to them; and he did hope, that
" those who had sworn to their present majesties, did not
" believe the late king had still a right: and that that point
" was already determined, and would not be suffered to be
" debated there. To which he answered, that King JAMES
" was allowed very lately the *rights of a King*, and that
" those who acted by his commission in *Ireland* were treated
" as enemies; and people that followed his fortune, might
" still suppose he had a right, which was enough to excuse
" them from being guilty of pyracy.

" One of the Lords then demanded of him, If any of their
" majesties subjects, by virtue of a commission from the late
" king, should by force seize the goods of their fellow-subjects
" by land, whether that would excuse them from being guilty
" at least of robbery? If it would not from robbery, why
" should it more excuse them from pyracy? To which he
" made no reply. Then the Lords asked Sir *Thomas Pinfold*
" and Dr. *Oldys*, Whether it were not treason in their ma-
" jesties subjects, to accept a commission from the late king
" to act in a hostile manner against their own nation? Which
" they both owned it was (and Sir *Thomas Pinfold* has since,

" as I am informed, given it under his hand, that they are
" traytors). The Lords farther asked them, If the seizing
" the ships and goods of their majesties subjects were treason,
" why they would not allow it to be pyracy? Because
" pyracy was nothing else but seizing of ships and goods by
" no commission; or what was all one, by a void or null one,
" and said, that there could be no commission to commit
" treason, but what must be so: to which they had nothing
" to reply, only Dr. *Oldys* pretended to quote a precedent,
" which he said came up to the present case, about *Antonio*
" king of *Portugal*, who, as he said, after he had lost his
" kingdom, gave commissions to privateers to seize upon all
" *Spanish* vessels, whom, as the *Spaniards* met with, they
" hanged as pyrates; (so far his precedent is against him;)
" but an author (without naming him) was of opinion, as he
" said, That if *Antonio* had ever been a rightful king, that
" then the *Spaniards* ought not to have treated those who
" acted by his commission, as pyrates. This was all that was
" said by the Doctor in behalf of the late king's privateers;
" upon which I must beg leave to make a few reflections.

" As to those privileges which were allowed the late King
" in *Ireland,* they were not allowed him upon the account of
" any right, nor was it an owning that he had any right to
" that kingdom, but barely as he was in possession; for then
" he had *Rempublicam Curiam, &c.,* and consequently a
" right to be treated as an enemy; and not only he, but
" whoever had been in possession would have a right to have
" been used after the same manner; and is no more than
" what is practised in all civil wars, where there are just
" forces on either side. These privileges being allowed him
" when he was a public person, and in possession of a king-
" dom, could be no just reason to induce any to imagine, that
" they would be permitted him when he was reduced to a
" private condition; much less is it such a presumption as is
" sufficient to excuse them, who acted by his commission,
" from suffering as pyrates. The very accepting a commis-
" sion from him, after he was reduced to a private condition,

" to act against their own nation, was a demonstration that
" the government was no longer in his, but other hands, who
" could not reasonably be presumed would allow that he had
" still any right, or they that acted by his commission should
" be dealt with, as if he still had a right; but that they
" should be used, as if they acted by no commission, or what
" is all one, a null or invalid one. Their pretending to be-
" lieve he has still a right, is no more an excuse in the case
" of pyracy, than of treason, which every traytor may pre-
" tend to.

" As to the story of *Antonio,* the Doctor is (to suppose
" no worse) abominably mistaken in the very foundation;
" for they that suffered by the *Spaniards* as pyrates, were
" *French,* who had not their commissions from *Antonio,*
" but from their own king, as *Albericus Gentilis,* who
" mentions this story, *Lib.* i. *cap.* 4, says, *At ipsa Historia*
" *vincat eos non fuisse Piratas, per literas quas Regis sui*
" *ostendebant, cui Regi serviebant, non Antonio, etsi maxime*
" *pro Antonio, quod illos non tangebat.* And *Conestaggius,*
" who is the historian he refers to, and who has given
" an excellent account of that war, says it was the royal
" navy of *France* (which is very improbable did act by any
" authority but that of the *French* king's) set out, as he
" words it, *Regiis sub Auspiciis,* with which the *Spanish* fleet
" engaged, and had the good fortune, after a long and bloody
" fight, to rout it, and took above five hundred prisoners, of
" which almost the fifth part were persons of quality, whom
" the *Spanish* admiral was resolved to sacrifice as pyrates,
" because the *French* king, without declaring war, had sent
" them to the assistance of *Antonio*: against which pro-
" ceedings the officers of the *Spanish* fleet murmured, and
" represented to their admiral, that they were not pyrates,
" because they had the *French* king's commission; but
" what they chiefly insisted on, was the ill consequence it
" would be to themselves, who, if they fell into the hands
" of the *French,* must expect the same usage. As to the
" *French* king's assisting *Antonio* without declaring war,

" they supposed, that before the sea fight, the two Crowns " might be said to be in a state of war, by reason of frequent " engagements they had in the Low Countries. This is " the account *Conestaggius* gives of it, which, how little it " is to the purpose the Doctor quoted it for, is so visible, " that there is no need of any words to shew it. But granting " (as the Doctor supposeth) that *Antonio* never had any " right, or, at least, the *Spaniards* would never allow he had " any, yet it is evident from the historian, that they allowed " him, during possession, the same privileges as the late King " had during the war in *Ireland*: and if the *Spaniard*, by " the law of nations, after *Antonio* was driven from his king- " dom, might treat those that acted by his commission as " pyrates, why may not the *English* deal after the same man- " ner with those that act by the late King's commission, " since they look on him to be in the same condition as the " *Spaniards* did on *Antonio*, without a kingdom, or right " to one? What difference can this make, that one had " never a right, and the other, tho' he had once a right, has " lost it?

" These two civilians, I believe, are the only persons, pre- " tending to be lawyers, who are of opinion, that a king " without a kingdom, or right to one, has, by the Law of " Nations, a right to grant commissions to privateers, espe- " cially if they are subjects (as they have acknowledged it) " to that king, against whom they, by their commissions, are " to act" (*y*).

This account is certainly tinged by the reporter's hatred of Jacobites, and very probably the arguments of *Pinfold* and *Oldys* are not fully reported; but after every deduction has been made in their favour, the reason of the thing must be allowed to preponderate greatly towards the position of *Tindal*, that these Privateers were *jure gentium* Pirates (*z*).

(*y*) *Tindal's Essay*, pp. 43, 8.

(*z*) The law respecting Privateers is discussed in the third volume of these Commentaries.

CHAPTER XXI.

RENVOI.—EXTRADITION.

CCCLXIII. The subject of this chapter seems to require a threefold division; for we have to consider—

1. The Right of a State to dismiss foreigners commorant in her territories—sometimes called the right of *Renvoi.*

2. The Obligation of a State, under the general law, to surrender foreign subjects—or the Law of *Extradition.*

3. The Obligation of a State to surrender foreign subjects, in compliance with the provisions of *Treaties of Extradition.*

CCCLXIV. Every State is held to lie under an obligation to take charge of its natural subjects; it cannot therefore refuse to receive back citizens who have migrated in quest of food or employment into foreign countries. Correspondent with this obligation on the part of the State of the citizen, is the right of the State into which he has migrated to send the foreign citizen back to his own home.

This right is usually known in Law by the term *Droit du Renvoi* (*a*). At the same time it must be observed, that it

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(*a*) *Kent's Comment.* vol. i. p. 36, and note.

Sir L. Jenkins, speaking of the demand made by the French Crown on behalf of a French subject, charged in an English port with having committed piracy on the high seas, says: "The matter of *Renvoy* being a thing quite disused among princes, and as every man by the usage of our European nations is justiciable in the place where the crime is committed, so are pyrates, being reputed out of the protection of all laws and privileges, and to be tried in what ports soever they are taken."—Vol. ii. p. 714.

Martens, l. iii. c. iii. s. 91.

This right is now seldom exercised but in time of war. During the present war (1870) the French Government have expelled resident Germans.

ceases, where the citizen has been naturalized by *express law*, in the foreign country. And the right can hardly be held to exist where the naturalization has been effected by *tacit permission*. Martens thinks it would be desirable to define, by the terms of a positive treaty negotiated with every country, the cases in which the tie between the citizen and his native Government shall be held to be so severed as to destroy the obligation of receiving him again; and he observes, that the Law does not consider the character of the native subject, in this sense and for this purpose, as indelible.

This suggestion of Martens is founded upon the practice of many of the German States, who appear also to have considered the question with respect to the transmission, through intermediate States, of persons from the country in which they have been sojourning to the country of their birth (*b*).

CCCLXV. The *right* of a State to dismiss foreigners from its territories having been discussed, the *obligation* of a State to deliver up or surrender the subject of a foreign State on the demand of that State, is next to be considered (*c*).

With respect to citizens, not being fugitives from justice, but who are needed for the exigencies of their original country,

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(*b*) *Martens*, l. iii. c. iii. s. 91.

"En effet, le gouvernement de chaque État a toujours le droit de contraindre les étrangers qui se trouvent sur son territoire à en sortir, en les faisant conduire jusqu'aux frontières. Ce droit est fondé sur ce que l'étranger ne faisant pas partie de la nation, sa réception individuelle sur le territoire est de pure faculté, de simple tolérance, et nullement d'obligation. L'exercice de ce droit peut être soumis, sans doute, à certaines formes par les lois intérieures de chaque pays; mais le droit n'en existe pas moins, universellement reconnu et pratiqué. En France, aucune forme spéciale n'est prescrite aujourd'hui en cette matière; l'exercice de ce droit d'expulsion est totalement abandonné au pouvoir exécutif."—*Ortolan, Diplom. de la Mer*, l. ii. c. xiv. p. 323.

(*c*) *Dissertatio de Deditione Profugorum: Henricus Provó Kluit*, Utrecht, 1829.

The Law of Extradition, by Charles Egan: London, 1846.

1 *Kent's Comment.* 36, note.

Ortolan, Dipl. de la Mer, l. i. c. xiv.

it has been already stated that International Law affords no pretext for their delivery.

With respect to fugitives from justice, the doctrine of the Roman Law was explicit on this point, ordering that every criminal should be remitted to his *forum criminis*: but the reason is given by Paul Voet:—

"Jure tamen civili notandum, remissionibus locum fuisse "de necessitate, ut reus ad locum ubi deliquit, sic petente "judice, fuerit mittendus, quod omnes judices uni subessent "imperatori. Et omnes provinciæ Romanæ unitæ essent "accessoriè, non principaliter" (*d*). . . . . . . "Moribus "nihilominus (non tamen Saxonicis) *totius fere Christi-"anismi*, nisi ex *humanitate*, non sunt admissæ remissi-"ones, quo casu, remittenti magistratui cavendum per lit-"teras reversoriales, ne actus jurisdictioni remittentis ullum "pariat præjudicium. Id quod etiam in nostris Provinciis "Unitis est receptum. Neque enim Provinciæ Fœderatæ "uni supremo parent" (*e*).

CCCLXVI. Though the reason for this remission of criminals arose from the peculiar condition of universality incident to the Roman Empire, there is not wanting the authority of great jurists (*f*) to support as maxims of

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(*d*) *P. Voet, De Stat.* s. xi. c. i. p. 297 (ed. 1715).
Id. p. 358.

(*e*) *Ib.* s. xi. c. i. n. 6, p. 297 (ed. 1715).
Id. p. 358 (ed. 1661).

(*f*) *Grotius*, l. ii. c. xxi. s. 3, 4, 5: "Veniamus ad quæstionem alteram de receptu adversus pœnas. Pœnas, ut ante diximus, naturaliter cuivis, cui nihil simile objici potest, exigere licet. Institutis civitatibus id quidem convenit, ut singulorum delicta, quæ ipsorum cœtum proprie spectant, ipsis ipsarumque rectoribus pro arbitrio punienda aut dissimulanda relinquerentur.

"At non etiam jus tam plenum illis concessum est in delictis, quæ ad societatem humanam aliquo modo pertinent, quæ persequi ita civitatibus aliis earumve rectoribus jus est, quomodo in civitatibus singulis de quibusdam delictis actio datur popularis: multoque minus illud plenum arbitrium habent in delictis, quibus alia civitas aut ejus rector peculiariter læsus est, et quo proinde nomine ille illave ob dignitatem aut securitatem suam jus habent pœnæ exigendæ, secundum ea quæ ante

International Law, both the following propositions upon this question of *Extradition* :—

1. That States are under an obligation to refuse an asylum to fugitive criminals;

2. That they are bound, if satisfied by examination of the *prima facie* guilt of the fugitive, to surrender him for trial to the country in which he committed the crime.

CCCLXVII. Nevertheless, the usage of nations has not accepted these propositions; nor is the opposite view without the support of eminent jurists, such as Puffendorf (*g*), John Voet (*h*), Martens (*i*), and others (*k*).

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diximus. Hoc ergo jus civitas, apud quam nocens degit, ejusve rector impedire non debet.

"Cum vero non soleant civitates permittere ut civitas altera armata intra fines suos pœnæ expetendæ nomine veniat, neque id expediat, sequitur ut civitas, apud quam degit qui culpæ est compertus, alterum facere debeat, aut ut ipsa interpellata pro merito puniat nocentem, aut ut eum permittat arbitrio interpellantis; hoc enim illud est dedere, quod in historiis sæpissime occurrit. . . . . Neque obstant illa adeo prædicata supplicum jura et asylorum exempla. Hæc enim illis prosunt qui immerito odio laborant, non qui commiserunt quod societati humanæ aut hominibus aliis sit injuriosum."

Rutherforth follows *Grotius's* opinion, l. ii. c. ix. s. 12. So also *Heineccius* in his *Prælectiones*.

Vattel, l. ii. c. vii. pp. 75–6–7.

Burlamaqui, pt. iv. c. iii. ss. 23-29.

(*g*) *Puffendorf*, l. viii. c. iii. ss. 23–4.

(*h*) *Voet, De Statutis*, 297. So too *Klüber*, t. i. c. ii. s. 66.

(*i*) *Martens*, l. iii. ch. iii. s. 101. *De l'Extradition d'un Criminel.*

Story, Conflict of Laws, ss. 626, 627, 628, pp. 878–9–80.

As to the opinion of American lawyers, most of the reasoning on each side will be found very fully collected in the case of *In the matter of Washburn*, 4 *John, Ch. R.* 106; that of *Commonwealth* v. *Deacon*, 10 *Serg. & Rawl.* 123; *Holmes* v. *Jennison*, 14 *Peter's R.* 540–598; and that of *Rex* v. *Ball*, 1 *Amer. Jurist*, 997. The latter case is the decision of Mr. Chief Justice Reid of Canada. See also 1 *Amer. State Papers*, 175; *Commonwealth* v. *De Longchamps*, 1 *Dall.* 111, 115; *U. States* v. *Davis*, 2 *Summer R.* 482, 486.

1 *Kent, Comment.* pp. 35–38.

Merlin, Questions du Droit, tit. ÉTRANGER; *Répert. du Droit*, tit. SOUVERAINETÉ.

(*k*) "Profecto populum cogere ut hunc illumve prehendat nobisque

France, Russia, England and the North American United States, have constantly, either by diplomatic acts or decisions of their tribunals, expressed their opinion, that upon principles of International Law, irrespective of Treaty, the surrender of a foreign criminal cannot be demanded (*l*).

Mr. Chancellor Kent, however, expresses himself very strongly upon this subject; and, according to him, " It is " the duty of Government to surrender up fugitives on demand, " after the civil magistrate shall have ascertained the existence " of reasonable ground for the charge, and sufficient to put the " accused on his trial. For the guilty party cannot be tried " and punished by any other jurisdiction than the one whose " laws have been violated; therefore the duty of surrendering " him applies as well to the case of the subjects of the State " surrendering as to the case of the subjects of the Power de- " manding the fugitive" (*m*); and it must be admitted that the English courts, even before the Treaties and Statutes hereinafter mentioned, appear to have held the doctrine that International Comity was sufficiently stringent to compel the surrender of the criminal. In the 29th year of Charles II., we find the following decision in the *King* v. *Hutchinson*:

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remittat, nihil aliud est, nisi illum cogere, ut faciat aliquid, ad quod jure obstringi non potest.

" Si quæritur, quid peragatur a civitate, quæ consentit in deditionem profugi, respondemus eam tantum alteri auxilium ferre in exercitio juris, quod in profugum habet. Auxilium ferre est actus benevolentiæ et *comitatis*, ad quem præstandum nemo perfecte est obligatus."—*Kluit, de Deditione Profugorum*, c. i. s. 1.

Tittman, in Strafrechtspf. p. 27: " Wenn das dieser Person schuldgegebene Verbrechen mehr aus einer Verletzung des politischen Systemes, als des Rechtes jenes Staates besteht, denn in solchen Fällen ist das Strafrecht an sich selbst noch zweifelhaft."—*Ib.* c. ii. s. 10, p. 81, note.

(*l*) *Kluit, de Deditione Profugorum*, c. iv. ss. 1, 3.

Heffters, l. i. lxiii. p. 119. *Recht der Auslieferungen.*

Fœlix, l. ii. t. ix. c. 7.

Coke's Institutes, iii. 180.

(*m*) 1 *Kent's Commentaries*, p. 37. But see *Story on the Constitution of the United States*, s. 1808, and note 2 thereon; *Story on the Conflict of Laws*, s. 628, and *Coke's 3rd Inst.* 380.

"On *Habeas Corpus* it appeared the defendant was com-
"mitted to Newgate on suspicion of murder in Portugal,
"which by Mr. Attorney, being a fact out of the King's
"dominions, is not triable by commission, upon 35 Henry
"VIII. c. 2, § 1, n. 2, but by a Constable and Marshal;
"and the Court refused to bail him," &c. (*n*).

In 1749, the Barons of the Exchequer said: "The Go-
"vernment may send persons to answer for a crime where-
"ever committed, that he may not involve his country; and
"to prevent reprisals" (*o*).

In 1811, Mr. Justice Heath, sitting in the Common Pleas, observed: "It has generally been understood that whereso-
"ever a crime has been committed, the criminal is punish-
"able according to the *lex loci* of the country, against the law
"of which the crime was committed; and by the comity of
"nations, the country in which the criminal has been found
"has aided the police of the country against which the
"crime was committed, in bringing the criminal to punish-
"ment. In *Lord Loughborough's* time the crew of a *Dutch*
"ship mastered the vessel, and ran away with her, and
"brought her into *Deal*, and it was a question whether we
"could seize them, and send them to Holland; and it was
"held we might" (*p*).

When the Scotch demanded the Extradition of Bothwell, Queen Elizabeth promised either to surrender him or send him out of her kingdom.

It is well known that Charles II. pursued the murderers of his father with unrelenting severity. He entered into a Treaty with Denmark (February 13, 1660), by the 5th

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(*n*) 3 *Keble's Rep.* 785.

(*o*) *East India Company* v. *Campbell*, 1 *Vesey's* (*Sen.*) *Rep.* 247.

(*p*) *Mure* v. *Kaye*, 4 *Taunton's Rep.* 43.

As to the power of transmitting criminals from England, in which country they were apprehended, to Ireland, in which country they had committed the offence, see *Case of Lundy*, 2 *Ventris's Rep.* p. 314, Case in the 2nd year of Will. and Mary; and *King* v. *Kimberley*, 2 *Strange's Rep.* 848, Case in the 3rd year of Geo. II.

article of which the Extradition of any of the regicides, who might take shelter in that country, was stipulated for, and three of the regicides, who had fled to Holland, were surrendered to him by De Witt, at that time Grand Pensioner. Napper Tandy, and some of his comrades concerned in the Irish rebellion of 1795–8, were arrested in Hamburg, and delivered up to the English authorities, an act which was greatly resented by Buonaparte (*q*).

There are two circumstances to be observed, which occur in these and in all other cases of Extradition:—

1. That the country demanding the criminal must be the country in which the crime is committed;

2. That the act done, on account of which his Extradition is demanded, must be considered as a crime by both States.

It may be further remarked (*r*), that the *obligation* to deliver up native subjects would now be denied by all States, even by those which carry the general doctrine of Extradition as to criminals to the farthest limit; and that it is generally admitted that Extradition should not be granted in the case of political offenders, but only in the case of individuals who have committed crimes against the Laws of Nature, the laws which all nations regard as the foundation of public and private security (*s*).

The result of the whole consideration of this subject is,

(*q*) *Martens, Erzählungen merkwürdiger Fälle des neueren Europ. Völkerrechts*, ii. 282.

Case of James Napper Tandy and another, Howell's State Trials, vol. xxvii. p. 1191.

(*r*) Many States are by the positive laws of their own constitution prevented from delivering up *citizens* to foreign Powers, *e. g.* Prussia, Bavaria, Würtemberg, Baden, Hesse, Oldenburg, Brunswick, and Altenburg.

Vide Heffters, ubi supra.

Fœlix.

Saalfeld, s. 40.

Klüber, t. i. c. ii. s. 63.

(*s*) *Vattel*, l. i. s. 233.

Fœlix, ubi supra.

that the Extradition of criminals is a matter of *Comity*, not of *Right*, except in the cases of special convention (*t*).

CCCLXVIII. It may happen that two nations make a request (*réclamation*) for the delivery of the same offender. The only course which the State harbouring the offender is *obliged* to pursue, in such a case, is, not to show partiality to either requesting State. According to Martens, the request of the State which claims the offender as attached to her *service, e.g.* as an officer, or a public functionary, is preferable to the request of the country against which, or more especially in which, the crime has been committed; while, on the other hand, the request of the latter State is preferable to that of the State which claims the offender merely as an individual subject. It is hardly necessary to discuss this nice point of International casuistry, as it is clear that the wisest conduct which a State can adopt is to refuse the request of both applicants (*u*).

(*t*) Κατὰ τὸν κοινὸν ἁπάντων ἀνθρώπων νόμον, ὃς κεῖται τὸν φεύγοντα δέχεσθαι.—*Demosth. contra Aristocr.* 648.

(*u*) *Edinburgh Review*, No. lxxxiii. pp. 129, 139, 141.

In the case of the *Creole*, all the judicial authorities in the House of Lords expressed the same opinion. February 1842, *Hans. Parl. Deb.*

Cases in the American courts:—

In the matter of *Washburn*, 4 *Johnson's Chancery Reports*, 106.

Commonwealth v. *Deacon*, 10 *Serg. & Rawl.* 123.

Rex v. *Ball*, *American Jurist*, 297.

United States v. *Davis*, 2 *Sumner's Rep.* 486. Judge Story's decision.

Holmes v. *Jenison*, 14 *Peter's Reports*, 540.

Ex parte Holmes, 12 *Vermont's Rep.* 630.

Case of *José Ferreire Jos Santos*, 2 *Brochenbourgh's Reports*, 492.

The result of these cases (for a reference to which I am indebted to a note in *Mr. Chancellor Kent's Commentaries*, vol. i. pp. 36, 37), seems to be, that the constitution of the United States confers no authority on their public officers or courts to deliver up a fugitive criminal.

See, too, *Opinions of the* (*American*) *Attornies-General*, vol. i. pp. 384, 392, affirming the same proposition, and correcting a former opinion (vol. i. p. 46); *Story's Comment. on the Constitution*, vol. iii. pp. 675, 676; *On the Conflict of Laws*, ss. 626, 627; also *Commonwealth* v. *De Longchamps*, 1 *Dallas*, 111, 115.

"Différend survenu en 1747, entre la Cour de Suède et celle de la Grande-Bretagne au sujet de l'extradition d'un négociant nommé *Springer*, accusé de haute trahison et refugié dans l'hôtel du ministre d'Angleterre." *Martens, Causes célèbres*, dixième Cause. *Vide post*, AMBASSADORS.

CCCLXIX. The right of a State to demand that rebellious subjects shall not be allowed to plot against it in the territory of another State, has been already discussed (*x*); it cannot, when stretched to its utmost limit, be extended beyond the point of requiring the foreign State to send the fugitive in safety elsewhere; and this demand can only be legally made, when the State has confessed or demonstrated its inability to restrain the fugitive, from carrying on plots against the country, from which he has fled.

This very important subject recently underwent a memorable discussion in the House of Peers. In a debate which arose upon the question of foreign refugees, most of the Lords, who were either then discharging, or who had discharged judicial functions in the highest tribunals of the realm, delivered their opinions upon this nice question of International Law.

Lord Lyndhurst introduced the subject by referring to the great irritation which prevailed at Vienna, and throughout the Austrian dominions, with respect to the alleged conduct, in London, of certain refugees from the Lombardic dominions of Austria. It will be very difficult to abridge without injuring the clear exposition both of our National and International Law laid down by that eminent and learned nobleman. He stated that Law, with respect both to British subjects and to foreign refugees, in these words:

" I will first take the case of a British subject. If a num-
" ber of British subjects were to combine and conspire toge-
" ther to excite revolt among the inhabitants of a friendly
" State—of a State united in alliance with us—and these
" persons, in pursuance of that conspiracy, were to issue mani-
" festoes and proclamations for the purpose of carrying that
" object into effect; above all, if they were to subscribe
" money for the purpose of purchasing arms to give effect to
" that intended enterprise, I conceive, and I state with con-
" fidence, that such persons would be guilty of a misdemea-
" nour, and liable to suffer punishment by the laws of this

(*x*) See chap. x.

" country, inasmuch as their conduct would tend to embroil
" the two countries together, to lead to remonstrances by the
" one with the other, and ultimately, it might be, to war. I
" think my noble and learned friends who are now assembled
" here, and who perform so important a part in the delibera-
" tions of this House, will not dissent from the opinion I
" state with respect to British subjects. Now with respect
" to foreigners. Foreigners residing in this country, as long
" as they reside here under the protection of this country, are
" considered in the light of British subjects, or rather subjects
" of her Majesty, and are punishable by the criminal law
" precisely in the same manner, to the same extent, and under
" the same conditions, as natural-born subjects of her Ma-
" jesty. In cases of this kind, persons coming here as re-
" fugees from a foreign State, in consequence of political acts
" which they have committed, are bound by every principle
" of gratitude to conduct themselves with propriety. This
" circumstance tends greatly to aggravate their offence, and
" no one can doubt that they are liable to severe punishment.
" I will put the case in another shape. The offence of en-
" deavouring to excite revolt against a neighbouring State is
" an offence against the Law of Nations. No writer on the
" Law of Nations states otherwise. But the Law of Nations,
" according to the decision of our greatest judges, is part of
" the Law of England. I need say no more with reference
" to the nature of the offence imputed to those individuals—
" I need say no more than that they are subject to be
" punished by the laws of this country for offences of this
" description. But there is a question connected with this
" subject of considerable difficulty, and that relates to the
" evidence by which a party can be convicted. Here, I
" admit, there is a very serious difficulty. It is not sufficient
" that the offence should be notorious to the world. You
" must have such evidence to support the particular charge
" as shall be admissible before our tribunals" (*y*).

(*y*) *Vide The Times*, 5th March, 1853.
Hansard's Parl. Deb. vol. cxxiv. p. 1046.

In the course of the debate, the Prime Minister stated that the Government had resolved, if any event occurred which gave just grounds of complaint to a foreign Government against a refugee in this country, to take upon themselves the prosecution of such an individual, and not to throw the burden of it upon the foreign minister. The principal occasions upon which such a course has been pursued are the two following:

In 1799, certain English subjects were prosecuted for publishing a libel upon Paul I., Emperor of Russia. The Attorney-General in that case said that he had been commanded to file an information in order to vindicate the character of the Emperor of Russia—a prince in amity with this country, defamed in a libel, contrary to the laws and usual policy of nations, which protect not only the magistracies, but the individuals of each other, from insult and reproach. Lord Kenyon tried the case, and, though Erskine defended the prisoners, the jury found them guilty. They were punished by fine and imprisonment (*z*). Lord George Gordon was found guilty of libelling Marie Antoinette, the consort of a Sovereign an ally of this kingdom.

In 1803, Jean Peltier, a French refugee, was prosecuted for a libel on Napoleon Buonaparte, then First Consul of the French Republic: Lord Ellenborough tried the case, and, in spite of an extraordinary speech delivered by Mackintosh, the jury found Peltier, his client, guilty; but as war, soon after this trial, was renewed between Great Britain and France, the defendant was never called upon to receive judgment (*a*).

In 1858 a conspiracy against the life of Napoleon III., planned in London, excited much debate on the Continent and in England on the state of our Criminal Law with respect to crimes committed by foreigners commorant here against foreign Sovereigns and allies. An attempt to alter or amend the existing law was fatal to the Government of Lord Palmerston, which introduced a Bill for that purpose.

(*z*) *State Trials* (*Howell*), vol. xxvii. pp. 627–630.
(*a*) *Ib.* vol. xxviii. pp. 530–619.

All the legal authorities—and they were of a very high order—in the House of Lords expressed their clear opinion that the foreigner was as amenable as a British subject to our jurisdiction for offences committed in this country, and that to conspire the murder of a foreign Sovereign or his consort was an offence cognizable by our law (*b*). In the same year one Bernard was tried on a charge of being an accessory before the fact to a plot for assassinating the Emperor of the French, which caused the murder of one of his guards. He was acquitted, whether justly or not is not to be considered in this place (*c*).

CCCLXX. The delicate question of the protection afforded to native offenders, by the residence of persons entitled to the privilege of *exterritoriality*, will be considered hereafter.

CCCLXXI. We have now to consider (*d*) the principal Treaties upon the subject of Extradition, which form an important part of Positive International Law between the contracting parties, and cannot but have, from their number, and from the variety of States which have entered into them, an important general bearing upon this question of International Jurisprudence.

CCCLXXII. In France (*e*), the matter of Extradition has been frequently the subject of domestic legislation and of treaty with other Powers.

With regard to the former, some doubt seems to exist as to the present legal effect of enactments and provisions made before the year 1831 (*f*).

The first Treaty, by which France promised and stipulated for Extradition, was concluded between that country and Spain, in 1765 (*g*). The second was entered into with the

(*b*) See *Hansard's Parl. Deb.* for 1858. *Ann. Reg.* 1858, pp. 32–4.
(*c*) *Ann. Reg.* 1858, p. 310.
(*d*) *De M. et De C. Tr.*, *Index*, tit. EXTRADITION.
(*e*) *Fœlix*, l. ii. t. ix. c. 7.
(*f*) *Ib.* pp. 586, 592, s. 612 and note.
(*g*) It does not appear in the general collections.

Duchy of Wurtemberg, in the same year (*h*). According to the terms of the latter Treaty, the subjects of Extradition are to be "brigands, malfaiteurs, voleurs, incendiaires, meur-" "triers, assassins, vagabonds."

In 1783 (*i*), France became a third party to a Treaty concluded between Spain and Portugal in 1778 (*j*), the sixth Article of which stipulates for the mutual Extradition of natives accused of counterfeiting coin, contrabandists, and deserters. The stipulations with respect to deserters were renewed by the sixteenth Article of a Treaty between France and Spain, made in 1786 (*k*).

By a Treaty concluded between France and Switzerland in August 1798 (fourteenth Article), and renewed in September 1803 (eighteenth Article), it is stipulated (*l*), —" Si les *individus* qui seroient déclarés juridiquement " coupables de crimes d'État, assassinats, empoisonnemens, " faux sur des actes publics, fabrication de fausse monnoye, " vols avec violence ou effraction, ou qui seroient poursuivis " comme tels en vertu de mandats décernés par autorité " légale, se réfugioient d'un pays dans l'autre, leur extradi- " tion sera accordée à la première réquisition. Les choses " volées dans l'un des deux pays, et déposées dans l'autre, " seront fidèlement restituées, et chaque État supportera, " jusqu'aux frontières de son territoire, les frais d'extradition " et de transport. Dans le cas de délits moins graves, mais " qui peuvent emporter peine afflictive, chacun des deux " États s'engage, indépendamment des restitutions à opérer, " à punir lui-même le délinquant ; et la sentence sera com- " muniquée à la légation françoise en Suisse, si c'est un " citoyen françois, et réciproquement à l'envoyé helvétique " à Paris, ou, à son défaut, au land-amman de la Suisse,

(*h*) *Martens, Rec. de Traités*, t. i. p. 310.

(*i*) *Ib.* t. ii. p. 612.

(*j*) *Ib.* p. 625.

(*k*) *Ib.* t. iv. p. 187.

(*l*) *Ib.* t. vi. p. 466; t. viii. p. 132; *Art.* xviii. Renewed on the 18th of July, 1828, according to *Fœlix*, 585.

"si la punition pesoit sur un citoyen de la Suisse." It provides also for the Extradition of public functionaries or receivers of public moneys pursued for carrying away the property of the State.

Stipulations to the same effect were inserted in the Treaty of Amiens in 1802 (Article Twenty), between England and France (*m*); and also in a Treaty between the same parties in February 1843 (*n*).

Treaties between France and England, in August 1787 and March 1815 (Articles Eight and Nine), contain reciprocal stipulations for the surrender of persons accused of offences cognizable in courts of law within their respective possessions in the East Indies (*o*).

In November 1834 *France* entered into a Treaty of Extradition with *Belgium*, containing similar stipulations; but each Government reserved to itself the right of excepting from the operation of the Treaty special and extraordinary cases (*p*). By this Treaty Belgium is not bound to surrender a French subject for an offence committed by him in Belgium; and the same rule applies to France (*q*).

By a Treaty between *France* and *Sardinia*, in May 1838, it is stipulated that persons "mis en accusation ou condamnés" in their respective countries, for any of the offences specified in the Treaty with Belgium which has been just mentioned, shall be subject to Extradition. The operation of the Treaty is limited to French subjects in Sardinia, and to Sardinian subjects in France or Corsica (*r*). But this Treaty

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(*m*) *Martens, Rec. de Traités,* t. vii. p. 412.

(*n*) *Vide post.*

(*o*) *Martens, Rec. de Traités,* t. iv. pp. 280–285.

(*p*) *Ib.* t. xx. (*Nouv. Rec.* t. xii.) *Art.* ii. p. 733: "Chacun des deux gouvernemens entend cependant se réserver le droit de ne pas consentir à l'extradition dans quelques cas spéciaux et extraordinaires rentrant dans la catégorie des faits prévus par l'article précédent.

"Il sera donné connaissance, au gouvernement qui réclame l'extradition, des motifs de refus."

(*q*) *Revue étrangère,* t. ix. p. 1032.

(*r*) See *M. Fœlix,* l. ii. tit. ix. ch. vii. p. 588, who has the following

does not contain the reservation specified in the Treaty with Belgium.

France has also Treaties of Extradition with *Sweden* and *Norway*, of December 1843 (*s*); with the *United States of North America*, of November 1843, promulgated April 1844 (*t*); with the *Grand Duchy of Baden*, of June 1844 (*u*); with *Luxemburg*, of September 1844 (*v*); and with *Bavaria*, of March 1846 (*w*).

France has particular Treaties upon the subject of Extradition of *deserters*, with *Wurtemberg*, of December 1765; with the *North American United States*, of November 1788 (*x*), and of June 1823 (*y*) (Article Ninth); with *Sardinia*, of June 1782, and of August 1820 (*z*); with the *Netherlands*, of October 1821 (*a*); with *Bavaria*, of May 1827 (*b*); and with *Prussia*, of July 1828.

CCCLXXIII. It appears to have been the usage of the kingdom of the *Two Sicilies* (*c*) to concede Extradition; but they had a positive Treaty, of July 1818, on the subject, with the Pope, for the surrender of all delinquents, with power for an armed force of the one country to make arrests within the territory of the other (*d*).

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note: "*Bulletin des Lois*, 1838, ix. Bull. 616, No. 7716; *Collection de M. Duvergier*, 1838, p. 734; *V. un cas d'application de ce Traité dans la Gazette des Tribunaux* du 21 janvier 1843."

(*s*) *Collection de M. Duvergier*, 1843, p. 69. (This reference and the three next are from *M. Fœlix.*)

(*t*) *Ibid.* 1844, p. 436.

(*u*) *Ibid.* 1844, p. 640.

(*v*) *Ibid.* 1846.

(*w*) *Martens*, t. iv. p. 417.

(*x*) *Bull. des Lois*, Bull. 614, No. 15,077. (This reference and the six next are from *M. Fœlix.*)

(*y*) *Ib.* Bull. 425, 1820, No. 9971.

Martens, Nouv. Supplément, t. ii. p. 42.

(*z*) *Bull. des Lois*, 1821, Bull. 486, No. 11,576.

(*a*) *Ib.* 1827, Bull. 162, No. 6054.

Martens, t. vii. p. 132.

(*b*) *Bull. des Lois*, 1828.

(*c*) *Fœlix*, p. 592.

(*d*) *Martens, Nouv. Rec.* t. v. p. 281.

The kingdom of the *Two Sicilies* had a Treaty, of May 1819, with *Sardinia* (*e*), for the delivery of individuals condemned to the galleys, or to temporary or perpetual labour.

The *Papal States* had the Treaty above mentioned with Sardinia.

CCCLXXIV. *Holland* has Treaties, of April 1718, and of December 1756, with *Austria* and *France* (*f*); with *Hanover*, of 1815 (*g*); and express Treaties for the surrender of deserters, with *France*, of October 1821; with *Sweden* and *Norway*, of May 1827; and with *Nassau*, of August 1828 (*h*).

CCCLXXV. *Sardinia* provides, by the eleventh Article of her Penal Code, that no Extradition shall take place except under the authority of the king. She has or had Treaties for Extradition of malefactors with France, Austria, Tuscany, Modena, Parma, Placentia, Morocco, Massa, Carrona (*i*).

CCCLXXVI. *Austria* (*j*), which incorporates into its own code the power and obligation of Extradition, has Treaties for the surrender of individuals accused of crimes or misdemeanours (*crimes ou délits communs*) with Sardinia, (April 1792, June 1838) (*k*); with Parma, Placentia, Guarlotten (July 1818); with Modena (October 1818, 1834); with the Swiss Cantons, excepting Glaris, Zug, Bâle, Ap-

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(*e*) *Martens, Nouv. Rec.* t. v. p. 398.

(*f*) *Ib. Guide diplomatique*, pp. 133, 138, and 771.

(*g*) *Fælix*, s. 619, p. 593 (notis).

(*h*) *Martens, Nouv. Rec.* t. vii. p. 682.

(*i*) *Ib.* t. vii. p. 214.

(*j*) *Fælix*, pp. 592, 593, 594.

De Puttlingen, Die gesetzliche Behandlung der Ausländer in Oesterreich.

Klüber, Oeffentliches Recht des deutschen Bundes und der Bundesstaaten, ss. 197, 347.

(*k*) *Martens, Nouv. Rec., Supplément*, t. ii. p. 81.

Fælix, s. 621, p. 594.

penzell, the Grisons, Geneva (1828) (*l*); and with Tuscany (October 1829) (*m*).

CCCLXXVII. The Extradition of persons accused of high treason is stipulated for in Treaties with Russia and Prussia as to Polish subjects (January 1834); with all the States of the Germanic Confederation (August 1836); and with the Two Sicilies (*n*).

CCCLXXVIII. For the Extradition of deserters, Austria has Treaties with Russia (April 1808, May 1815, July 1822) (*o*); with the minor Italian States; with the Pope (June 1821); with Sardinia (February 1826); with the Germanic Confederation (February 1831, May 1832).

CCCLXXIX. *Prussia* punishes offences committed by her subjects in foreign lands against her *own* laws only (*p*); but has incorporated in her criminal code the obligation of the proper magistrate to enforce the Extradition which has been the subject of Treaties with other nations; certain precautions being taken, such as taking security for obtaining a return for the Act of Comity granted by her (*reversalia de observando reciproco* (*q*)). She has Treaties of Extradition for persons charged with crimes or misdemeanours with Mecklenburg-Schwerin, of February 1811, and 1831 (*r*); with Russia, of May 1816, and March 1830 (*s*); and with Belgium, of July 1836 (*t*).

In 1832, 1834, and 1836 Prussia entered into Treaties for the surrender of political offenders with the Germanic Confederation, Austria, and Russia (*u*); in 1833 and 1837 (*v*),

(*l*) *Martens, Nouv. Rec.* t. vii. p. 646.
(*m*) *Martens,* t. xv. p. 44.
(*n*) *Fœlix,* s. 621, p. 594.
(*o*) *Martens, Nouv. Recueil,* t. iv. p. 282; t. vi. p. 120. *Fœlix,* s. 621, p. 595.
(*p*) *Ib.* s. 560, p. 547.
(*q*) *Fœlix,* s. 622, p. 595.
(*r*) *Martens, Nouv. Rec.* t. ix. p. 216.
(*s*) *Ib.* t. iv. p. 293; t. viii. p. 244.
(*t*) *Ib.* t. xv. p. 98.
(*u*) *Ib.* t. xv. p. 44.
(*v*) *Fœlix,* s. 622, p. 596.

into Treaties with the Germanic Confederation for the surrender of contrabandists, provided that they were not subjects of the State in which they were arrested.

Prussia has stipulated for the Extradition of deserters with *Denmark*, *Brazil*, *France*, *Luxemburg*, and the *Germanic Confederation* (*x*).

Bavaria, *Oldenburg*, *Saxe-Altenburg*, *Brunswick*, *Hanover*, and *the Elector of Hesse*, have or had the same principles, generally speaking, inserted in their domestic Codes and foreign Treaties.

CCCLXXX. *Switzerland* has concluded Treaties with *France* (*y*), *Austria* (*z*), and *Baden* (*a*), for the Extradition of persons accused of crimes or misdemeanours; but in none of these Treaties is any mention made of the surrender of Swiss citizens; and it is expressly refused in the third Article of the Treaty with Austria.

Spain and Portugal (*b*) recognize the Extradition of persons charged with crimes or misdemeanours, as a principle of International Law; but have no other Treaties on the subject than that already mentioned, with France, of 1778 and 1783 (*c*).

CCCLXXXI. *Denmark* has Treaties for the Extradition of malefactors with *Brunswick*, of May 1732, July 1744, February 1759, and November 1767 (*d*); with *Sweden*, of December 1809 (*e*), in the Ninth and separate Article of which it is stipulated :—" Les devoirs du bon voi-" sinage imposant aux hautes parties contractantes l'obli-" gation réciproquement salutaire de contribuer, en autant

(*x*) *Fælix*, s. 622, pp. 596, 597.
(*y*) *Vide supra.*
(*z*) *Vide supra.*
(*a*) *Vide supra.*
(*b*) *Martens, Nouv. Rec.* t. vii. p. 646; t. ix. p. 22.
Fælix, p. 605, and note.
(*c*) *Vide supra.*
(*d*) *M. Kluit, passim.*
Fælix, s. 635, p. 606.
(*e*) *Martens, Nouv. Rec.* t. i. p. 223.

"qu'il est en leur pouvoir, au maintien des loix criminelles "des deux pays, elles sont convenues d'un article séparé "qui sera à regarder comme s'il étoit inséré mot à mot dans "le présent traité, et par lequel l'extradition réciproque des "malfaiteurs et déserteurs sera stipulée et réglée."

Denmark has a similar Treaty with *Norway*, of March 1823 (*f*), which contains provisions similar to those in the Treaty with Sweden. *Denmark* has Treaties, for the Extradition of deserters, with *Spain*, of July 1767 (*g*); with *Sweden*, in the Treaty already mentioned; with *Mecklenburg Strelitz and Schwerin*, of February and April 1823 (*h*); with *Hamburg*, of May 1832 (*i*).

CCCLXXXII. *Sweden* appears to have only two Treaties on this subject:—1. The Treaty already mentioned, with *Denmark*; 2. A Treaty with *Russia* of November 1810 (*k*), by the seventh Article of which it is stipulated: "La tran- "quillité et la sûreté des paisibles habitans de ces frontières, "étant trop exposées par la grande facilité aux malfaiteurs "de se soustraire à leurs justes punitions, en passant sur le "territoire de l'autre puissance, il est convenu que tout meur- "trier, incendiaire, brigand ou voleur qui, après avoir commis "un crime dans une des paroisses limitrophes, s'évadera sur le "territoire étranger, sera saisi et livré à son gouvernement "aussitôt que réquisition en aura été faite; mais en cas que "l'accusé soit sujet de l'État où il se sera refugié après "avoir commis le crime sur le territoire étranger, il sera jugé "et puni par son propre gouvernement, avec la même "rigueur que s'il s'étoit rendu coupable envers celui-ci." In both these Treaties, the surrender of deserters is conceded.

Norway appears to have only the Treaty already mentioned, with Denmark (*l*).

(*f*) *Martens, Nouv. Rec.* t. vii. p. 14.
(*g*) *Ib.* t. i. p. 459.
(*h*) *Ib.* t. vii. pp. 5, 16.
(*i*) *Ib.* t. vi. p. 259.
(*k*) *Ib.* t. i. p. 313, t. iv. p. 33.
(*l*) *Vide supra.*

CCCLXXXIII. *Russia* has the Treaties already mentioned (*m*), for the Extradition of malefactors and deserters, with Austria, Prussia, and Sweden; for the Extradition of deserters, with the kingdom of the Two Sicilies, of January 1787 (*n*); with Portugal, of December 1787 (*o*), and December 1798 (*p*); with Saxony, of October 1806 (*q*).

CCCLXXXIV. The *Sublime Porte* is accustomed to surrender malefactors who are *not* subjects (*r*); but has refused to surrender *political* criminals. She appears to have no Treaty on the subject of Extradition.

CCCLXXXV. *Greece* allows by her domestic law the Extradition of Turkish subjects for crimes or misdemeanours committed in her territory, but does not allow Greek subjects to be surrendered to Turkish authority for offences committed in the Turkish dominions (*s*).

CCCLXXXVI. *England* holds, and has always held, as a general principle, the doctrine of refusing to surrender any persons who may have taken refuge in her dominions (*t*). The recent deviations from this principle are bounded by the letter of the Treaty which constitutes the particular case of exception; and by no Treaty has she departed from her rule of refusing the Extradition of political refugees (*u*).

By the Treaty of Amiens, England, for the first time, covenanted with France for the Extradition of fugitives charged with forgery, fraudulent bankruptcy, or murder, committed in their respective territories (*v*); but this Treaty was for a limited period.

(*m*) *Ubi supra.*

(*n*) *Martens, Recueil,* t. iv. p. 229.

(*o*) *Ib.* t. iv. p. 315 (*Art.* xix.).

(*p*) *Ib.* t. vi. p. 537 (*Art.* xix.).

(*q*) *Martens, Nouv. Recueil,* t. i. p. 153.

(*r*) *Fœlix,* s. 639, p. 607, and note.

(*s*) *Fœlix,* s. 640, p. 607.

Revue étrangère, t. i. p. 417.

(*t*) *Vide M. Fœlix,* s. 641, p. 607, and note.

(*u*) *Debate in the House of Lords, 4th February,* 1842. *Speech of Lord Brougham.*

(*v*) *Martens, Recueil,* t. vii. p. 404 (*Art.* xx.).

England has also had at various times Treaties for the Extradition of deserters, with the German principalities,—*Hesse Cassel* (*x*) (January 1776, September 1787 (*y*), and April 1793 (*z*)); *Baden* (September 1793 (*a*)); *Hesse Darmstadt* (*b*) (September and October 1793); *Brunswick* (November 1794 (*c*); the *Elector Palatine* (March 1800 (*d*)); *Duchy of Wurtemberg* (April 1800 (*e*)); *Archbishopric of Mayence* (April 1800 (*f*)). But at present she has only two Treaties of Extradition with foreign States, one with France and another with America, both confirmed by Acts of Parliament (*g*).

The Treaty with France, on 13th February, 1843, provides, that the high contracting parties should, on requisition made in their name through the medium of their respective diplomatic agents, deliver up to justice persons who, being accused of the crimes of murder (comprehending the crimes designated in the *French* penal code by the terms assassination, parricide, infanticide, and poisoning), or of an attempt to commit murder, or of forgery, or of fraudulent bankruptcy, committed within the jurisdiction of the requiring party, should seek an asylum or should be found

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(*x*) *Martens, Recueil,* t. ii. p. 422.
(*y*) *Ib.* t. iv. p. 306.
(*z*) *Ib.* t. v. p. 449.
(*a*) *Ib.* t. v. p. 506.
(*b*) *Ib.* t. v. pp. 492 and 524.
(*c*) *Ib.* t. v. p. 620.
(*d*) *Ib.* t. vi. p. 707.
(*e*) *Ib.* t. vii. p. 47 (*Art.* viii.).
(*f*) *Ib.* t. vii. p. 54 (*Art.* viii.).
(*g*) *Hertslet's Treaties,* vol. vi. pp. 448-9. "An Act of the British Parliament for giving effect to a Convention between her Majesty and the King of the French for the apprehension of certain offenders," 6 & 7 Vict. c. lxxv. s. 1.

Further provisions for facilitating the execution of this Act were given by 8 & 9 Vict. c. 120.

7 *Hertslet's Tr.* 356.
Martens, Rec. de Tr. t. xxxiv. p. 20.
Ann. Reg. (1843), p. 470.

within the territories of the other; provided that this should be done only when the commission of the crime should be so established, as that the laws of the country, where the fugitive or person so accused should be found, would justify his apprehension and commitment for trial, if the crime had been there committed; and also provides, that on the part of the British Government the surrender should be made only on the report of a judge or magistrate duly authorized to take cognizance of the acts charged against the fugitive in the warrant of arrest, or other equivalent judicial document issued by a judge or competent magistrate in *France*, and likewise clearly setting forth the said Acts; and also provides, that the expenses of any detention and surrender made in virtue of the stipulations hereinbefore recited should be borne and defrayed by the Government in whose name the requisition should have been made; and also provides, that the provisions of the said Convention should not apply in any manner to crimes of murder, forgery, or fraudulent bankruptcy committed antecedently to the date thereof; and also provides, that the said Convention should be in force until after the First day of January, in the year one thousand eight hundred and forty-four, after which date either of the high contracting parties should be at liberty to give notice to the other of its intention to put an end to it, and it should altogether cease and determine at the expiration of six months from the date of such notice.

This Treaty was confirmed by the Act 6 & 7 Vict. c. 75, passed on 22nd August, 1843.

The Treaty of Great Britain with the United States of North America, on 9th August, 1842, provides, by the tenth Article, that the two countries should, upon mutual requisitions by them or their ministers, officers, or authorities respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within

the jurisdiction of either of the high contracting parties, should seek an asylum or should be found within the territories of the other: provided that this should only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged should be found, would justify his apprehension and commitment for trial if the crime or offence had been there committed, and that the respective judges and other magistrates of the two Governments should have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, so that he might be brought before such judges or other magistrates respectively, to the end that the evidence of criminality might be heard and considered; and if on such hearing the evidence should be deemed sufficient to sustain the charge, it should be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant might issue for the surrender of such fugitive, and that the expense of such apprehension and delivery should be borne and defrayed by the party making the requisition and receiving the fugitive; and the eleventh Article provides that the said tenth Article shall continue in force until one or other of the high contracting parties shall signify its wish to terminate it, and no longer (*h*).

This Treaty was confirmed by the Act 6 & 7 Vict. c. 76, passed on 22nd August, 1843; and both the Treaties with France and the United States were further confirmed by the 8 & 9 Vict. c. 120, which facilitated their execution.

A former Treaty on the same subject had been signed between the North American United States and Great Britain, in 1794; and under the twenty-seventh Article of that

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(*h*) *Hertslet's Treaties*, vol. vi. pp. 862–3. "An Act of the British Parliament for giving effect to a Treaty between her Majesty and the United States of America, for the apprehension of certain offenders," 6 & 7 Vict. c. 76.

Martens, Rec. de Tr. t. xxxiv. p. 507.

Treaty, a citizen of the North American United States, who had committed murder within the jurisdiction of England, that is, upon board a British ship on the high seas, was delivered up to the British by the American authorities, although it was strongly contended that the article of the Treaty was contrary to the constitution of the United States; that the Treaty could only relate to foreigners; that, the crime having been committed on the high seas, the Courts of the United States had competent jurisdiction; and that a grand jury ought to make inquest, before a party was sent away for trial. All these objections were overruled, and the prisoner delivered up to the British Consul (*i*).

CCCLXXXVII. The United States of North America have the aforesaid Treaty of Extradition with England, and also one with France.

In 1853 the Treaty with England was enforced in the case of Thomas Kaine, an Irish criminal claimed by the British Consul, at the port of New York, for the crime of an assault with an intent to commit murder within the British dominions; and a formal and careful decision upon the effect of the Treaty was delivered by the American Commissioner, who said that it was his duty to inquire, whether the evidence of the guilt of the person charged would justify his commitment for trial, according to the laws in force in the State of New York, if charged with the crime there, and the requisitions of those laws would be fully complied with by the production of evidence from which the magistrate or Commissioner might conclude that the offence had been committed, and that there was probable cause to believe that the prisoner had been guilty of it. In this case the criminal was surrendered under the provisions of the Treaty (*k*).

(*i*) *Robbins's Case*, sentence by *Judge Bee*, *State Trials of the United States*, published at Philadelphia (1849), p. 393.

United States v. *Nash*, *Bee's* (*American*) *Admiralty Reports*, 266.

(*k*) The reciprocal Extradition of criminals among the States which

CCCLXXXVIII. It appears that, with respect to proceedings had in virtue of these Treaties and Acts, the applications of the British Government to France and the United States have been generally successful, but that the reverse may be predicated of the applications by France and America to *Great Britain* (*l*).

It has been decided in England that no retrospective effect can be given to these Acts or Treaties.

The only important decision given in England on these statutes was that in "*The Queen* v. *Clinton*," in which Mr. Baron Platt observed: "The object of the Act was to give "effect to a Treaty for reciprocally rendering up persons "'being charged' with forgery, &c., 'committed' within the "jurisdiction of either party, &c. Now, 'being charged,' "in his opinion, clearly meant, 'being *then* charged;' but "the word 'committed' might stand for 'which have there-"'tofore been committed,' or 'which were then committed,' "or 'which should be committed after the passing of the "'Act.' Looking into the Treaty, for the purpose of giving "effect to which this Act was passed, he found the terms "were such person as 'having committed,' &c., and 'being "'fugitive from justice,' &c. On this he would remark that "it appeared to him very doubtful whether, under this Treaty, "a merchant committing forgery of a bill of exchange in the "United States with the intention of providing for it at "maturity, and coming over here *animo revertendi*, and there-"fore not a fugitive from justice, could be taken and given "up to the American Government. 'Being fugitive' meant "being so at the time when the law was to be put in force. "If so, then it would appear that the word 'committed' meant "committed after the Treaty. According to the common "course of reasoning and of justice, it must be considered "that the Treaty was meant to attach only on those whose

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constitute the union is expressly provided for by the constitution.—*Story on the Constitution*, ss. 1807–8–9.

(*l*) *Egan on the Law of Extradition*, p. 57.

"crimes as well as flight had taken place since the making "of the Treaty. That must be the construction of the "Treaty, and the construction of the Act of Parliament "must correspond; for he considered that they were bound "to advert to the Treaty to discover the meaning and "intention of the Act of Parliament; and therefore he "thought that the word 'committed' could not be referred "to transactions before the date of the Treaty. The word "could have no other application. That was his opinion; "and he thought he was bound to act upon it, because it "seemed to him that, in this country, laws to tax or restrain "liberty must be clear; and if this was defective in express- "ing the intention of the Legislature, it was for them to "alter it. His opinion was founded on the Treaty; and, "taking that ground, he thought that the Act of Parliament "could only apply to those who had committed the crime after "the passing of it (*m*). It seemed to him, therefore, that he "could only order that this man be discharged. The prisoner "was then accordingly discharged."

CCCLXXXIX. An important British statute (*n*) has been enacted during the present year (1870), amending the existing municipal Law relating to the Extradition of Criminals. Political offences are excluded from the scope of its operation. It extends to British possessions as well as to the United Kingdom. It will be found printed at length in the Appendix to this volume, as also the statute of 1852 (*o*), for executing arrangements with foreign Powers as to the apprehension of seamen who have deserted their ship.

(*m*) *The Law Times*, Nov. 1, 1845.

Egan on the Law of Extradition, pp. 54, 55.

The Act 1 W. IV. c. 66, which applies to the forging or uttering in England documents purporting to be made out of England.

(*n*) 33 & 34 Vict. c. 52.

(*o*) 15 Vict. c. 26.

PART THE FOURTH.

CHAPTER I.

INTERVENTION.

CCCXC. In all systems of Private Jurisprudence, provision is made for placing upon the abstract Right of Individual Property such restrictions as the general safety may require. The maxim "*expedit enim reipublicæ, ne* "*quis sua re malè utatur,*" belongs to the law of all countries (*a*).

The Prætorian *Interdict* (*b*) of the Roman, the *Injunction* of the English Law, give effect to this principle by *preventing* the mischief from being done, instead of endeavouring to remedy it when done.

CCCXCI. Some analogous right or power must exist in the system of International Jurisprudence; "Nei-" ther," says Lord Bacon, "is the opinion of some of the "schoolmen to be received, that a war cannot justly be made

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(*a*) *Inst.* lib. i. viii. 22: "Chaque droit a ses limites: il est limité par les droits analogues de tous les membres d'une société."—*Ahrens, Cours de Droit naturel ou de Philosophie du Droit,* p. 296. (Brux. 1844.)

(*b*) Among the principal instances in which individual property is subjected to restriction on account of the general good are the following:—

Cautio damni infecti, Dig. xxxix. t. 2.
Actio de tigno juncto, Dig. xlvii. t. 3.
Interdictum de glande legenda, Dig. xliii. t. 28.
Actio aquæ pluviæ arcendæ, Dig. xxxix. t. 3.
Interdictum de arboribus cædendis, Dig. xliii. t. 27.

"but upon a precedent injury or provocation; for there is "no question but a just fear of an imminent danger, though "there be no blow given, is a lawful cause of a war" (*c*). The Right of Self-Defence incident to every State may in certain circumstances carry with it the necessity of *intervening* in the relations, and, to a certain extent, of controlling the conduct of another State; and this where the interest of the *intervener* is not immediately and directly, but mediately and indirectly, affected. This remark brings us to the consideration of the doctrine of INTERVENTION (*d*).

CCCXCII. And first of all it should be clearly understood that the Intervention of bodies of men, armed or to be armed, uncommissioned and unauthorized by the State to which they belong, in a war, domestic or foreign, of another State, has no warrant from International Law.

It has been already observed (*e*) that it is the duty of a State to restrain its subjects from invading the territory of another State; and the question when such an act on the part of subjects, though unauthorized by the State, may bring penal consequences upon it, has received some consideration.

It is a question to which the events of modern times have given great importance, and as to which, during the last half-century, the opinions of Statesmen, especially of this country, have undergone a material change.

That this duty of restraining her subjects is incumbent upon a State, and that her inability to execute it cannot be alleged as a valid excuse or as a sufficient defence to the invaded State, are propositions which, strenuously contested as they were in 1818, will scarcely be controverted in 1870.

(*c*) *Essay on Empire.*

(*d*) *Günther*, i. 287, ss. 8–12.

Heffters, 90.

Wheaton, Droit intern. t. i. pp. 77, 92.

Manning, Law of Nations, p. 97.

(*e*) *Vide antè*, s. ccxix. on the question *Civitasne deliquerit an cives?*

The means which each State has provided for the purpose of enabling herself to fulfil this obligation form an interesting part of Public and Constitutional Jurisprudence, to the province of which they, strictly speaking, belong. The question, however, borders closely upon the general province of International Law, and upon the particular theme of this chapter; and some notice of the private law of States, especially of England and the United States of America, with respect to this subject seems proper in this place, though the fuller consideration of it belongs to a later part of this work, in which the duties and rights of Neutrals in time of War are discussed.

The United States of America began their career as an independent country under wise and great auspices, and it was the firm determination of those who guided their nascent energy to fulfil the obligations of International Law as recognized and established in the Christian commonwealth of which they had become a member.

They were sorely tried at the breaking out of the war of the first French Revolution, for they had been much indebted to France during their conflict with their mother country, and were much embarrassed by certain clauses relating to Privateers in their Treaty with France of 1778; but in 1793, under the Presidency of Washington, they put forth a proclamation of neutrality, and, resisting both the threats and the blandishments of their recent ally, took their stand upon sound principles of International Law, and passed their first Neutrality Statute of 1794. The same spirit induced the Government of these States at that important crisis when the Spanish colonies in America threw off their allegiance to the mother country to pass the amended Foreign Enlistment Statute of 1818; in accordance with which, during the same year, the British statute, after a severe struggle and mainly by the great power of Mr. Canning, was carried through Parliament.

Public feeling, however, was generally averse to it, and a notion that it assisted the despotic Powers of Europe in

repressing the efforts of their subjects to obtain constitutional liberty prevailed. It is a very remarkable fact that no public prosecution of an offender against the provisions of the statute appears to have been formally conducted, by order of the Government, in a court of justice, until the period of the recent American civil war; that is, nearly fifty years after the passing of the Act. Public opinion upon the subject had then undergone a revolution. The statute when put to a practical test was found to be badly constructed, and to bear in its loose phraseology and disjointed sentences (*f*) marks of the compromise which had enabled it to become law (*g*).

In substance, though not without variations judicially considered important, it agreed with the American statute, which it was designed to follow. The machinery has been much improved in the statute of this year, which is better calculated to strengthen the hands of the Executive (*h*).

The American statute has not as yet been altered (*i*).

(*f*) Mr. Baron Channell, in the case of the *Alexandra*, said: "The Foreign Enlistment Act, particularly the seventh section, is very imperfectly worded. There is no doubt that it was in a great measure, but with what appear to me important variations, penned from an Act of the United States, passed in Congress, first in the year 1794, and re-enacted by Congress in the year 1818. . . . . Faulty and imperfect as may be the wording of the seventh section of the Foreign Enlistment Act (and more imperfect or faulty wording I can scarcely conceive), if, notwithstanding all this, the words of the seventh section, read with reference to the other part of the Act, do, by a reasonably fair interpretation of our statute and the evidence, embrace the case of the *Alexandra*, then in my judgment it scarcely becomes necessary to consider what have been the decisions of the courts in America upon Acts of Congress in the main much the same, but in not unimportant respects different from our own Act."—*Rep. of the Alexandra*, by Eyre and Spottiswoode, 1864, p. 551.

(*g*) *Queen* v. *Carlin, ship Salvador. Judgment of the Privy Council*, by Lord Cairns, June 28, 1870.

(*h*) The English and American statutes are printed in the Appendix to this volume.

(*i*) See a very elaborate note, by Mr. Dana, on the statute, with reference to the legislative, executive, and judicial proceedings upon it, in his edition of *Wheaton*, p. 536 (439). In 1866 a new Neutrality Bill was

It appeared from evidence laid before the English "Neu-"trality Laws Commission," appointed by the Queen in 1867 (the recommendations of whose Report are mainly incorporated in the present and recent statute), that European States generally were furnished by their municipal law with the means of fulfilling their international obligations in this respect.

The question of contraband merchandise sent to the market of a belligerent, and subject to capture on its road, does not properly belong to this chapter, but to another part of these Commentaries (*k*).

CCCXCIII. Having made these observations with respect to the INTERVENTION of subjects unauthorized by the State to which they belong, we must now consider *Intervention* properly so called; that is, by the State herself.

The reason of the thing and the practice of nations appear to have sanctioned this Intervention in the following cases:—

I. Sometimes, but rarely, in the domestic concerns and internal rights of Self-Government, incident, as we have seen, to every State.

II. More frequently, and upon far surer grounds, with

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presented to the House of Representatives by the Committee of Foreign Affairs. It was the fruit of the existing irritation about the *Alabama*. It never became law. It "proposed to modify the American neutrality laws so as to make them more in conformity with the British Foreign Enlistment Act (59 Geo. III. c. 69), but with one notable difference. That Act prohibits the arming or equipment of any ship within the United Kingdom, with intent that it shall be employed in the service of any foreign State or with intent to commit hostilities against any State with whom her Majesty shall not then be at war; but, by way of retort for the alleged delinquencies of the British Government in the case of the *Alabama*, the Neutrality Bill provided that 'the neutrality laws shall not be so construed as to prohibit the sale of vessels, ships, or steamers, or materials and munitions of war, the growth or product of this country, to the Government or citizens of any country not at war with the United States.' So that the framers of this measure proposed to legalize the very thing from which, owing to a clandestine evasion of the Act, America had herself suffered, and of which she so loudly complained against Great Britain."—*Ann. Reg.* 1866, p. 277.

(*k*) See vol. iii. pt. x. ch. i.

respect to the territorial acquisitions or foreign relations of other States, when such acquisitions or relations threaten the peace and safety of other States.

In the former case the just grounds of Intervention are—

1. Self-Defence, when the Domestic Institutions of a State are inconsistent with the peace and safety of other States.
2. The Rights and Duties of a guarantee.
3. The Invitation of the Belligerent Parties in a civil war.
4. The Protection of Reversionary Right or Interest.

In the latter case the just grounds of Intervention are—

5. To preserve the Balance of Power; that is, to prevent the dangerous aggrandisement of any one State by external acquisitions.
6. To protect Persons, subjects of another State, from *persecution* on account of professing a Religion not recognized by that State, but identical with the Religion of the Intervening State.

These grounds, either separately or in conjunction, will be found in the following pages to have been deliberately and solemnly proclaimed as justifying causes of Foreign Intervention.

CCCXCIV. The First Limitation of the general right, incident to every State, of adopting whatever form of government, whatever political and civil institutions, and whatever rules she may please, is this:

No State has a right to establish a form of government which is built upon professed principles of hostility to the government of other nations (*l*).

CCCXCV. It may be admitted that Venice in 1298, Great Britain in 1649, France in 1789 and after the accession of the Cavaignac Administration in 1848, and after the last revolution in 1851, and after the defeat of Sedan in this year 1870, were entitled, upon the principles

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(*l*) *Kent's Comment.* i. 21, &c.

of National Independence, and without the Intervention of Foreign States, to make the great changes in their respective constitutions which were effected at those periods, because such changes concerned themselves alone.

CCCXCVI. Why, then, cannot the same remark be applied to the French Revolution in the year 1792? The answer is to be found in the Decree promulgated by the Convention on the 19th of November, 1792.

The *Moniteur* of that day records it in these words: "*Lepeaux* propose et la *Convention* adopte la rédaction "suivante:

"La convention nationale déclare qu'elle accordera secours "à tous les peuples qui voudront recouvrer leur liberté, et "elle charge le pouvoir exécutif de donner des ordres aux "généraux des armées françaises pour secourir les citoyens "qui auraient été, ou qui seraient vexés, pour la cause de la "liberté.

"La convention nationale ordonne aux généraux des "armées françaises de faire imprimer et afficher le présent "décret dans tous les lieux où ils porteront les armes de la "république.

"*Sergint.* Je demande que ce décret soit traduit et im-"primé dans toutes les langues.—Cette proposition est "adoptée."

This decree was treated by Great Britain (*m*), which, up to

(*m*) "The decisive proof upon the subject was to be found, not in loose recollection or in vague reports, but in the Journals of the House.—The speeches with which the King had opened and concluded each session of Parliament afforded an authentic record of the language of Government respecting the origin, grounds, and progress of the war. There were, besides, upon the Journals, many declarations which this House had made at different periods, and sometimes at the express suggestion of Ministers themselves, and with the avowed intention of obviating misrepresentations.

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"This then was his defence of Parliament against the imputation of having varied its language or disguised its objects—of having engaged in the war for the restoration of monarchy in France, or of having pur-

the period of its promulgation, had remained strictly neutral, as a declaration of war, of the worst and most hateful kind, against all nations; nor indeed is it possible to conceive a grosser violation of the particular principle of International Law (*n*) which we are discussing, than is to be found in this barbarous and unprecedented proclamation—the herald of that long, bloody, terrible, and universal war, which shook not only Europe, but the world, to its centre, and of which the wounds are not yet healed.

CCCXCVII. It is impossible to deny that the proclamation put forward by the De Lamartine Administration, after the expulsion of Louis-Philippe, partook of the same character, though in a mitigated degree.

According to that proclamation, "Les traités de 1815 "*n'existent plus en droit* aux yeux de la République Fran-"çaise: toutefois les circonscriptions territoriales de ces "traités sont un fait qu'elle admet comme base et comme "point de départ dans les rapports avec les autres nations" (*o*).

CCCXCVIII. In cases like the foregoing, the Right of Self-Defence justifies other nations in intervening and demanding, and if necessary by force of arms compelling, the abolition of a Government avowing a *principle* of hostility to the existing Governments of all other nations.

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sued it, at any period, with any other view than that of obtaining a secure and honourable peace for his country."—*Speech of Lord Grenville in the House of Peers, on the motion of the Duke of Bedford for the dismissal of Ministers*, 22nd *March*, 1798. Pub. by J. Wright, 169 Piccadilly. See also *M. Lanfrey's Hist. de Napoléon I*, t. ii. pp. 63, 4, 5.

(*n*) *Vattel* justifies by anticipation the conduct of Great Britain in declaring war after the promulgation of this decree. "Donc toutes les nations sont en droit de réprimer par la force celle qui viole ouvertement les lois de la société que la nature a établies entre elles, ou qui attaque directement le bien et le salut de cette société."—*Prélim.* s. 22. "Les nations ont le plus grand intérêt à faire universellement respecter le droit des gens, qui est la base de leur tranquillité. Si quelqu'un le foule ouvertement aux pieds, toutes peuvent et doivent s'élever contre lui; et réunissant leurs forces pour châtier cet ennemi commun, elles s'acquitteront de leurs devoirs envers elles-mêmes et envers la société humaine, dont elles sont membres."—L. i. c. 23, s. 283.

(*o*) "Manifeste aux Puissances, 4 mars:" *Trois Mois au Pouvoir de M. de Lamartine*, p. 75.

But this, like the other grounds of Intervention, is very liable to be abused. The most flagrant instances of such abuse are to be found in the Partitions of Poland (*p*). The detailed history of these public crimes is without the province of this work. But no treatise on International Law may pass over, wholly without comment, these grievous acts of national wickedness.

The first spoliation was effected in September 1772, by Catherine II., Empress of Russia, Marie-Thérèse, Empress of Austria, and Frederick II., King of Prussia.

In the manifesto of the two latter may be read the miserable pretexts under which this crime was sought to be veiled. Austria claimed territory, alienated from her to Poland *several centuries ago,* her first date being 1324 A.D., because, among other reasons, by the *Canon Law* alienations of territory by a crowned head were as invalid as the acts of a minor. Prussia took up her history not earlier than 1107 A.D., and recited various subsequent losses of property by the Margraves of Brandenburg, which Poland had acquired at a time when the Margraves were too feeble to resist, but to which property it was alleged that the Margraves had never formally renounced their claim.

It is manifest that the original sin of the spoliation was greatly enhanced by these pretended reasons for it; every one of them aimed a deadly blow at some sound principle of that faith which ought to bind together the nations of the

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(*p*) *Mackintosh's Works*, vol. ii. p. 330; and *Edinburgh Review*, vol. xxxvi. p. 463.

Ferrand, Histoire des trois Démembrements de la Pologne.

Rulhière, Histoire de l'Anarchie de Pologne.

Flassan, Histoire de la Diplomatie française, t. vi.

Dohm, Denkwürdigkeiten meiner Zeit.

Von Raumer, Polens Untergang; Histor. Taschenbuch, t. iii.

Koch, Histoire abrégée de Traités de Paix, continuée par Schoell (ed. Bruxelles), t. iv. pp. 266–284, c. 60, *ib.* pp. 296, 304, 307–13, c. 62.

Koch, Tableau des Révolutions de l'Europe, t. ii. pp. 168, 224, 284.

Gentz, Fragmente aus der neuesten Geschichte des politischen Gleichgewichts in Europa. Schriften, Band iv. ss. 51–59.

Wheaton's Hist. pp. 267–281.

Allge. Gesch. B. xxiii. k. 11.

globe. Russia, by far the boldest, and, if the expression were allowable, the most honest criminal, seized upon her prey at once, scorning all subterfuges, and making openly her might her right.

These three spoliators, however, were not the only offenders against International Law. France and England beheld with silence and indifference this violation of all the safeguards of national liberty and independence: they cannot be acquitted of all blame; they contracted, in some degree at least, the guilt of the bystander who tamely and silently suffers a deed of wrong to be perpetrated in his presence.

In 1790, Poland, availing herself of the occupation afforded by a Turkish war to Catherine II. (who had never ceased to treat her as a province of Russia), contracted an alliance with Prussia, whereby that Power undertook to aid Poland against the attempt of any foreign nation to interfere with her internal government or affairs (*q*).

Under cover of this alliance, in 1791 Poland gave herself a new constitution, rendering her crown hereditary in the Electoral House of Saxony, abolishing that source of her misery the *liberum veto*, and effecting a reformation, of which Mr. Burke said: "So far as it has gone, it probably is the "most pure and defecated public good which ever has been "conferred on mankind" (*r*).

But the French Revolution broke out, and Prussia not only forgot her pledge, but joined with Russia and Austria in plundering, for the second time, the country which had relied upon her honour. The second spoliation of Poland took place in 1793; the third, after the insurrection of the illustrious Kosciusko in 1795.

The fate of Poland was again discussed at the Treaty of Vienna (1815); but after some remonstrance on the part of the British and French plenipotentiaries (*s*), and the delivery

(*q*) *Martens, Rec. de Traités*, t. iv. p. 472.
(*r*) *Appeal from the New to the Old Whigs.*
(*s*) *Klüber, Acten des Wiener Congr.* Band ix. 40–51. *Wheaton's Hist.* pp. 425–435.

of a remarkable state paper by the latter, Russia retained that part of ancient Poland erected by Napoleon into the Duchy of Warsaw, and by this Treaty the Partition of Poland was ultimately confirmed.

This Treaty, however, declared Cracow to be a free, independent, and neutral city, under the protection of Russia, Austria, and Prussia, with so many square miles on the left bank of the Vistula, and a certain amount of population. This small remnant of their original prey has been subsequently devoured by the three protecting Powers. In 1832 the Emperor Nicholas annexed the kingdom of Poland to the Russian Empire, and destroyed every vestige of its separate nationality. In 1836 Cracow was occupied by Russian and Austrian forces, upon the allegation that it had become the centre of revolutionary plots. In 1846 (November 6), Cracow, in spite of the protests of Great Britain, France, and Sweden, was annexed to Austria.

Memorable lessons are written for the ensample of nations in the history of these great crimes and their consequences.

First, the folly and shortsightedness of vulgar politicians who hold the doctrine that a State has no concern with the acts of her neighbour, and that if wrong be done to others, and not to herself, she cannot afford to interfere.

Secondly, the certainty of that *Nemesis* which sooner or later overtakes the countries which have been, or have suffered their rulers to be, the doers of wrong.

It requires only a moderate acquaintance with history subsequent to those first spoliations of Poland, to know that the interference of England and France to prevent these atrocious acts, and to defend betimes the liberties of Europe, would have been no less wise, if regarded in an economical point of view, than just, if considered upon higher principles; and the Rulers of Austria, Prussia, and Russia must have been taught, during the wars of the French Revolution, and in the day of their bitter suffering and humiliation, the impolicy of injustice, and the danger of creating a precedent of rapine and wrong.

Great jurists of all countries have passed sentence upon the

partitions of Poland. *M. de Talleyrand* (*t*) described it as the prelude, as partly the cause, and perhaps the excuse of the convulsions of Europe during the French Revolution. "The partition of Poland in 1772," says *M. Koch* (*u*), "appeared to sanction all subsequent usurpations." It was the most flagrant violation, according to *Mr. Wheaton* (*x*), of natural justice and International Law, since Europe had emerged from barbarism. No less a publicist than *Von Gentz* (*y*) observes that the partition of Poland was a crime fraught with peculiar mischief to the best interests of Europe —it showed to the astonished world a league of monarchs in favour of injustice;—those who ought to be the protectors, acting as the oppressors of national independence; while the doctrine of the Balance of Power, cited as a justification of their conduct by those who were destroying it, mournfully illustrated the adage, *Corruptio optimi pessima* (*z*).

CCCXCIX. The Second Limitation arises in the instance of a *Guarantee* given by a Foreign Nation, either *generally* to secure the inviolability of the provisions of a particular Treaty, or *specially* to support a particular Constitution or form of government (*a*) established in another country, or to secure some particular possession or other individual object appertaining to it. The question of a *Federal Guarantee*, mutually given by United States, has been already discussed: the very constitution of such a body politic implies the existence of a mutual guarantee for the independence of each member of it. This is the case of a guarantee from *within*, a question rather of Public than International Law, and very different from a guarantee from *without*, which rests upon a distinct principle, and is one of the most difficult

(*t*) *Note to the Congress of Vienna.*

(*u*) *Introd.* p. 30.

(*x*) *Hist.* p. 332.

(*y*) *Fragmente aus der neuesten Geschichte des politischen Gleichgewichts in Europa. Schriften,* B. iv. ss. 54–59.

(*z*) *Vide antè*, s. lxxiii. p. 94, for the subsequent international position of Poland.

(*a*) *Vide post.*

and delicate questions which fall under the cognizance of International Law. The consideration of the duties and rights of *guarantees* belongs to that branch of the subject in which the nature of TREATIES is discussed.

CCCC. Another Limitation of the general principle under discussion may possibly arise from the necessity of Intervention by Foreign Powers in order *to stay the shedding of blood* caused by a protracted and desolating civil war in the bosom of another State (*b*). This ground of Intervention, urged on behalf of the general interests of humanity, has been frequently put forward, and especially in our own times, but rarely, if ever, without others of greater and more legitimate weight to support it; such, for instance, as the danger accruing to other States from the continuance of such a state of things, or the right to accede to an application from one of the contending parties.

As an accessory to others, this ground may be defensible; but as a substantive and solitary justification of Intervention in the affairs of another country, it can scarcely be admitted into the code of International Law, since it is manifestly open to abuses, tending to the violation and destruction of the vital principles of that system of jurisprudence,—such abuses as generated the several partitions of Poland, the great precedent so often quoted, and so often imitated by the violators of International Law. The necessity of staying the shedding of blood occupied a very prominent place among the various reasons alleged for the Intervention in the affairs of

(*b*) "Sciendum quoque est, Reges, et qui par Regibus jus obtinent, jus habere pœnas poscendi non tantum ob injurias in se aut subditos suos commissas, sed et ob eas quæ ipsos peculiariter non tangunt, sed *in quibusvis personis jus naturæ aut gentium immaniter violantibus.* Nam libertas humanæ societati per pœnas consulendi, quæ initio ut diximus penes singulos fuerat, civitatibus ac judiciis institutis penes summas potestates resedit; non propriè qua aliis imperant, sed qua nemini parent. Nam subjectio aliis id jus abstulit. Imo tanto honestiùs est alienas injurias quam suas vindicare, quanto in suis magis metuendum est ne quis doloris sui sensu aut modum excedat, aut certe animum inficiat."—*Grotius, de J. B.* lib. ii. cap. xx. sec. xl. p. 535.

Turkey and her then Greek subjects in 1827; but it was by no means, as will be presently seen, the only justification advanced for that Intervention, though, perhaps, if it had been, the long continuance, as well as the horrible nature of the massacres committed, would alone, if ever such reasons could, have justified the interference of Christendom (*c*).

CCCCI. A Third Limitation arises when both contending parties in a civil war invite the Intervention of a third Power: in this case the right to accede to the request is perfectly clear. This was in fact the foundation of the Intervention in the case of Belgium. Whether, when the Intervention has been once undertaken, either or both of the contending parties can resile from their engagement, and whether the Intervener be obliged to desist *re infecta*, is a matter of some nicety, and must in some measure receive its decision according to the particular (*d*) circumstances of each case (*e*). The Intervener might of course stipulate, before he undertook the Intervention, that both parties should abide by his decision. Although the right of intervening admits of no doubt where both parties invoke the Intervention, it is less clear when the application is made by one party alone, and yet it cannot be asserted, that even this kind of Intervention, so solicited, is necessarily at variance with any abstract principle of International Law, while it must be admitted to have received some sanction from the practice of nations. It should be observed that the recognition of the insurgent party in a civil war either as a

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(*c*) *Papers relative to the affairs of Greece*, p. 98.—London, 1835. (Printed by the Foreign Office.)

(*d*) France and England were the only two of the five Intervening Powers, in the case of Belgium, who seem to have entertained no scruples of this kind.—*Papers, &c., relative to Belgium.—Les Plénipotentiaires, &c.*, p. 35; and in the case of Portugal, and in the case of Greece, *vide infra*, *Wheaton, Hist.* 541.

(*e*) *Heffters* maintains stoutly the obligation of withdrawing at the request of the party who invoked the aid (p. 95, end of s. 46).—*Martens*, t. i. 80–1–2.

belligerent or as a separate State does not constitute the recognizing State a belligerent.

The United States recognized, perhaps somewhat hastily in both senses, the insurgent American colonies of Spain, but were not at war with Spain. England and France during the late American civil war recognized the Southern Confederacy as belligerent; and, though in the heat and irritation of civil contest the Government of the United States resented even this qualified and necessary recognition, it was clearly a matter of simple justice and strict neutrality: a further recognition by sending an accredited Minister to a *de facto State* like the Southern Confederacy, with a regular Government and a large army, would not have afforded a justifying cause of war to the other belligerent.

France in 1770 not only recognized the American colonies when they revolted from England as a belligerent and a *de facto* State, but supplied them with money, arms, and soldiers, and entered into a secret alliance with them—an act of treacherous hostility to the mother country which no American jurist would deny to have fully justified England in declaring war against her.

It will be remembered that at present we have no concern with the wisdom or policy of an Intervention invoked by one party alone: that is a National, not an International question. There is, however, one proposition with respect to this kind of Intervention which cannot be too broadly or emphatically stated.

In order to justify such Intervention, the kingdom in which it is to take place must be really divided against itself; there must be therein two parties in the *bona fide* condition of waging actual war upon each other.

No mere temporary outbreak, no isolated resistance to authority, no successful skirmish, is sufficient for this purpose; there should be "such a contest as exhibits some "equality of force, and of which, if the combatants were

" left to themselves, the issue would be, in some degree, " doubtful " (*f*).

In most cases, therefore, some time must elapse before an internal commotion can be clothed with the character of a revolution, and before the rebellious subjects can become the allies of a Foreign State.

The interference of Great Britain, France, and Russia in the affairs of Greece was vindicated upon three grounds; viz., 1st, of complying with the request of one party; 2ndly, of staying the shedding of blood; 3rdly, and principally, of affording protection to the subjects of other Powers who navigated the Levant, in which, for many years, atrocious Piracy had been exercised, while neither Turkey nor revolted Greece were *de facto* either able or willing to prevent the excesses springing out of this state of anarchy. The third ground unquestionably justifies such an interference as might redress the evil complained of, and secure the subjects of third Powers against a repetition of it. But the interference took place at the request of only one of the contending parties, and that the party of revolted subjects; and it is edifying to observe with what scrupulous care the British Minister for Foreign Affairs, of that time, justifies, as an exception to general rules, the adoption of coercive measures against Turkey.

" To accomplish a great good," says this admirable State Paper (*g*), " to put an end to a great evil, pressing seriously " upon the interests of his Majesty's own subjects, after " several previous attempts by advice and remonstrance, " separate or combined, had failed, and at the solicitation of " one of the contending parties, his Majesty acceded to a " more direct and concerted interference in the affairs of " Greece. The Treaty of London was signed; and when " proposals, made under it to both sides, and accepted by

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(*f*) *Sir J. Mackintosh's Speech on the Recognition of the Spanish American States*, vol. iii. p. 462, of his Works.

(*g*) *State Papers—Greece*, 1826–1832, pp. 54, 55. London, 1835.

" the Greeks, had been rejected by the Turks, his Majesty
" proceeded, along with his Allies, to adopt measures of a
" coercive nature, calculated to give effect to those pro-
" posals. But, in this departure from the general rule
" which forbids other Powers to interfere in contests betwixt
" Sovereign and Subject, his Majesty strictly limited him-
" self to what he deemed the necessity of the case; and in
" pursuing an object of policy, endeavoured to adhere, as
" much as possible, to the principles of National Law.

" The design of the Treaty was the pacification of the
" Levant; but it is evident, both from the provisions of that
" Treaty, and from the language of the Protocol which pre-
" ceded it, as well as from the tone of every communication
" relating to the Greek question, which has been made by
" his Majesty's commands since the Congress of Verona,
" that it was equally our design to accomplish this end by
" pacific means. It was but late, slowly and unwillingly,
" that we entertained the idea of any species of coercion;
" and then only with such caution, and with such a reserva-
" tion of our right to look narrowly at each successive stage
" in that career, as were in themselves sufficiently indicative
" of the spirit in which we interposed. The conduct of the
" Allies is inexplicable upon any other ground than that
" which is here stated to have been its foundation. If the
" intention of three of the greatest Powers in Europe, to put
" an end to a manifest grievance, had not been controlled
" and modified by many weighty considerations of justice
" and policy, they would have pursued a far different course.
" They would not have waited six years before they carried
" their interposition beyond the limit of amicable remon-
" strance; nor, having at length satisfied themselves that
" they must advance somewhat further for the execution of
" their design, would they have stipulated beforehand to
" pause upon every successive step, in order to give time for
" reflection and concession on the part of a Power whom
" they did not design to crush, or even to humble, but, if
" possible, to lead into the path of safety and repose.

"If they had not been restrained by such considerations, "they would at once have put forth a strength irresistible "by far greater empires; they would have substituted "dictation, backed by force, for advice and remonstrance; "and they would not have asked the consent of those to "whom it was in their power to give law. But they felt, "as we still feel, that this was a case surrounded with diffi-"culties, of which the mere physical resistance of the contu-"macious party was the least. They knew that hasty and "violent measures might draw along with them evils worse "than those which they meant to remedy. They knew too "that the long continuance of extraordinary evils might "justify an extraordinary interposition. Still they felt that "they were bound to take care that the interposition should "not be more than commensurate with the evil; that it was "neither politic nor just to risk the overthrow of an empire, "for the chance of improving the condition of a part of its "subjects; and that the cessation of Piracy in the Levant "would be dearly purchased by a general war in Europe."

The pacification of Greece and the Levant was the object of the Treaty of 1827, contracted between Russia, England, and France; the object of it was not "to construct a State "capable of balancing the Turkish power in Europe, and of "carrying on the relations of peace and war upon a footing "of equality with the Porte;" this object, nevertheless, might, after the rejection by Turkey of the compromise proposed in that Treaty, have been partly intended and effected by the subsequent Treaty of the 7th of May, 1832 (*h*). The distinction between Intervention and Mediation is pointed out in the happiest manner by Mr. Canning, in a passage of his state paper upon the Pacification of Greece at the close of the year 1824. "If" (he wrote) "the sovereignty of the "Turks were not to be absolutely restored, nor the inde-"pendence of the Greek to be absolutely acknowledged (*to* "*propose either of which extremes would have been not to*

(*h*) *Papers*, p. 155.

"*mediate, but to take a decided part in the contest*), there was "necessarily no other choice than to qualify in some mode "and degree the sovereignty of the one and the indepen-"dence of the other, and the mode and degree of that qua-"lification seemed to constitute the question for inquiry "and deliberation" (*i*).

CCCCII. This observation brings us to the consideration of the Fourth Limitation of the general principle which founds the Right of Intervention,—which is, the right of third Powers to watch over the preservation of the Balance of Power among existing States, whether by preventing the aggressions and conquests of any one Power, or by taking care that, out of the new order of things produced by internal revolutions, no existing Power acquires an aggrandisement that may menace the liberties of the rest of the world (*j*).

This right, indeed, is the right of the State to do that

(*i*) *Reply of Mr. Secretary Canning to a letter of M. Radios, relative to the "Russian Memoir on the Pacification of Greece."*—Vol. xii. *of State Papers* (1824–25), p. 900.

(*j*) *Günther*, i. 345.

Martens, s. 121, *a*, *b*.

Ancillon über den Geist der Staatsverf. 320 u. s. w.

Klinkhammer's Disp. Hist. Pol. de Belli propter Success. Regni Hispan., &c. (1829, *Amstelodami*), pp. 52–66.

De Gardens, Traité complet de Dipl. t. i. p. 257.

Foreign Quarterly Review, vol. viii. (1831), vol. xiii. (1834).

Mackintosh's second Review of Burke's Letter on a Regicide Peace.

Ortolan, vol. ii., *Du Domaine international* (tit. iii. *De l'Équilibre politique*), contains, among other passages worthy of attentive perusal, an elaborate review of the projects of Henry IV. and Sully to found a *République très-chrestienne*, and thereby maintain a perpetual European equilibrium—an idea which M. Ortolan thinks pervaded the minds of the framers of the Treaty of Westphalia.—*Gentz, Ausgewählte Schriften*, iv. i. *Fragmente aus der neuesten Geschichte des politischen Gleichgewichts.*

Fénelon, Œuvres de, t. iii. p. 361, ed. 1835: *Examen de la Conscience sur les Devoirs de la Royauté*, in which work, written for the instruction of the Duke of Burgundy, *Mr. Wheaton* remarks (*Hist.* p. 82) that the principles of Intervention to maintain the balance of power are laid down with accuracy and moderation.

Mably, vol. ii. pp. 88, 107, 212.

which Cicero (*k*), with so much eloquent reason, truly maintained was the innate right of every individual: it is the Right of Self-Defence, which is as lawfully exercised in preventing as in repelling attack (*l*).

How anxiously this right, "founded so much on common "sense and obvious reasoning," was asserted and cherished by the Greeks, is well known to all readers of Thucydides and Xenophon, and above all of Demosthenes, whose eloquence was never more "resistless" (*m*) than when exerted for the purpose of rousing his countrymen to adopt and act upon this principle (*n*).

In the History of Rome the opportunities for the development of this principle were fewer; but the pages of Livy and Polybius have recorded some remarkable instances of its operation. The reflection of the latter historian upon the conduct of Hiero, King of Syracuse, who, though an ally of Rome, sent aid to Carthage, during the war of the Auxiliaries, may claim a place even in a modern work upon International Law. Hiero esteemed it necessary, Polybius tells us, "both "in order to retain his dominions in Sicily, and to preserve "the Roman friendship, that Carthage should be safe; lest

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(*k*) *Pro Milone.*

(*l*) "Ainsi quand un État voisin est injustement attaqué par un ennemi puissant, qui menace de l'opprimer, il n'est pas douteux que vous ne *deviez* le faire. N'objectez point qu'il n'est pas permis à un souverain d'exposer la vie de ses soldats pour le salut d'un étranger, avec qui il n'aura contracté aucune alliance défensive, il peut lui-même se trouver dans le cas d'avoir besoin de secours; et, par conséquent, mettre en vigueur cet esprit d'assistance mutuelle, c'est travailler au salut de sa propre nation."—*Vattel*, l. ii. c. 1–4.

(*m*) "Whose resistless eloquence
Shook the arsenal, and fulmin'd over Greece
To Macedon and Artaxerxes' throne."

Milton, Par. Reg. iv. 268–271.

(*n*) Among the passages, see *κατὰ Φιλ.* Γ. ιε: Τοὺς ἄλλους ἤδη παρακαλῶμεν, καὶ τοὺς ταῦτα διδάξοντας ἐκπέμπωμεν πρέσβεις πανταχοῖ, εἰς Πελοπόννησον, εἰς Ῥόδον, εἰς Χίον ὡς βασιλέα λέγω—οὐδὲ γὰρ τῶν ἐκείνῳ συμφερόντων ἀφέστηκε τὸ μὴ τοῦτον ἐᾶσαι πάντα καταστρέψασθαι—ἵν' ἐὰν μὲν πείσητε, κοινωνοὺς ἔχητε καὶ τῶν κινδύνων καὶ τῶν ἀναλωμάτων, κ.τ.λ.

" by its fall the remaining Power should be able, without let
" or hindrance, to execute every purpose and undertaking.
" And here he acted with great wisdom and prudence; for
" that is never, on any account, to be overlooked; nor ought
" such a force ever to be thrown into one hand, as to incapa-
" citate the neighbouring States from defending their rights
" against it."

Most justly does Mr. Hume remark upon this passage, " Here is the aim of modern politics pointed out in express " terms " (*o*).

It was the natural tendency of the Feudal System introduced into Europe after the fall of Rome, to restrain each State within its own boundaries (*p*); and it may be said, that from the reign of Charlemagne, to the invasion of Italy by Charles VIII. of France, towards the close of the fifteenth century, the state of the civilized world was not such as to call into any general operation this principle of International Law (*q*). To repel this invasion, the ingenious and refined Italians strove to induce the European Powers to adopt that policy of preventing the undue aggrandisement of any one Power, by which they had, for some time, maintained the equilibrium of the petty States of their own Peninsula. During the century which followed (*r*), and from the time that the liberties of the German Protestants were secured, under the guarantee of France and Sweden, by the Peace of Westphalia in 1648, this principle of International Law has been rooted in the usage and practice of the whole civilized world. The preservation of the Balance of Power has been the professed object of all, and the real

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(*o*) *Polybius*, l. i. c. 83: Τότε δὲ καὶ μᾶλλον ἐφιλοτιμεῖτο πεπεισμένος συμφέρειν ἑαυτῷ καὶ πρὸς τὴν ἐν Σικελίᾳ δυναστείαν καὶ πρὸς τὴν Ῥωμαίων φιλίαν τὸ σώζεσθαι Καρχηδονίους, ἵνα μὴ παντάπασιν ἐξῇ τὸ προτεθὲν ἀκονιτὶ συντελεῖσθαι τοῖς ἰσχύουσιν, πάνυ φρονίμως καὶ νουνεχῶς λογιζόμενος, κ.τ.λ. *Hume's Essays*, vol. ii. p. 323, Essay vii. *On the Balance of Power*.

(*p*) See *Koch*, *Tableau des Révolutions*, t. i. pp. 314–15, &c.

(*q*) *Koch*, as to English Conquests in France, t. i. p. 314.

(*r*) *Wheaton's Hist.* p. 81.

end of most of what may be called the Cardinal Treaties. The recital and analysis of the events which led to them belong to the history of the progress, rather than to a treatise on the principles, of International Jurisprudence. It will be sufficient for our present purpose to notice briefly those Treaties in which this feature is most conspicuous.

CCCCIII. In the year 1519 (*s*), enormous territorial possessions rendered the Emperor Charles V. more powerful than any sovereign who had existed in Christendom since the reign of Charlemagne; a natural apprehension was felt by the other States of Europe, which the personal character of Charles was well calculated to foment (*t*). No better occasion could arise for the practical application of that refined and sagacious policy, which had so lately crossed the Alps. France took upon herself the task of adjusting the equilibrium of power in Europe; Francis I. actually concluded, for this object, a Treaty of Alliance with the Turks, the first Treaty contracted by an European Sovereign, and by which the Porte may be said to have been introduced into the political system of the West, and to have become a consenting party to a branch of *positive* International Law. The next step taken by France, was to constitute herself protectress of the minor German States; and in the intensity of her zeal to effect her object, she availed herself of the tremendous weapon which the Religious war of the Reformation offered to her grasp. The all-important succour which Queen Elizabeth of England afforded to the revolted Netherlands, was a natural consequence both of the political and religious condition of her kingdom (*u*).

But the effects, which this maxim of preserving the liberty of all States by preventing the undue aggrandisement of one, produced upon the policy of France, are such as must have baffled all previous calculation. Then was unfolded that

(*s*) *Koch*, i. 317.
(*t*) *Ib.* i. 318.
(*u*) *Sully's* memorable proposition to Queen Elizabeth, *Koch*, i. 519.

remarkable page of history, in which Roman Catholic France was seen, under the governments of Richelieu and Mazarin, repressing with one hand, and that a hand of iron, the Calvinistic subjects of her own land; while with the other she supported the Protestants of Germany in their long and successful opposition to the aggressions of the Imperial power.

To preserve the Balance of Power was the real object of the terrible and desolating war of the Thirty Years. The creation of the Federal System of the Germanic Empire, and the recognition of the two new independent States—the United Netherlands, and the Swiss Cantons—guaranteed by France and Sweden in the Treaties of Westphalia (1648) and the Pyrenees (1659), were intended and supposed to form an effectual barrier to the undue preponderance of Austria, and to have secured the equilibrium, and thereby the peace of Europe.

The independence and liberties thus secured to the States of Southern Europe were, about the same time, *guaranteed*, by the Treaties of Copenhagen (1658) and Oliva (1660), to the States of Northern Europe (*x*), which composed, in some sort, a distinct system.

The equilibrium of power in the North, which had been endangered by the ambition of Sweden, was adjusted by the Treaties between Sweden, Denmark, Poland, and the Elec-

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(*x*) *Bynkershoek* considers this forcible pacification of the North to have been an infringement of International Law: "Ut iniquum est (he say) principem invitum ad bellum cogere, ita et ad pacem. Cum tamen Ordines Generales sibi a Francis metuerent, et Franciæ quoque magnitudo liminibus Anglicis videretur officere, Angliæ et Sueciæ reges, itemque Ordines Generales, 23 Jan. 1668 iniverunt fœdus, quo inter alia cautum est, ut Hispani, quos inter et Francos bellum erat, quasdam conditiones, illo fœdere præscriptas, tenerentur accipere, et, iis acceptis, si Franciæ Rex pergeret regi Hispaniæ bellum facere, se armis intercessuros, coactis sic ad pacem Franciæ et Hispaniæ regibus. Rursus, cum publice non expediret, Sueciæ regem etiam Daniam habere, Sueciæ regem cum Dano pacem facere coëgerunt Franci, Angli et Ordines Generales 21 May 1659, erepto sic Daniæ rege mediis ex faucibus Orci, in quas se præcipitaverat, vicino potentiore in se concitato. His injuriis prætexitur studium conservandæ pacis," &c.—*Quæst. Jur. Pub.* l. i. c. xxv. s. 10.

torate of Brandenburg, under the guaranteeship of Austria, France, England, and the United Provinces.

Before the close of the century in which these Treaties were made, the aggrandisement and ambition of France united against her the same Powers which had formerly, for like causes existing elsewhere, leagued themselves with her; and to these Powers were now added Great Britain and the United Provinces.

The principal object of the Treaty of Utrecht (1713), Rastadt and Baden (1714), was to secure Europe against the universal dominion of France.

By the fundamental articles of this Treaty, the second great landmark of modern history, it was declared that the kingdoms of France and Spain should never be united under one sceptre; and that the Spanish Netherlands should be transferred to the House of Austria, to which Milan and Naples, with less reason, were also assigned (*y*).

The avowed object of the memorable wars which preceded this Treaty, and of the convention itself, was the restoration of the Balance of Power in Europe (*z*). This Treaty may in some degree be said to have "called in the New World to "balance the Old" (*a*); the balance being partly adjusted by the cession and transference, from one European Power to another, of colonial possessions in other parts of the globe (*b*); in other words, positive International Law was carried beyond the limits of Europe.

This Treaty was made, to borrow its own language (*c*), "ad "conservandum in Europa equilibrium;" indeed, the recognition of *the system of balance* may be dated from this epoch: and—if we except a partial deviation from it by the Treaty of Vienna in 1738, which seated a younger branch of the

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(*y*) *Koch*, ii. 7, 27.
(*z*) *Wheaton, Hist.* p. 125.
(*a*) *Mr. Canning's* Speech on sending the troops to Portugal.—*Speeches*, vol. vi. p. 61.
(*b*) *Wheaton, Hist.* p. 87.
(*c*) *Koch*, ii. 92.

Spanish monarchy upon the throne of the Two Sicilies—it continued to govern the territorial arrangements of the South of Europe, till the first French Revolution, and is mentioned in every treaty of peace till that of Luneville, in 1800.

So late as 1846–7 (*d*) the Treaty of Utrecht was invoked by England, when protesting against the ill-omened marriage of the Duc de Montpensier; and though the doctrine of non-revival, by express mention in subsequent Treaties, may be held to have annulled the binding force of its specific provisions, the *principle* of European policy, namely, that the Crowns of France and Spain shall never rest upon the same head, is put on record for ever by a Treaty of this description.

CCCCIV. From the date of the Treaty of Utrecht to the present day, the progress and fate of this principle of International Law have undergone great vicissitudes. The most convenient way of drawing attention to them is to divide the period which has elapsed between 1713 and 1854 into five Historical Epochs, namely—

1. The interval between the Treaty of Utrecht and the breaking out of the first French Revolution (1713–1789).
2. The interval between the first French Revolution and the Treaty of Vienna (1789–1815).
3. The interval between the Treaty of Vienna and the Treaty of Paris (1815–1856).
4. The interval between the Treaty of Paris and the Treaty of Prague (1856–1806).
5. The interval between the Treaty of Prague and the present time (1866–1870).

1. In the first interval (1713–1789) various causes, natural and moral, conspired to disturb the equilibrium esta-

(*d*) *Mackintosh's Works* (Speech, Feb. 19, 1816), who thinks that the Treaty of Utrecht is not now in force; but see a pamphlet on the Montpensier Marriage, written, it is believed, by Lord William Hervey, secretary to the English embassy at Paris, 1846–7: and see this subject discussed in a later part of this work, under TREATIES.

blished at Utrecht. The rapid and immense aggrandisement of Russia (*e*), emerging from Asia into Europe after the victories of Peter the Great—the depression of Sweden—the creation of the essentially military kingdom of Prussia, intervening between the Northern and Southern systems of European States, rivalling the power of Austria and causing the strange phenomenon of a union between the Houses of Hapsburg and Bourbon, dividing as it were Germany into two parts, and preparing in the opinion of many the dissolution of the Germanic Confederation—the increasing maritime preponderance of Great Britain:—these were natural causes which deranged the Balance of Power established at Utrecht, while they inflicted no open violence upon the principles of International Law. But the wars of the Austrian and Bavarian successions, and above all the first spoliation of Poland—all these transactions in which

"Violence
Proceeded, and oppression, and sword-law,
Through all the plain" (*f*)—

shook to its very centre the system of International Justice. They introduced the worst of all periods which, since the introduction of Christianity, this system has experienced, viz.—

2. The period from 1789 to 1815. The aggressions of Revolutionary France during this epoch were repeatedly justified by reference to the rapine committed by Russia, Austria, and Prussia upon Poland (*g*). The bitter and degrading humiliations which the two latter Powers underwent before, by the heroic exertions of their people, they shook off the yoke of Napoleon, the bloody fields of Eylau and Smolensko, and the terrible necessity which destroyed the second capital of Russia—these were the legitimate fruits of the evil doctrine promulgated by those Powers, when they invaded and partitioned the kingdom of Poland.

The Treaty of Paris and the Congress of Vienna (1814–15)

(*e*) *Koch*, ii. 92-95.
(*f*) *Milton, Par. Lost*, b. xi. ll. 671-3.
(*g*) *Gentz*, vol. iv. p. 50, &c.

concluded the war for the independence of Europe; and again the attempt of one nation to exercise universal dominion over others—an attempt of a far more formidable character than any which had occurred during the preceding periods—was defeated. The main object of this Treaty (*h*) was to restore the equilibrium of Europe; but many of the means by which this end was sought or was said to be effected, appear indefensible upon the true and sound principles of International Law. A terror of the consequences of the French Revolution, and of the dominion of Buonaparte, seems to have generated in the great Powers of Europe the baneful notion that the creation of large kingdoms, by the absorption of small independent States, was the best security against a recurrence of the evils which Europe had endured for nearly a quarter of a century (*i*).

To effect this purpose, States were, in several instances, treated simply as containing so many square miles and so many inhabitants, little or no regard being paid to national feelings, habits, wishes, or prejudices. The annexation of Norway to Sweden, of Genoa to Sardinia, of Venice to Austria, and the diminution of the territory of Saxony, were among the instances of grievous violations of International Justice afforded by this Treaty, and for which the preservation of the Balance of Power was the pretext and excuse (*k*); but the true and legitimate application of that principle would have been a league of protection of the greater with the smaller

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(*h*) "Les Puissances alliées réunies dans l'intention de mettre un terme aux malheurs de l'Europe, et de fonder son repos sur une juste répartition des forces entre les États qui la composent."—*Convention signée à Paris*, le 23 avril 1814, *De M. et De C.* t. iii. p. 8.

(*i*) *Gentz, ubi supra.*

(*k*) "His injuriis (says Bynkershoek, speaking of what he conceived to be infringements of International Law on the pretext of preserving the general safety of States) prætexitur studium conservandæ pacis, quod et ipsum prætexitur injuriis, longè adhuc majoribus, quæ potissimum ab aliquot retrò annis invaluerunt, quum nempe principes mutuis pactis, de aliorum principum regnis et ditionibus ex animi sententia statuunt, atque si de re sua statuerent. Has injurias peperit, et adhuc parit, *Ratio* quam vocant, *Statûs*."—*Quæst. Jur. Pub.* lib. i. c. xxv. s. 10.

States. The policy which seeks to establish one principle of International Law upon the ruin of others, has been, and always must be, a policy as fatal to the lasting peace of the world, as the attempt to promote one moral duty, at the expense and by the sacrifice of others, is and must be fatal to the peace of an individual: "populus jura naturæ gentiumque "violans, suæ quoque tranquillitatis in posterum rescindit "munimenta" (*l*).

CCCCV. 3. During the period from the Treaty of Vienna to the Treaty of Paris (1815–1856), the principle of the Balance of Power has been, upon several occasions of great importance, most formally and distinctly recognized as an essential part of the system of International Law.

In the earlier part of this period the abuse of the principle which tainted so injuriously the Treaty of Vienna, continued in full operation. An alliance was formed between Great Britain, Russia, Austria, and Prussia, to which, at the Congress of Aix-la-Chapelle, in 1818, France became also a party; the object of this alliance was never perhaps very clearly defined; but some of the contracting parties, at least, considered it to be a system of Intervention, not merely to guard against the unlawful aggrandisement of any one State, but also to prevent the happening of such internal changes in any existing State, as these Powers might consider to be of a revolutionary character, and therefore as eventually unsafe to neighbouring States. Great Britain, however, appears never to have put this construction on the object of the coalition;

(*l*) "Malè autem à Carneade stultitiæ nomine justitia traducitur. Nam sicut, ipso fatente, stultus non est civis qui in civitate jus civile sequitur, etiamsi ob ejus juris reverentiam quædam sibi utilia omittere debeat: ita nec stultus est populus, qui non tanti facit suas utilitates, et propterea communia populorum jura negligat; par enim in utroque est ratio. Nam sicut civis qui jus civile perrumpit utilitatis præsentis causa, id convellit quo ipsius posteritatisque suæ perpetuæ utilitates continentur: *sic et populus jura naturæ gentiumque violans, suæ quoque tranquillitatis in posterum rescindit munimenta*."—*Grotius, Prolegomena*, 18.

See *Mably's* opinion that Treaties of Partition are contrary to International Law, t. ii. pp. 64–5, 149–150.

at all events, she expressed her emphatic dissent from it, upon the first occasion of its practical application in the resolutions of Austria, Russia, and Prussia, at the Congresses of Troppau and Laybach. Great Britain protested then, while her foreign affairs were under the administration of Lord Castlereagh, against the measures adopted by those Powers with respect to the revolution at Naples in 1820, and still more against the principles upon which they were said to be founded. She protested also, under the same administration, against the proceedings of the Congress of Vienna in 1822, at which the armed intervention of France in the internal affairs of Spain was sanctioned by Russia, Austria, and Prussia. Subsequently, under the wise and vigorous administration of Mr. Canning, Great Britain protested against any Intervention of the European Powers in the contest between Spain and her American Colonies, declaring that she would consider any such Intervention by force or menace as a reason for recognizing the latter without delay (*m*); and at the same time the United States of America announced, that they would consider any such Intervention as an unfriendly manifestation towards themselves.

A few years later Mr. Canning, in the House of Commons, defended the Government for not having resisted, by war, the entrance of the French army in Spain, which he admitted that the disturbance of the balance of power caused by this event would have justified; and, alluding to the recognition of the American Colonies, which had then taken place, made his proud and legitimate boast, "I called "the New World into existence, to redress the balance of "the Old."

It was at this epoch that the American President Munroe promulgated, in his annual address, an opinion which afterwards obtained celebrity under the name of the "Munroe "Doctrine." An erroneous conception as to this opinion or

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(*m*) *Vide post.*

doctrine has very generally prevailed; but in 1862 Mr. Everett wrote a paper in the "New York Ledger" (*n*) which appears to put a proper construction on the opinion itself, and to give a correct version of the transaction in which it originated. In 1823 President Munroe said, in his annual address, as follows:—

"The late events in Spain and Portugal show that Europe "is still unsettled. Of this important fact no stronger "proof can be adduced than that the allied Powers should "have thought it proper, on any principle satisfactory to "themselves, to have interposed, by force, in the internal "concerns of Spain. To what extent such interpositions "may be carried on the same principle is a question in "which all independent Powers whose Governments differ "from theirs are interested—even those most remote, and "surely none more so than the United States. Our policy "in regard to Europe, which was adopted at an early age of "the wars which have so long agitated that quarter of the "globe, nevertheless remains the same; which is, not to in-"terfere in the internal concerns of any of its Powers; to "consider the Government *de facto* as the legitimate Go-"vernment for us; to cultivate friendly relations with it, and "to preserve those relations by a frank, firm, and manly "policy; meeting, in all instances, the just claims of every "Power—submitting to injuries from none. But, in regard "to those continents, circumstances are eminently and con-"spicuously different. It is impossible that the allied "Powers should extend their political system to any portion "of either continent without endangering our peace and "happiness; nor can any one believe that our Southern "brethren, if left to themselves, would adopt it of their own "accord. It is equally impossible, therefore, that we should "behold such interposition in any form with indifference. "If we look to the comparative strength and resources of

(*n*) Afterwards printed in a separate form by the Loyal Publication Society, N. 34—*The Munroe Doctrine*, Sept. 2, 1863.

"Spain, and those new Governments, and their distance
"from each other, it must be obvious that she can never
"subdue them. It is still the true policy of the United
"States to leave the parties to themselves, in the hope that
"other Powers will pursue the same course" (o).

Mr. Canning had stated that if a Congress of European Powers assembled to deal with the affairs of Spanish America, he should insist on the United States being represented; and, in answer to the statement of their Minister at St. James's, that it was a traditional rule of the United States not to interfere with European politics, had replied that such a policy, however generally and formerly sound, was inapplicable to the present circumstances.

"The question was a new and complicated one in modern
"affairs. It was also full as much American as European,
"*to say no more.* It concerned the United States under
"aspects and interests as immediate and commanding as it
"did or could any of the States of Europe. They were the
"first Power established on that continent, and confessedly
"the leading Power. They were connected with Spanish
"America by their position, as with Europe by their rela-
"tions; and they also stood connected with these new States
"by political relations. *Was it possible that they could
"see with indifference their fate decided upon by Europe?*
"Could Europe expect this indifference? Had not a new
"epoch arrived in the relative position of the United States
"towards Europe, which Europe must acknowledge? *Were
"the great political and commercial interests which hung
"upon the destinies of the new continent to be canvassed and
"adjusted in this hemisphere without the co-operation or even
"knowledge of the United States?* Were they to be can-
"vassed and adjusted, he would even add, without some
"proper understanding between the United States and Great
"Britain, as the two chief commercial and maritime States

(o) *Ann. Reg.* 1823, pp. 193-4.

" of both worlds? He hoped not, he would wish to per-
" suade himself not."

It was in consequence of this urgent pressure that President Munroe uttered the language which has been cited from his address. I may observe, in passing, that the doctrine contained in it, whatever that be, has not been corroborated by an act of the legislature of the United States. But the doctrine does not, as has been sometimes supposed, deny the right of European countries to rule their colonies in America, or their right of further colonization in America. It protests against war being waged in America by European Powers to preserve the equilibrium of States in Europe.

It was considered at the time as proclaiming a policy identical with that of Mr. Canning, and was hailed with every expression of joy by the liberal statesmen of the British Parliament. The indirect consequence was to redress in some respects the European Balance of Power, and to justify the language already cited of Mr. Canning on this subject.

CCCCVI. It is true that the military Intervention of Great Britain in the affairs of Portugal in 1826 took place in order to discharge the obligations of Treaties, and, at the request of Portugal herself, to protect her against the hostile aggressions of Spain; and not in order, directly at least, to restore the Balance of Power. But the Intervention of Great Britain, Austria, Russia, Prussia, and France in the Belgian (*p*) Revolution of 1830, had, as has been already seen, for one of its avowed objects, the establishment of a just Balance of Power, and the security of the general peace.

On the 19th of February, 1831, the intervening Powers signed a Protocol, in which the enunciation of this principle occupied a very conspicuous place.

" Les Plénipotentiaires des Cours d'Autriche, de France,
" de la Grande-Bretagne, de Prusse, et de Russie, s'étant

(*p*) *Hansard, Parl. Deb.* vol. xxviii. pp. 1133–1163. *Martens, Nouv. Rec.* t. i. p. 70.

" assemblés, ont porté toute leur attention sur les interpré-
" tations diverses données au Protocole de la Conférence de
" Londres, en date du 20 décembre 1830, et aux princi-
" paux Actes dont il a été suivi. Les délibérations des
" Plénipotentiaires les ont conduits à reconnaître unanime-
" ment, qu'ils doivent à la position des cinq Cours, comme à
" la cause de la paix générale, qui est leur propre cause, et
" *celle de la civilisation européenne, de rappeler ici le grand*
" *principe de droit public,* dont des Actes de la Conférence
" de Londres n'ont fait qu'offrir une application salutaire et
" constante.

" D'après *ce principe d'un ordre supérieur,* les Traités ne
" perdent pas leur puissance, quels que soient les changemens
" qui interviennent dans l'organisation intérieure des peuples.
" Pour juger de l'application que les cinq Cours ont faite de
" ce même principe, pour apprécier les déterminations qu'elles
" ont prises relativement à la Belgique, il suffit de se reporter
" à l'époque de l'année 1814.

" A cette époque les Provinces Belges étaient occupées
" militairement par l'Autriche, la Grande-Bretagne, la Prusse,
" et la Russie; et les droits que ces Puissances exerçaient
" sur elles furent complétés par la renonciation de la France
" à la possession de ces mêmes Provinces. Mais la renoncia-
" tion de la France n'eut pas lieu au profit des Puissances
" occupantes. Elle tint à une pensée d'un ordre plus élevé.
" Les Puissances, et la France elle-même, également désin-
" téressées alors comme aujourd'hui dans leurs vues sur la
" Belgique, en gardèrent la disposition et non la souveraineté,
" dans la seule intention de faire concourir les Provinces
" Belges à *l'établissement d'un juste équilibre en Europe,* et au
" maintien de la paix générale. Ce fut cette intention qui
" présida à leurs stipulations ultérieures; ce fut elle qui unit
" la Belgique à la Hollande; ce fut elle qui porta les Puis-
" sances à assurer dès lors aux Belges le double bienfait
" d'institutions libres, et d'un commerce fécond pour eux en
" richesse et en développement d'industrie.

" L'union de la Belgique avec la Hollande se brisa. Des

"communications officielles ne tardèrent pas à convaincre
"les cinq Cours, que les moyens primitivement destinés à
"la maintenir ne pourraient plus ni la rétablir pour le mo-
"ment, ni la conserver par la suite; et que désormais, au
"lieu de confondre les affections et le bonheur des deux
"Peuples, elle ne mettrait en présence que les passions et les
"haines, elle ne ferait jaillir de leur choc que la guerre avec
"tous ses désastres. Il n'appartenait pas aux Puissances
"de juger des causes qui venaient de rompre les liens
"qu'elles avaient formés. Mais quand elles voyaient ces
"liens rompus, il leur appartenait d'atteindre encore l'objet
"qu'elles s'étaient proposé en les formant. Il leur appar-
"tenait d'assurer, à la faveur de combinaisons nouvelles,
"cette tranquillité de l'Europe, dont l'union de la Belgique
"avec la Hollande avait constitué une des bases. Les
"Puissances y étaient impérieusement appelées. *Elles*
"*avaient le droit, et les évènemens leur imposaient le devoir,*
"*d'empêcher que les Provinces Belges, devenues indépendantes,*
"*ne portassent atteinte à la sécurité générale, et à l'équilibre*
"*européen*" (*q*).

The Kingdom of Belgium was thus founded upon the principle of maintaining the Balance of Power in Europe. In this year (1870) it was thought necessary by the British Government to enter into further separate Treaties with France and Prussia, then, as now, at war with each other, by which Treaties England undertook, in the event of either of these two Powers attacking Belgium, to become the ally of the other Power for the purpose of defending Belgium (*r*).

The Duchy of Luxemburg belonged to the King of Holland as Grand Duke, and formed part of the old German Confederation, which was destroyed by Prussia at the close of the war in 1866 between that country and Austria. In

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(*q*) *Protocols of Conferences in London relative to the Affairs of Belgium*, art. i. 1830-31, pp. 59-60; and *State Papers*, vol. xviii. p. 779, &c.

(*r*) *Vide antè*, p. 129.

1867, after a Conference between England, France, Austria, Prussia, Russia, and Holland, to which Italy was afterwards admitted, and in which Belgium was also represented, a Treaty was concluded, by the provisions of which the sovereignty of Luxemburg was preserved to the King Grand Duke and his successors; the Grand Duchy was neutralized in a manner presently to be stated; the fortifications were to be destroyed and not restored; the Prussian troops were to evacuate the place, and no military establishment to be kept up there.

The neutralization article was as follows :—

Art. 2. " The Grand Duchy of Luxemburg, within the " limits determined by the Act annexed to the Treaties " of the 19th of April, 1839, under the guarantee of the " Courts of Great Britain, Austria, France, Prussia, and " Russia, shall henceforth form a perpetually neutral State.

" It shall be bound to observe the same neutrality towards " all other States.

" The high contracting parties engage to respect the " principle of neutrality stipulated by the present article.

" That principle is and remains placed under the sanc- " tion of the collective guarantee of the Powers signing " parties to the present Treaty, with the exception of Bel- " gium, which is itself a neutral State " (*s*).

During the present war (1870) the neutrality of Belgium and Luxemburg has been hitherto respected by both belligerents.

The intervention of France, Great Britain, and Russia in the Greek Revolution of 1828, as has been already observed, was not originally founded upon the plea of preserving the Balance of Power, but was placed upon other grounds.

In April 1834 a Quadruple Alliance was formed between France, England, Portugal, and Spain, by which the two former undertook to assist the two latter Powers in fulfilling a mutual agreement to expel Don Miguel, the

(*s*) *Ann. Reg.* 1867, p. 225.

Pretender to the throne of Portugal, and Don Carlos, the Pretender to the throne of Spain, from the territories of the two kingdoms.

"In consequence of this agreement" (it is said in the preamble of this Treaty of the Quadruple Alliance), "their "Majesties the Regents have addressed themselves to their "Majesties the King of the United Kingdom of Great "Britain and Ireland, and the King of the French; and "their said Majesties, considering the interest they must "always take in the security of the Spanish monarchy, and "being further animated by the most anxious desire to assist "in the establishment of peace in the Peninsula, as well as "in every other part of Europe; and his Britannic Ma"jesty considering, moreover, the special obligations arising "out of his ancient alliance with Portugal; their Majes"ties have consented to become parties to the proposed "engagement."

In August 1834 a Treaty of additional articles was concluded, whereby France undertook to prevent the importation of supplies and ammunition to the party of Don Carlos in Spain; and Great Britain undertook to supply arms to the Spanish Government, and assist it with naval forces. Great Britain relaxed the provisions of her Foreign Enlistment Act, and permitted, by an Order in Council, her subjects to engage in the service of the Spanish Government, and a corps of volunteers was raised and commanded by a British officer.

The independent existence of the Turkish Empire at Constantinople has become, in the opinion of all the principal European Powers, necessary to the preservation of the Balance of Power:—so great, and so little to be foretold, have been the vicissitudes of the kingdoms of the world, and especially of Europe, since the sixteenth century.

It is not true that Christian Europe requires, as has been sometimes said, as a condition of her security, the existence of a Mahometan Power within her boundaries; but that the preservation and maintenance of the general peace demands

that the Ottoman dominions should not be absorbed into the territories of any of the existing European communities (*t*). It is conceivable that Constantinople may again become the seat of a Christian Greek Government, capable of maintaining the position and supporting the character of an independent kingdom; and were such an event to occur, the Balance of Power might be at least as well secured as by the present state of things. The same remark applies to the Pachalic of Egypt, holden under the *suzeraineté* of the Porte (*u*), which could not be included in the possessions of any other European Sovereign without danger to the security of other European States.

During the epoch now under discussion, there have been several Interventions by the European Powers in the affairs of Turkey.

After the battle of Navarino, and the recognition of the independence of Greece, war still continued between Russia and Turkey, and was not altogether concluded until the framing of the Treaty of Adrianople in 1829.

Before the Porte had recovered from her losses and disasters, she was threatened with a more alarming danger, from the ambitious rebellion of Mehemet Ali, Pacha of Egypt. After the battle of Koniah in 1833, in which the Turkish were utterly defeated by the Egyptian forces, under Ibrahim Pacha, Constantinople itself was in imminent peril, and the Porte requested the Intervention of Austria, France, and England. While these Powers undertook a negotiation to prevent the further advance of Ibrahim, Russia landed an army on the Asiatic side of the Bosphorus, between Ibrahim and the capital. A treaty of peace between the Sultan and

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(*t*) The Porte concluded, on 21st January, 1790, a Treaty against Austria and Russia with Prussia, in which that Power "à cause du préjudice que les ennemis, en passant le Danube, ont apporté *à la balance du pouvoir désiré et nécessaire*, promet de déclarer la guerre de toutes ses forces aux Russes et aux Autrichiens," &c.—*Koch, Hist. des Tr.* t. iv. p. 419.

(*u*) *Vide antè*, p. 129, s. xcix.

the Pacha was concluded at Keelayah, under the mediation of France and England, in 1833, and a separate Treaty entered into between Russia and the Porte at Unkiar Skelessi in the same year, by which, among other things, it was covenanted that Russia should assist the Porte with a naval and military force, when requested to do so, and that the Porte should, by way of reciprocity, close the Dardanelles against foreign ships at the request of Russia.

France protested against this Treaty as producing a change in the relations between the Ottoman Empire and Russia which affected the interests of the other European States. The duration of this Treaty was limited to eight years; before that period had elapsed, war again broke out between the Sultan and the Pacha of Egypt, who gained a decisive victory over the Turkish troops at Nezib. Shortly afterwards the whole Turkish fleet deserted to the Pacha. These events, disturbing the security of the Levant, and endangering the general peace, the alarm engendered by the spirit of the Treaty of Unkiar Skelessi, and the exclusive interference of Russia, determined the Western Powers to intervene in this war of the two great divisions of the Ottoman Empire.

Their Intervention was expressly and carefully founded upon the grounds, that the present state of things disturbed the Balance of Power, and thereby the peace of Europe, and that the Sultan had requested their Intervention. A Convention was ultimately concluded at London on the 14th of July, 1840, between the great European Powers, exclusive of France. By this Convention the Sultan conferred on Mehemet Ali and his descendants in the direct line, the Pachalic of Egypt for his life, with the title of Pacha of Acre, and the command of the fortress of St. Jean d'Acre. It was further stipulated that Mehemet Ali and his descendants should pay a certain annual tribute to the Sultan;—that the Turkish fleet should be immediately restored;—that the Treaties and Laws of the Ottoman Empire should be applicable to Egypt in the same manner as to every other part of the Ottoman Empire;—that the military and naval

forces of the Pacha should be considered as part of the forces of the Ottoman Empire, and maintained for the service of the State.

In 1847, England, France, and Spain intervened in the internal affairs of Portugal, at the request of the Queen of that country, and put down by force the rebellion that harassed her subjects; but at the same time guaranteed to the insurgents, under certain conditions, an amnesty for political offences, and certain improvements in the Constitutional Government. In this mediation England took the leading part (*x*).

In 1848, France and England endeavoured jointly to mediate in the disturbances which agitated every kingdom in the Italian peninsula; and in 1849, the Government of England asserted her right of intervening, by the expression of opinion at least, in the civil contest between Austria and Hungary (*y*).

In 1851 the Governments of France and England addressed notes, the former to the Powers who had signed the Treaty of Vienna, the latter to the Germanic Confederation, protesting against the suggested incorporation of Austrian provinces, not being German, into the Germanic Confederation. Such an event, it was urged, though unconnected with any acquisition of new territory, would clearly affect the Balance of Power (*z*).

Upon the same principle, on the 2nd of August, 1850, Austria, France, England, Prussia, Russia, and Sweden, put forth a Protocol, respecting the succession to the Danish monarchy, in which "the maintenance of the integrity" of that monarchy was said "to be connected with the general "interests of the *Balance of Europe*, and of high importance

(*x*) *Ann. Reg.* 1849, p. 346, June 12 & 13.

(*y*) *Ib.* 1848–9, vol. xc. p. 171; vol. xci. chap. vi.

(*z*) See these notes *in extenso*, *Ann. des Deux Mondes* (1851–2), French memorandum, p. 953; English note (*Lord Cowley*), p. 959, "qu'il prévoit en même temps qu'un pareil changement *dérangerait l'équilibre général*," &c.

"to the preservation of peace;" and therefore, at the request of the King of Denmark, they put forth a declaration to the above effect (*a*).

The same Powers, on the 8th of May, 1852, concluded a Treaty, binding themselves to recognize Prince Christian of Sleswig-Holstein and his heirs male as the lawful successors to the throne of Denmark (*b*).

In 1851, the doctrine of Intervention was vigorously enforced on the South American Continent, in a manner well deserving attentive consideration (*c*).

That portion of South America which is politically and geographically designated as the States of De La Plata, on account of the position they occupy in the great basin of this river, consists of the Argentine Confederation (then under the dominion of General Rosas), the Oriental Republic of Uruguay, and Paraguay. Paraguay and Uruguay (*d*) touch the confines of the empire of Brazil. Rosas had for some time threatened directly the independence of Paraguay (formerly a province of the Vice-Royalty of Buenos Ayres), which he claimed as a province of the Argentine Confederation, while at the same time he manifested an intention of indirectly domineering over Uruguay, the capital of which, Monte Video, had been for a long time assailed by General Oribe, his ally. The Emperor of Brazil, greatly preferring Paraguay and Uruguay, as at present governed, for his neighbours, to those countries under the domination of Rosas, suddenly, and without any concert with the European Powers, intervened with an armed force in the quarrel between Monte Video and the Argentine Republic, and destroyed in a moment the power of Rosas, which had for many years embarrassed the diplomacy of England and France (*e*).

(*a*) *Ann. Reg.* for 1852, p. 440.

(*b*) *Ann. des Deux Mondes* (1851–2), pp. 960–1.

(*c*) *Ib.* (1851–2), pp. 27, 865, 881, 978.

(*d*) *Vide antè*, p. 163.

(*e*) *Ann. des Deux Mondes* (1850), p. 1052, *Question de la Plate; ib.* 1851), pp. 27, 865, &c.

Brazil has entered into five Treaties with the Oriental Republic of Uruguay, forming, in fact, a code or system of general relations between the two States, but especially regulating the mode of Intervention accorded to Brazil in the affairs of Uruguay (*f*).

In 1852–3 (*g*), this doctrine of Intervention to prevent the undue aggrandisement of any one State by the absorption of the territories of another, was applied upon a very important occasion by England and France to the American Continent and the West Indies. These two Governments invited the North American United States to accede to a tripartite Treaty, the object of which was, to bind the three Governments to renounce both now and hereafter all intention of appropriating the Island of Cuba, or, in other words, to express their determination to abide by the *status quo* in the West Indies (*h*). The North American United States refused to be parties to this Treaty; but the right of Intervention, on the part of England and France, was steadily proclaimed, both on account of their own interests, and on account of those of friendly States in South America, as to the "present distribution of power" (*i*) in the American seas.

In 1854 a war was waged by England, France, and Turkey against Russia for the avowed purpose of preserving the Balance of Power, and for preventing on that account the absorption of European Turkey into the territories of Russia.

The following is the text of the convention concluded between England, France, and the Porte, signed March 13th, 1854:—

(*f*) See these treaties *in extenso, Ann. des Deux Mondes* (1851–2), pp. 979–986.

(*g*) See *Correspondence between the United States, Spain, France, and England concerning alleged projects of Conquest and Annexation of the Island of Cuba*, presented to the House of Commons, April 11, 1853.

(*h*) *Lord Cowley's despatch to Lord John Russell*, January 24, 1853.

(*i*) *Letter of Lord John Russell to Mr. Campbell*, February 16, 1853.

"As her Majesty the Queen of Great Britain and "Ireland, and his Majesty the Emperor of the French, "have been requested by his Highness the Sultan to assist "him in repelling the attack which has been made by his "Majesty the Emperor of All the Russias on the territory "of the Sublime Porte—an attack by which the integrity "of the Ottoman Empire and the independence of the "Sultan's throne are endangered—and as their Ma-"jesties are perfectly convinced that the existence of the "Ottoman Empire in its present extent, is of essential "importance to *the balance of power among the States of* "*Europe*, and as they have in consequence agreed to afford "his Highness the Sultan the assistance which he has "requested to this end,—their aforesaid Majesties and his "Highness the Sultan have deemed it proper to conclude a "Treaty, so as to attest their intentions in conformity with "the above, and to settle the manner in which their afore-"said Majesties shall lend their assistance to his Highness."

The ground of a religious protectorate, upon which Russia defended her aggression upon the Porte, will presently be considered. By Article VII. of the Treaty of Paris, March 30, 1856, England, Austria, France, Russia and Prussia—after declaring "the Sublime Porte admitted to participate "in the advantages of the public law and system (*concert*) "of Europe"—"engage each on his part to respect the "independence and the territorial integrity of the Ottoman "Empire; guarantee in common the strict observance of "that engagement, and will in consequence consider any "act tending to its violation as a question of general inter-"est" (*k*).

In the preceding year, 1855 (November 21), in a Treaty between England, France, and the King of Sweden and Norway, it is recited that these Powers, "being anxious to "avert any complication which might disturb the *existing*

(*k*) *Ann. Reg.* 1856, p. 313.

" *Balance of Power in Europe*, have resolved to come to
" an understanding with a view to secure the integrity
" of the United Kingdoms of Sweden and Norway, and
" have named their Plenipotentiaries to conclude a Treaty
" for that purpose" (*l*).

In 1860, after the war between France and Italy against Austria had ceased, and after the stipulations between France and Austria by the Treaty of Zurich (November 1859) had become impracticable, Tuscany, Parma, Modena, and the Legations having by the vote of their national assemblies united themselves to Sardinia, France obtained, in an evil hour for herself, the cession of Savoy and Nice as an alleged compensation to the Balance of Power said to be disturbed by the increase of territory obtained by Sardinia in Italy. England intervened by a strong remonstrance, which cannot be read without profit at the present time (1870).

" Her Majesty's Government," Earl Russell wrote to Earl Cowley, the English Ambassador at Paris, " must be
" allowed to remark that a demand for cession of a neigh-
" bour's territory, made by a State so powerful as France,
" and whose former and not very remote policy of territorial
" aggrandisement brought countless calamities upon Europe,
" cannot well fail to give umbrage to every State interested
" in the Balance of Power and in the maintenance of the
" general peace. Nor can that umbrage be diminished by
" the grounds on which the claim is founded; because, if a
" great military Power like France is to demand the terri-
" tory of a neighbour upon its own theory of what constitutes
" geographically its proper system of defence, it is evident
" that no State could be secure from the aggressions of a
" more powerful neighbour; that might, not right, would
" henceforward be the rule to determine territorial pos-
" session; and that the integrity and independence of the

(*l*) *Ann. Reg.* 1856, p. 323.

"smaller States of Europe would be placed in perpetual "jeopardy"(*m*).

It is true that, by the Treaty between France and Sardinia which recorded this cession, it was provided that the consent of the inhabitants should be previously obtained (*n*), and that a *plébiscite*—to use the new and ominous expression on this subject—of the ceded countries gave a colour to the cession; but the value of an expression of opinion of this kind depends entirely upon the freedom with which it was uttered. It is difficult, having regard to the circumstances, to maintain that this essential element of validity was present when this *plébiscite* was arranged. It has been said that it was in an evil hour for France that this territorial acquisition was made, and surely the truth of this remark cannot be gainsaid in the autumn of 1870, when Prussia justifies, in some degree at least, her acquisition of Alsace and Lorraine—perhaps the severest blow ever dealt to France—by a reference to this unhappy precedent. But the mischief of this example was earlier felt. The spoliation of Denmark, Hanover, Nassau, and free Frankfort in 1866 has been already mentioned (*o*). No event for many years has given so rude a shock to the liberties of States, and the principle of the Balance of Power, intended to be, and valuable only as, the outwork of those liberties. England at least desired—the apology for her is indeed unsatisfactory—to intervene, and would have done so with the alliance of

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(*m*) *Ann. Reg.* 1860, pp. 257–8.

(*n*) "It is understood between their Majesties that this annexation shall be effected without any constraint of the wishes of the population, and that the Governments of the Emperor of the French and the King of Sardinia will concert together as soon as possible upon the best means of appreciating and verifying the manifestation of these wishes."—*Art.* 1, *Treaty of Annexation of Savoy and Nice to France*, *Ann. Reg.* 1860, p. 240.

It was also stipulated, by Art. 11, that the Emperor of the French was "to come to an understanding" with the Powers represented at the Congress of Vienna and the Swiss Confederation on this subject.

(*o*) *Vide antè*, p. 49 and note (*s*), and p. 149.

France. But France stood aloof—partly hampered by her own precedent, partly, it is to be feared, waiting for an opportunity of repeating it—and not until 1870 did she intervene by war to redress the Balance of Power upon an immediate ground which did not justify the intervention.

An intervention in the affairs of Mexico (*p*) took place in 1861, by England, France, and Spain, founded, apparently, upon the same principles—namely, of demanding payment for debts long due to their subjects, satisfaction for outrages committed on them, and some security against their recurrence. The object of the Convention, signed at London, October 31, 1861, by the three Powers, was "to demand "more efficacious protection for the persons and properties "of their subjects, as well as a fulfilment of the obligations "contracted towards their Majesties; and they engaged not "to seek for themselves, in the employment of the contemplated coercive measures, any acquisition of territory, "or any special advantage, nor to exercise in the internal "affairs of Mexico any influence of a nature to prejudice "the right of the Mexican nation to choose and constitute "the form of its government."

The debt to France was very small, the debt to England was very large, and had been repeatedly guaranteed by Mexican Governments; and the revenues of the Customs had been formally pledged for their discharge. A serious difference of opinion began to show itself between the Commissioners of the three Powers at the first conference, which was held at (*q*) Vera Cruz. The Treaty of Soledad (*r*),

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(*p*) *Dana's Wheaton*, p. 126.

Lawrence's Wheaton (French ed.), vol. ii. p. 339.

See *Rec. gén. de Traités, par Samwer* (*contin. de Martens*), t. iv. 2e partie, p. 143: "Convention conclue à Londres, le 31 octobre 1861, entre l'Espagne, la France, et la Grande-Bretagne, pour combiner une action commune contre le Mexique."

(*q*) *Ib.* p. 145: "Proclamation adressée à Vera-Cruz, le 10 janvier 1862, par les représentants de l'Espagne, de la France, et de la Grande-Bretagne au peuple mexicain."

(*r*) "Convention préliminaire entre le Mexique d'une part, et l'Espagne,

February 1862, between the English, Spanish, and French Commissioners and the Minister of the Mexican Republic, was not ratified by the Emperor, and at the last conference of the three Powers at Orizaba (April 1862) this difference so increased as to dissolve the alliance. England and Spain then withdrew from common action with France. This difference was, in truth, one of principle, which affected the whole object of the expedition. The Queen of England had said, in her speech to Parliament,—

"The wrongs committed by various parties and by suc-
"cessive Governments in Mexico upon foreigners resident
"within the Mexican territory, and for which no satisfactory
"redress could be obtained, have led to the conclusion of a
"convention between her Majesty, the Emperor of the
"French, and the Queen of Spain, for the purpose of
"regulating a combined operation on the coast of Mexico,
"with a view to obtain that redress which has hitherto been
"withheld" (*s*).

The English intervention was strictly limited to these objects, which it accomplished; while France thought it necessary to go further, in order to obtain, as she said, security against the recurrence of the evils complained of;

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la France, et la Grande-Bretagne d'autre part, relative aux réclamations des sujets respectifs signée à la Soledad le 19 février 1862.

"Art. 1. Le gouvernement constitutionnel qui est actuellement au pouvoir dans la république mexicaine ayant informé les commissaires des Puissances alliées qu'il n'a pas besoin de l'assistance offerte par elle avec tant de bienveillance au peuple mexicain, parce que ce peuple contient en lui-même des éléments suffisants de force pour se préserver de toute révolte intérieure, les Alliés auront recours à des traités pour présenter toutes les réclamations qu'ils sont chargés de faire au nom de leurs nations respectives.

"Art. 2. Dans ce but, et les représentants des Puissances alliées protestant qu'ils n'ont nullement l'intention de nuire à la souveraineté ou à l'intégrité de la république mexicaine, des négociations seront ouvertes à Orizaba, où les commissaires des Puissances alliées et les ministres de la république se rendront, à moins que des délégués ne soient nommés par les deux parties d'un consentement mutuel."—*Ib.* p. 147.

(*s*) *Ann. Reg.* 1862, p. 5.

but the Emperor Napoleon desired, as he afterwards announced, to support the position of the Latin race in America, to prevent the United States from acquiring more Mexican territory, and to establish an empire which might be favourable to France, and aid, as it was supposed, in assisting the development of French commerce with Central America. England, and subsequently Spain, declined altogether to assist in the furtherance of any of these schemes. The United States had been invited to join the original convention, but had refused to do so, not because they were at that time distracted by civil war, but, as it should appear from their public statements, partly because it was contrary to their traditional policy to enter into European alliances, but principally because they could not endure the creation of a new monarchy on the American continent. They even refused to acknowledge the *de facto* sovereignty of Maximilian, at a time when it certainly existed, and was recognized by every other country; or even to recognize as a belligerent the party in the State which supported him, or the blockade which he instituted; while at the same time they were loud and earnest in their demand that their own blockade of the revolted Southern States should be recognized, to an extent and with a strictness which, if it did not exceed, went to the very utmost limit of the severest application of International Law upon the subject. It will hardly be denied by any dispassionate historian or jurist that they allowed their dislike of a monarchy and of European intervention in American affairs to make them disregard, upon the subject of *de facto* sovereignties and belligerent rights, the principles of International Law which their executive and their judicial tribunals had always maintained. The failure of the French attempt, the withdrawal of their forces from the Mexican territory, and the murder of the ill-fated and deserted Maximilian, and the reconstruction of a Mexican Republic, are well-known portions of contemporary history, which are without the province of this work.

The Balance of Power has been more disturbed by the aggressions of Prussia and Austria upon Denmark, and of Prussia upon her weaker neighbours, than by any triumph of the system of standing armies since Napoleon the First was at Berlin, for I pass over all mention of the war which is now (1870) distracting Europe, further than to observe that if France had accepted the invitation of England in 1864, and taken joint action with her for the protection of Denmark, in all probability Christendom and civilization would have been spared the disgrace and curse which now afflict them (*t*).

CCCCVII. The general subject of the Balance of Power should not be altogether dismissed without the remark that the maintenance of this doctrine does not require that all existing Powers should retain exactly their present territorial possessions, but rather that no single Power should be allowed to increase them in a manner which threatens the

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(*t*) "Le démembrement du Danemark, toléré par nous malgré les offres formelles de concours que nous faisait alors l'Angleterre, pour empêcher une iniquité si dangereuse, les encouragements que la Prusse a reçus de nous dans ses desseins déclarés contre l'Autriche, sont des faits qu'on peut abandonner au jugement sévère de l'équitable postérité."—*La France nouvelle, par M. Prevost-Paradol* (dernier chapitre).

Earl Russell's answer to Count Bismark, August 1864: "Her Majesty's Government are also bound to remark, when the satisfaction of national feelings is referred to, that it appears certain that a considerable number—perhaps two or three hundred thousand—of the loyal Danish population are transferred to a German State; and it is to be feared that the complaints hitherto made respecting the attempts to force the language of Denmark upon the German subjects of a Danish Sovereign will be succeeded by complaints of the attempt to force the language of Germany upon the Danish subjects of a German Sovereign.

"Her Majesty's Government had hoped that at least the districts to the north of Flensburg would, in pursuance of a suggestion made by the Prussian Plenipotentiary in the Conference of London, have been left under the Danish Crown.

"If it is said that force has decided this question, and that the superiority of the arms of Austria and Prussia over those of Denmark was incontestable, the assertion must be admitted. But in that case it is out of place to claim credit for equity and moderation."—*Ann. Reg.* 1864, pp. 237, 238.

liberties of other States (*u*). The doctrine, properly understood, does not imply a pedantic adherence to the particular system of equilibrium maintained by existing arrangements, but it is opposed to such an alteration of the balance as tends to seriously disturb the relations of existing States (*x*).

CCCCVIII. Another ground of Intervention (*y*) in the

(*u*) *Bolingbroke's Works*, vol. ii. p. 439.

(*x*) "Sunt profectò eruntque semper hujus libræ lances impares: verum est politicorum curare ne aliqua ex parte nimiùm invergat discrimen. Quod ubi rectĕ providetur, etsi eveniant rerum conversiones salva manet doctrina equilibrii, nomen ergo hoc sensu meliùs interpretaberis prout Ancillon *System der Gegenkräfte und der Wechselwirkung*, quam cum aliis *System des Gleichgewichts*."—*Klinkhammer, ubi supra*, p. 61.

Lord Bacon says: "Kings have to deal with their neighbours.—First, for their neighbours there can no general rule be given (the occasions are so variable), save one which ever holdeth: which is, that princes do keep due sentinel, that none of their neighbours do overgrow so (by increase of territory, by embracing of trade, by approaches, or the like) as they become more able to annoy them than they were; and this is generally the work of standing counsels to foresee and to hinder it. During that triumvirate of kings, King Henry VIII. of England, Francis I., King of France, and Charles V., Emperor, there was such a watch kept that none of the three could win a palm of ground, but the other two would straightways balance it, either by confederation, or, if need were, by a war; and would not in any wise take up peace at interest: and the like was done by that league (which Guicciardini saith was the security of Italy) made between Ferdinando, King of Naples, Florenzius Medicea, and Ludovicus Sforza, potentates, the one of Florence, the other of Milan. Neither is the opinion of some of the schoolmen to be received, that a war cannot justly be made but upon a precedent injury or provocation; for there is no question but a just fear of an imminent danger, though there be no blow given, is a lawful cause of a war."—*Bacon, Essay on Empire.*

In 1848 M. Guizot, in the Chamber of Deputies, said: "Je crois, comme M. Thiers, que la France doit avoir constamment l'œil ouvert sur l'équilibre qui s'établit, et qui se déplace de jour en jour en Europe entre les grands systèmes de gouvernement, entre les gouvernements absolus et les gouvernements constitutionnels. . . . Savez-vous ce qu'il y a de plus dangereux, de plus fatal pour le régime constitutionnel, pour ce côté du grand équilibre européen? Ce sont les tentatives infructueuses ou malheureuses."—*Guizot, Hist. parlementaire de France*, t. v. p. 558.

(*y*) *Heffters*, pp. 92-95.

internal affairs of another kingdom has been asserted; namely, when the alterations and changes made in the constitution of that kingdom affect the Reversionary Rights of the Intervening Power; for instance, when a recognized feudal relation, or the contingent and eventual Right of Succession, secured by Treaty to the Intervening kingdom, is cut off by the alterations and changes so made (*z*).

In the year 1849, Austria is supposed to have meditated an Intervention in the affairs of Tuscany upon this ground(*a*).

By the Treaty of Vienna, in 1735, it was provided that the Duke of Lorraine should succeed to the last male heir of the Medici, the childless Gaston. This was a part of the negotiations by which Charles VI. sought to secure the undisputed recognition of Maria Theresa as successor to his dominions. The arrangement, guaranteed by almost all the European Powers, was as follows:—" Le Grand-Duché " de Toscane, après la mort du présent possesseur, appar- " tiendra *à la maison de Lorraine*, pour l'indemniser des " Duchez qu'elle possède aujourd'huy.

" Toutes les Puissances qui prendront part à la pacifica- " tion, luy en garantiront la succession éventuelle " (*b*).

The " maison de Lorraine " was despoiled of its Tuscan possessions by the Treaty of Luneville in 1801; but they were restored to it by the Treaty of Vienna in 1815. By the 100th Article of the final Act of the Congress, it is provided that " *S. A. I. et R. l'Archiduc Ferdinand d'Autriche* " est rétabli, tant pour lui que pour ses héritiers et suc- " cesseurs, dans tous les droits de souveraineté et propriété " sur le Grand-Duché de Toscane et ses dépendances ainsi " que S. A. I. les a possédés antérieurement au Traité de " Luneville. Les stipulations de l'article 11 du Traité de " Vienne du 3 octobre 1735, entre l'Empereur Charles VI " et le Roi de France, auxquelles accédèrent les autres

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(*z*) *Martens*, p. 190, cases cited in note.
(*a*) See an article in the *Globe*, April 4, 1849.
(*b*) *Wenck. Jur. Gent.* t. i. p. 3.

"Puissances, sont pleinement rétablies en faveur de S. A. I. "et ses descendants ainsi que les garanties résultantes de "ces stipulations" (*c*).

In this latter Treaty of Vienna the name of the reigning Grand Duke is substituted for that of his House, and the House, as distinguished from the issue of Ferdinand, is nowhere mentioned.

A presumption unfavourable to the claim of Austria arises from this marked difference in the language of the two Treaties; and the presumption is certainly much strengthened by the language of the 98th and 99th Articles of the Treaty of 1815 (*d*), which renewed and confirmed in express terms the Rights of Reversion (*les droits de succession et réversion*) of Austria to the Duchies of Modena, Reggio, and Mirandola, and to the Principalities of Massa and Carrara, and the Rights of Reversion of Austria and Sardinia to the Duchies of Parma, Placentia, and Guastalla.

(*c*) *Martens, Rec. de Tr.* t. x. p. 424.

(*d*) "Art. XCVIII.—S. A. R. l'Archiduc François d'Est, ses héritiers et successeurs, posséderont en toute propriété et souveraineté les duchés de Modène, de Reggio, et de Mirandole, dans la même étendue qu'ils étaient à l'époque du traité de Campo-Formio.

"S. A. R. l'Archiduchesse Marie Béatrix d'Est, ses héritiers et successeurs, posséderont en toute souveraineté et propriété le duché de Massa et la principauté de Carrara, ainsi que les fiefs impériaux dans la Lunigiana. Ces derniers pourront servir à des échanges ou autres arrangements de gré à gré avec S. A. I. le Grand-Duc de Toscane, selon la convenance réciproque.

"Les droits de succession et réversion établis dans les branches des archiducs d'Autriche, relativement aux duchés de Modène, de Reggio, et Mirandole, ainsi que des principautés de Massa et Carrara, sont conservés.

"Art. XCIX.—Sa Majesté l'Impératrice Marie-Louise possédera en toute propriété et souveraineté les duchés de Parme, de Plaisance, et de Guastalla, à l'exception des districts enclavés dans les États de S. M. I. et R. Apost. sur la rive gauche du Pô.

"La réversibilité de ces pays sera déterminée de commun accord entre les cours d'Autriche, de Russie, de France, d'Espagne, d'Angleterre, et de Prusse, toutefois ayant égard aux droits de réversion de la maison d'Autriche et de S. M. le Roi de Sardaigne sur les dits pays."—*Martens, Rec. de Tr.* t. x. p. 423.

It may well have been foreseen, that the addition of Tuscany to Austria would cause a very material alteration in the Balance of Power, and would threaten the security of other States, while the absorption of the minor principalities into the kingdoms of Austria and Sardinia would produce no such effect.

It is evident that any question with respect to the Reversionary Rights of Foreign Princes over a State which has long occupied an independent position in the society of nations, may be fraught with the greatest difficulties both in speculation and practice (*e*).

Take the case of Tuscany for an example, on the supposition that the claim of Austria was well founded on the letter of the Treaty (*f*). Suppose that a State, having occupied for

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(*e*) "C'est incontestable qu'une nation change à son gré ses lois fondamentales."—*Mably*, t. ii. p. 138.

(*f*) "La nation peut, par la même raison, faire renoncer une branche qui s'établit ailleurs, une fille qui épouse un prince étranger. Ces renonciations, exigées ou approuvées par l'État, sont très-valides, puisqu'elles sont équivalentes à une loi que l'État ferait pour exclure ces mêmes personnes qui ont renoncé, et leur postérité. Ainsi la loi d'Angleterre a rejeté pour toujours tout héritier catholique romain. 'Ainsi la loi de Russie, faite au commencement du règne d'ÉLISABETH, exclut-elle très-prudemment tout héritier qui posséderait une autre monarchie; ainsi la loi de Portugal rejette-t-elle tout étranger qui serait appelé à la couronne par le droit du sang.'—(*Esprit des Lois*, l. xxvi. c. xxiii., où l'on peut voir de très-bonnes raisons politiques de ces dispositions.) Des auteurs célèbres, très-savants d'ailleurs et très-judicieux, ont donc manqué les vrais principes en traitant des renonciations. Ils ont beaucoup parlé des droits des enfans nés ou à naître, de la transmission de ces droits, etc. Il fallait considérer la succession moins comme une propriété de la famille régnante que comme une loi de l'État. De ce principe lumineux et incontestable découle avec facilité toute la doctrine des renonciations. Celles que l'État a exigées ou approuvées sont valides et sacrées; *ce sont des lois fondamentales*: celles qui ne sont point autorisées par l'État ne peuvent être obligatoires que pour le prince qui les a faites; elles ne sauraient nuire à sa postérité; et lui-même peut en revenir, au cas que l'État ait besoin de lui et l'appelle, car il se doit à un peuple qui lui avait commis le soin de son salut. Par la même raison, le prince ne peut légitimement renoncer à contre-temps au dommage de l'État, et abandonner dans le danger une nation qui s'était remise entre ses mains."—*Vattel*, l. i. c. 5, s. 62.

a long period the position of a free and independent nation in the society of other States, thinks fit to secure its constitution, and to pass a fundamental law, similar to that by which Great Britain excluded James II. and his descendants from her throne, that no Prince of a certain race shall be henceforth their ruler; or a fundamental law, similar to that which was established by Russia in the reign of her Elizabeth, that the crown of their country shall never be worn by the Sovereign of another country; can it be denied that the exercise of such a power is inherent in the nature of an independent State? Third Powers, indeed, must recollect that the obligation of Treaties is as important a maxim of International Law as the free agency of independent States; but with respect to the nation herself, it remains certainly very difficult to reconcile her character of independence with the impossibility of exercising one of the most important attributes belonging to it.

It is to be hoped that the notion and the term of "Patrimonial States" are banished for ever from the theory and practice of International Law (*g*), and that the attempt will never again be made to give to the Sovereign of one independent State the Reversionary Right of succeeding to the throne of another.

CCCCIX. There yet remains (*h*) to be discussed the question of *Intervention on the ground of Religion*—a question which has assumed, from the events which have since happened, the character of importance and magnitude which, the possible consequences duly considered, it will be difficult to exaggerate.

(*g*) *Rotteck, Staats-Lexicon,* "Garantie" (vol. vi. p. 264), mentions the Bourbon family compact of 1761 as a proof of imperfect acquaintance with the true principles of International Law, inasmuch as by it the people were treated "*als das blosse Pertinenzstück des regierenden Hauses.*"

See, too, *Ompteda,* vii. n. a.

(*h*) Most of the remarks in the text which follow on this subject will be found in a pamphlet (1853), entitled *Russia and Turkey,* &c., by the author of this work.

"So familiar, and as it were so natural, to man, is the "practice of violence, that our indulgence allows the slightest "provocation, the most disputable right, as a sufficient "ground of national hostility. But the name and nature "of a *holy war* demands a more vigorous scrutiny; nor can "we hastily believe, that the servants of the Prince of "Peace would unsheath the sword of destruction, unless the "motive were pure, the quarrel legitimate, and the neces-"sity inevitable" (*i*).

This opinion of the celebrated historian of Christian Constantinople—whatever may have been the spirit in which it was uttered—appears to rest upon a foundation of truth.

It was intended, we need not stop to inquire with what justice (*k*), to censure the earliest European invasion of the dominions of the Turk, the first religious war waged by Christian Princes against the disciples of Mahomet.

The Emperor of Russia maintained that the war in 1854 between Russia and the Porte was a Religious war (*l*).

If there be any truth in the doctrines laid down in the preceding pages of this work, there certainly are *principles of International Law* by which this position of Russia must be tried, and which are not perhaps either difficult to discover, or hard to apply.

We have seen upon what principles other kinds of Intervention have been justified. The question of Religious Intervention naturally divides itself into two parts:—

(*i*) *Gibbon's Decline and Fall of the Roman Empire*, vol. ii. c. lx.

(*k*) *Fleury, Hist. ecclés.* t. xii. sixième Discours, 111: "Je ne vois point que l'on ait mis *alors* en question si cette guerre étoit juste: tous les chrétiens d'Orient et d'Occident le supposoient également. Toutefois la différence de religion n'est pas une cause suffisante de guerre," &c. "Les princes chrétiens ont cru de tout tems être en droit de protéger les chrétiens étrangers *opprimés* par leurs souverains." On this ground he says, Theodosius the younger refused to deliver up a Persian Christian to the King of Persia; and the Patriarch of Jerusalem sent through Peter the Hermit letters of entreaty for aid to Pope Urban.

(*l*) *Correspondence respecting the Rights and Privileges of the Latin and Greek Churches in Turkey*, presented to both Houses of Parliament by command of her Majesty, 1854.

First, whether identity of religious faith, with a certain number of the subjects of another State, whose rulers profess a different faith, has ever been holden, or ought in principle to be holden, as warranting the Intervention of a Foreign State on behalf of those subjects with whom it has the impalpable but stringent bond of a common religion. Secondly, if Intervention be justifiable on this ground, what kind of Intervention?—that of remonstrance, carried, if necessary, to the length of a refusal to maintain any intercourse with the oppressor of your brethren in the faith? or the *ultima ratio,* the commencement of actual hostilities against the State which denies your title to interfere with her jurisdiction over her citizens?

With respect to any right of Intervention on the ground of similarity of religious faith, there is, *in limine,* a distinction, perhaps, not unimportant to be taken. Intervention may be, and has been, claimed by one Christian State, in the affairs of another on behalf of a particular body of Christians, professing a form of Christianity identical with that of the Intervening State, but different from that of the State of which they are subjects. Again, Intervention may be claimed in the affairs of an Infidel State on behalf either of Christians *generally,* or of a *particular* body of Christians. This latter kind of Intervention is that which was claimed by Russia as to the jurisdiction of the Porte over the Christian subjects in her dominions—a species of Intervention which Russia, by virtue of her Protectorate of the Greek Church, had been *accustomed* to exercise, and which she then declared she desired to exercise merely for the purpose of securing to the Greek Church rights conceded to her *ab antiquo* by the Porte.

CCCCX. It would seem that three propositions were, by implication, maintained in this claim:—

1. That the demand was sanctioned by the analogy derivable from the precedents of Christian Intervention in other Christian States on behalf of particular bodies of Christians.

2. That the right of Christian Intervention on religious grounds in a Mahometan State rests upon an obviously stronger foundation.

3. That the rights which the Russian Intervention were intended to secure were rights granted by the Porte, *ab antiquo*, to the Greek Church.

CCCCXI. As to the first of these propositions:—The practice (if it can be called such) of Intervention by one Christian State on behalf of the subjects of another Christian State upon the ground of religion, dates from the period of the Reformation. It could scarcely, indeed, have had an earlier origin. The abstract principle of this kind of Intervention has derived positive force from being embodied in various important Treaties.

The Treaties having for their object to secure the peaceable profession of religion are of two kinds—first, those which concern the exercise of religion (*devotio domestica*) of native subjects of the Intervening State commorant in a foreign land; secondly, those which concern the religion of foreigners not its subjects.

The great Treaty of Westphalia, in its general language respecting Germany, established, as a maxim of public law, that there should be an equality of rights between the Roman Catholic and Protestant religions; a maxim renewed and fortified by the Germanic Confederation of 1815. In these instances, it is true, the several States to which the stipulation related were all members of one Confederation, though individually independent of each other. But the precedent does not stop here; for, passing by the Interventions of Elizabeth, Cromwell, and even Charles II., on behalf of foreign Protestants, and going back no later than 1690, we find in that year Great Britain and Holland intervening in the affairs of Savoy, and obtaining from that kingdom a permission that a portion of the Sardinian subjects might freely exercise their religion (*m*).

(*m*) *Schmauss*, vol. i. p. 1093.

In the negotiations which preceded the Treaty of Utrecht (1714), our Queen Anne stipulated with France that, in return for the permission accorded to French subjects to sell their immovable property in the North American Colonies recently conquered by Great Britain, his Most Gracious Majesty should release from the galleys the French Protestants who had been confined there solely on account of their religion. Further than this, we learn from Lord Bolingbroke's letters (*n*), foreign interference could not be extended;—he suggests, indeed, that France might be tempted to retort, and require some mitigation of the heavy penalties under which the Irish Roman Catholic subjects of Queen Anne were then suffering.

Sweden interfered in 1707 on behalf of the Protestants of Poland.

The Treaties of Velau (*o*), 1657, of Oliva (*p*), 1660, of Nimeguen (*q*), 1679, of Ryswick (*r*), 1698, of Utrecht (*s*), 1714, of Breslau (*t*), 1742, may all be enumerated as instances of Roman Catholic Intervention on behalf of Roman Catholic subjects, in countries ceded to Protestant sovereigns—an Intervention which, it should be remembered, was almost invariably *invoked* by the inhabitants within the country.

It appears, therefore, that Intervention by one Christian State on behalf of the subjects of another upon the ground of Religion has, as a matter of fact, in certain circumstances, been practised, and cannot be said, in the abstract, to be a violation of International Law. But what kind of Intervention? By remonstrance, by stipulation, by a condition in a Treaty concluding a war waged upon other grounds.

(*n*) *Bolingbroke's Letters*, vol. iv. pp. 121, 171–2, 459.
(*o*) Art. xvi.
(*p*) Art. ii.
(*q*) Art. ix.
(*r*) Art. iv.
(*s*) Art. xxiii.
(*t*) Art. vi.

It may, perhaps, be justly contended that the principle might be pushed further; and that in the event of a *persecution* of large bodies of men, on account of their religious belief, an armed Intervention on their behalf might be as warrantable by International Law, as an armed Intervention to prevent the shedding of blood and protracted internal hostilities.

It is, however, manifestly unsafe to contemplate these extreme cases of exception from the sound general rule of non-interference in the domestic legislation of Foreign States. The duty of such non-interference is clear; it should not be turned into a doubt. Therefore it is that no writer of authority upon International Law sanctions such an Intervention, except in the extreme case of a positive *persecution* inflicted avowedly upon the ground of religious belief. Vattel, himself a Protestant, was not at all disposed to underrate the right of Intervention of Foreign Powers on behalf of their co-religionists in other countries: his opinion, therefore, which is in accordance with that which has been here expressed, deserves the most respectful consideration(*u*).

It would be difficult to find any writer upon International Law who has ever expressed a different opinion; though not uncommonly they close their remarks on this subject by observing on the manner in which the exceptional use of Intervention upon religious grounds has been abused in practice.

Thus the accurate and careful Martens observes:

" Toutes les guerres auxquelles la religion a servi de " motif ou de prétexte ont fait voir, 1° que jamais la religion " n'a été le seul motif pour lequel les Puissances étrangères " sont entrées en guerre; 2° que lorsque la politique " s'accorde avec les intérêts de leur religion, elles ont effec- " tivement soutenu la cause de celle-ci; 3° mais que tou- " jours le zèle religieux a cédé aux motifs de politique;

(*u*) " Du droit de sûreté, et des effets de la souveraineté et de l'indépendance des nations."—*Vattel, Droit des Gens,* t. i. p. 311, ss. 57, 59, 62.

et que plus d'une fois même celle-ci a entraîné à des "démarches directement opposées aux intérêts de leur "religion" (*x*).

So much for the doctrine of Intervention in matters of religion between Christian States.

CCCCXII. We now arrive at the consideration of the second proposition, which relates to Christian Intervention upon the same subject with Mahometan States. The converse of this, viz., Mahometan Intervention with Christian States, has, it is believed, never yet arisen in practice, but it would be subject on principle to the same law (*y*).

Is the rule of law altered by the fact that the persons in whose behalf the right of Intervention is claimed, are the subjects of a Mahometan or Infidel State?

The true answer seems to be that the rule is not changed, but that there is a much wider field for the application of the exceptional principle of interference.

For some time after the conquest of Constantinople (1453) grave doubts were entertained by the nations of Christendom as to the lawfulness of any pacific intercourse with the Sultan. It was not till after the Treaty of Constantinople in 1720 that the Russian minister was permitted to *reside* at Constantinople; and direct relations between Roman Catholic Sovereigns and the Porte can scarcely be said to have an earlier date than the end of the eighteenth century (*z*). Even after the lapse of nearly four centuries, at the Congress of Vienna, 1815, the Ottoman Empire was not represented, nor was it included in the provisions of positive public law contained in the Treaty which was the result of the Congress. The admission of the representative of the Porte to the congress which preceded the Treaty of Paris in 1856, and the

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(*x*) *Martens, Précis du Droit des Gens*, t. i. p. 261.

(*y*) There is an article in the Treaty of Constantinople, between Russia and the Porte in 1779, in which Russia stipulates that the Porte shall perform certain religious ceremonies on behalf of the Khan of Tartary.

(*z*) *Miltitz, Manuel des Consuls*, t. ii. p. 1571.

recognition of her new position in this respect, carrying with it the duties and rights arising from the Public Law of Europe, was a matter of solemn record in a protocol of that Treaty (*a*).

CCCCXIII. With respect to the third proposition:

From the period of the permanent settlement of the Turk in Europe, all the Christian Powers have endeavoured to obtain, and have by degrees succeeded in obtaining, a criminal and civil jurisdiction over their *own subjects* in Turkey through the medium of Consuls. Moreover, Roman Catholic Powers have obtained certain privileges, both with respect to the access of their own subjects to the Holy Places of Palestine, and with respect to the Latin Church there. At first these privileges were granted to some favoured European Powers, and especially to France, under whose flag other Christian Powers sought protection (*b*). The Treaty recently referred to by French authorities, between Sultan Achmet and Henry IV. of France, concluded in 1604 (*c*), is the model Treaty, so to speak, upon this subject (*d*).

(*a*) Protocol 2.—" The fourth point is read throughout, and Count Walewski remarks thereupon that it will be proper to record the entrance of Turkey within the Public Law of Europe. The Plenipotentiaries agree that it is important to record this new fact by a special stipulation inserted in the general Treaty." It was embodied in art. vii. of the Treaty of Paris. See Appendix.

(*b*) In 1534, Francis I. made an alliance with the Sultan Soliman against Charles V., and from that time a close intercourse has subsisted between France and the Porte. *Vide post*, COMITY.

(*c*) *Schmauss*, t. i. p. 430.

(*d*) " Art. IV.—Que de Vénétiens en Anglois en là les Espagnols, Portugais, Cattelans, Ragusois, Génevois, Anconitains, Florentins et généralement toutes autres nations quelles qu'elles soient, puissent librement venir trafiquer par nos Païs, sous l'aveu et seureté de la Bannière de France, laquelle ils porteront comme leur sauve-garde, et de cette façon ils pourront aller et venir trafiquer par les lieux de notre Empire comme ils y sont venus d'Ancienneté, obéissant aux Consuls François qui résident et demeurent par nos Havres et Échelles; voulons et entendons qu'en usant ainsi ils puissent trafiquer avec leurs vaisseaux et gallions sans être inquiétés, et ce seulement tant que ledit Empereur de France conservera notre amitié et ne contreviendra à celle qu'il nous à promise.

To this Treaty succeeded one in 1673; but a later and more important Treaty was in 1740. It related to the two subjects: 1. The Holy places. 2. The general protection of the Christian Religion.

With respect to the Holy Places there are various specific provisions (*e*).

With respect to the general question of the Christian worship and religion, the provisions are as follow:—

"Les deux Ordres de Religieux François qui sont à Galata, "savoir les Jésuites et les Capucins, y ayant deux Eglises, "qu'ils ont entre leurs mains *ab antiquo*, resteront encore "entre leurs mains, et ils en auront la possession et jouis- "sance: Et comme l'une de ces Églises a été brûlée, elle "sera rebâtie avec permission de la justice, et elle restera "comme par ci-devant entre les mains des Capucins, sans "qu'ils puissent être inquiétés à cet égard. On n'inquiétera "pas non plus les Églises que la Nation Françoise a à "Smyrne, à Syde, à Alexandrie, et dans les autres à "Échelles; et l'on n'exigera d'eux aucun argent sous ce "prétexte" (*f*).

"On n'inquiétera pas les François quand dans les bornes "de leur État; ils liront l'Évangile dans leur Hôpital de "Galata" (*g*).

Voulons et commandons aussi que les sujets dudit Empereur de France, et ceux des Princes ses amis, Alliés, et Confœdérés, puissent sous son aveu et protection venir librement visiter les Saints Lieux de Jérusalem, sans qu'il leur soit fait ou donné aucun empêchement. De plus pour l'honneur et amitié d'icelui Empereur nous voulons que les Religieux qui demeurent en Jérusalem et servent l'Église de Coumame (c'est-à-dire le saint sépulcre de Notre Seigneur Jésus-Christ) y puissent demeurer, aller et venir seurement et sans aucun trouble et detourbier, et y soient bien reçus, protégés, aidés et secourus en la considération susdite."—Traité entre Henri IV, Roy de France, et le Sultan Achmet, de l'an 1604, *Schmauss*, t. i. p. 430.

(*e*) Capitulations ou Traités anciens et nouveaux, entre la Cour de France et la Porte ottomane, renouvelés et augmentés l'an de J.-C. 1740, et de l'Égire 1153, art. i. xxxii. xxxiii. xxxiv. lxxxii.—*Wenck, Cod. Jur. Gent.* t. i. p. 538.

(*f*) *Wenck. Cod. Jur. Gent.* t. i. p. 555: Capitulations, &c., art. xxxv.

(*g*) *Ib.* art. xxxvi. p. 556.

An unquestionable authority upon the nature and character of the French Protectorate in the East, appears to be furnished by the Diplomatic Memoirs of Monsieur de Saint-Priest. He was ambassador from the Court of France at Constantinople from 1768 to 1785; he describes the Protectorate exercised by the monarchs of France over the Roman Catholics of the Levant, in these words:—

"On a décoré le zèle de nos Rois de l'expression de pro-
"tection de la Religion Catholique en Levant; mais elle est
"*illusoire*, et sert à égarer ceux qui n'approfondissent pas la
"chose. Jamais les Sultans n'ont eu seulement l'idée que
"les Monarques François se crussent autorisés à s'immiscer
"de la Religion des sujets de la Porte.—'Il n'y a point de
"'Prince, dit fort sagement un de nos prédécesseurs, M. le
"'Marquis de Bonnat, dans un Mémoire sur cette matière,
"'quelque étroite union qu'il ait avec un autre Souverain, qui
"'lui permette de se mêler de la Religion de ses sujets. Les
"'Turcs sont aussi délicats que d'autres là-dessus.'

"Il est aisé de comprendre que la France n'ayant jamais
"traité avec la Porte qu'à titre d'amitié, n'a pu lui imposer des
"obligations odieuses de leur nature. Aussi le premier point
"de mes instructions me prescrivoit d'éviter tout ce qui pour-
"roit causer de l'ombrage à la Porte en donnant trop d'ex-
"tension aux capitulations en matière de la Religion" (*h*).

The true doctrine of International Law upon this subject could not be more fairly or more correctly expressed than in the important citation which has just been made. And it must be remembered, that no single Treaty can be pointed out between the Porte and France, any more than between the Porte and Russia, in which that doctrine has ever been, in the slightest degree, violated.

The Russian Protectorate of the Greek Church, which has

(*h*) *Moniteur*, 3rd June, 1853.—*L'Univers*, 4th June, 1853. It is also referred to by *M. Drouyn de Lhuys* in his second circular.

Vide antè, papers referred to, note (*l*), p. 516.

France has subsequently explained with distinctness that she only claims a protectorate over French Roman Catholic subjects.

been claimed, must be of comparatively recent date. It was not till about the year 1677 that the Russians and the Turks were brought into actual contact with each other. In 1854 Count Nesselrode referred to the Treaty of Kaynardgi (1774) as containing the record of the Right of Intervention now claimed by Russia, and also to the Treaty of Adrianople (1829) as confirmatory of the stipulations. Here, then, we have tangible, accessible references, and not shadowy allusions to undefined, unrecorded concessions. The earlier Treaty of Belgrade (1739) might have also been referred to. It is of great importance to study the *ipsissima verba* of these Treaties, and see whether their letter or their spirit sustained the Russian demand.

The eleventh article of the Treaty of Belgrade, concluded between the Empress Anne of Russia and the Sultan Mahmud (*i*), relates to the free access of Russia to the Holy Places. Austria concluded at Belgrade, at the same time, a Treaty containing similar provisions.

The Treaty of Kaynardgi (or Koutchouk-Kainardji), to which the Emperor of Russia has especially referred as the foundation of his claim, was concluded in the year 1774, between Russia and the Porte. The articles of it which refer to the present subject are here given at length.

Art. VII. (*k*)

"La Fulgida Porta promette una ferma protezione alla religione Christiana, e alle chiese di quella; permette ancora a' Ministri dell'

Art. VII.

"La Sublime Porte promet de protéger constamment la religion chrétienne et ses églises; et aussi elle permet aux Ministres de la

(*i*) *Acta Pacis Belgradi inter Annam Russiæ Imperatricem et Sultanum Ottom. Mahmud. Traduction du Traité de Paix de Belgrade entre la Russie et la Porte*, art. xi.

(*k*) Articoli della perpetua Pace tra l' Impero di tutte le Russie e la Porta Ottomanna, conchiusa nel campo presso la città di Chiusciuc Cainargi, distante 4 leghe della città di Silistria. Traité de Paix perpétuelle et d'amitié entre l'Empire de Russie et la Porte ottomane, conclu le 10 juillet dans la tente du Commandant-en-chef le Feld-maréchal comte de Roumanzow, près du village de Kutschouc Kaynardgi-sur la rive droite du Danube.—*Martens, Rec. de Tr.* t. ii. (1771–1779) pp. 286–7.

Imperial Corte di Russia di fare in ogni occorrenza varie rappresentanze alla Porta a favore della sotto mentovata eretta chiesa in Constantinopoli, accennata nell' Art. XIV, non meno che di quei che la servono, e promette ricevere queste rimostranze con attenzione, come fatte da persona considerata d' una vicina e sinceramente mica Potenza."

Cour Impériale de Russie de faire dans toutes les occasions des représentations, tant en faveur de la nouvelle église à Constantinople dont il sera mention à l'Article XIV., que pour ceux qui la desservent, promettant de les prendre en considération, comme faites par une personne de confiance d'une Puissance voisine et sincèrement amie" (*l*).

ART. XIV.

"L' altissima Corte di Russia potrà *a norma delle altre Potenze,* a riserva della chiesa domestica, edificarne una nella parte di Galata nella strada detta Bey-Uglù, la qual chiesa sarà pubblica, chiamata Russo-Greca, e questa sempre si manterrà sotto la protezione del Ministro di questo Impero, e anderà illesa da ogni molestia ed oltraggio."

ART. XIV.

"*A l'exemple des autres Puissances,* on permet à la haute Cour de Russie, outre la chapelle bâtie dans la maison du Ministre, de construire dans un quartier de Galata, dans la rue nommée Bey-Oglu, une église publique du rit grec, laquelle sera toujours sous la protection des Ministres de cet Empire et à l'abri de toute gêne et de toute avanie" (*m*).

ART. VIII.

"Si permetterà liberamente a' sudditi dell' Impero Russo, tanto ecclesiastici quanto secolari, il visitare la S. Città di Gerusalemme, ed altri luoghi degni di esser visitati, e non si dimanderà mai da tali viandanti e viaggiatori, nè in Gerusalemme, nè in altri luoghi, nè anche nelle vie da chicchesia, nessun caraccio, taglia, o tributo, o qualche altra tassa. Ma oltre a ciò saranno muniti co' convenienti passaporti, o firmani, i quali si danno ai sudditi delle altre Potenze. E nel tempo ch' essi saranno nell' Impero Ottomanno, non si farà loro nessun torto, nè alcun oltraggio, ma saranno difesi con tutto il rigore delle leggi."

ART. VIII.

"Il sera libre et permis aux sujets de l'Empire de Russie, tant séculiers qu'ecclésiastiques, de visiter la sainte ville de Jérusalem et autres lieux dignes d'attention. Il ne sera exigé de ces pèlerins et voyageurs par qui que ce puisse être, ni à Jérusalem, ni ailleurs, ni sur la route, aucun charatsch, contribution, droit ou autre imposition; mais ils seront munis de passeports et firmans, tels qu'on en donne aux sujets des autres Puissances amies. Pendant leur séjour dans l'Empire ottoman, il ne leur sera fait le moindre tort ni offense, mais au contraire ils seront sous la protection la plus rigide des loix."

(*l*) *Martens, Rec. de Tr.* t. ii. (1771–1779), pp. 296–7.
(*m*) *Ib.* pp. 300, 301.

In 1854 the Treaty of Adrianople (1829) was referred to by Russia as confirming the rights conceded by this Treaty of Kaynardgi.

That Treaty contains no *new* provision whatever on the subject of religion. There are special provisions relating to Moldavia and Wallachia, both in the body of the Treaty and in an annexed Treaty; but the only religious stipulation is for the free enjoyment and exercise of their religion (*n*).

The substance of the provisions of the Treaties just cited appears to be—

1. That Pilgrims, Ecclesiastics, and Travellers may visit, safely and untaxed, Jerusalem and the Holy Places.

2. That certain new Chapels may be built in a particular quarter of Constantinople—*à l'exemple des autres Puissances*—besides the Ambassadorial Chapel, then existing: there is similar provision in the French Treaty of 1740.

3. That the Sublime Porte, *not* the Emperor of Russia, shall continue to protect the "Christian Religion:"—the interference of *the Emperor* being, in the same clause, implicitly limited to the making representations in favour of a particular church and its clergy, to which the Porte, on the ground of friendship alone, engages to listen.

CCCCXIV. Not only the language of the Treaties which have been concluded on this subject between Russia and the Porte, must be considered—but also the absence both of such Treaties themselves, and the absence of such provisions in Treaties, when the circumstances might well seem to call for them. In other words, the demand of Russia must be negatively, as well as affirmatively, examined. Let the cases of Servia and of Greece be considered.

The *Christian* Servians, who had made common cause with Russia in her wars with the Porte, and had been included in the Treaty of Bucharest in 1812, applied in vain, though after suffering atrocious cruelties, to the Congress of

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(*n*) Art. V.—" Elles jouiront du libre exercice de leur culte," &c.

Vienna, even to mediate on their behalf, and yet in that Congress Russia was pre-eminently powerful.

The Intervention of the great Christian Powers, among whom was Russia, for the pacification of Greece (1826), was placed, as we have seen (*o*), with careful precision upon the necessity of putting an end to a contest which injured the commerce and disturbed the repose of Europe, and upon the request of the Greeks for the mediation of the European Powers. In that Treaty, no allusion to the Russian Protectorate of the Greek Church is to be found.

If these premises be correct the conclusion seems inevitable; but it must be left to the impartial jurist to decide whether the evidence, both negative and affirmative, was favourable to or conclusive against the demand of Russia; whether it had a foundation in *precedent or* whether it was altogether *new*; whether, in fact, it was not a pretext for an invasion of the Turkish dominions with the intention of acquiring a portion of them, if not Constantinople itself. We have seen the grounds upon which the European allies of Turkey founded their right of intervention on her behalf. We must pass over the history of what is popularly called the Crimean War which ensued; and, confining ourselves to the question of intervention on behalf of subjects of a foreign Power, co-religionists of the intervening Power, we have to notice next in order the memorandum (December 28, 1854) communicated by the Plenipotentiaries of Austria, France, and England to Prince Gortschakoff, the Russian Minister. The fourth article referred to these former Treaties between Russia and the Porte, and especially to the Treaty of Koutchouk-Kainardji, "the erroneous interpretation of "which had been the principal cause of the existing war;" and pointed out that Russia in renouncing "the pretension "of covering by her official Protectorate the Christian

(*o*) *Vide antè*, p. 115.

" subjects of the Porte," would also renounce any privileges arising from these Treaties (*p*).

In the Conference of Vienna (*q*), March 15, 1855, between the same Powers and Russia and Turkey, the first protocol recited this fourth article as one of the four bases of the Conference. At the subsequent Congress of Paris (April 16, 1856), between the same Powers, Aali Pasha, the representative of the Porte, stated " that a new Hatti-Sheriff " had renewed the religious privileges granted to the non-" Mussulman subjects of the Porte, had prescribed new " reforms, that this Act had been published, and that the " Sublime Porte, in proposing to communicate it to the " Powers by means of an official note, would in that matter " have complied with the requirements in regard to the " fourth point " (*r*). The ninth article of the Treaty of Paris, March 30, 1856, between the same Powers, was as follows: " His Imperial Majesty the Sultan, having, in his " constant solicitude for the welfare of his subjects, issued a " firman which, while ameliorating their condition without " distinction of religion or of race, records his generous " intentions towards the Christian population of his Empire, " and wishing to give a further proof of his sentiments in " that respect, has resolved to communicate to the Con-" tracting Parties the said firman emanating spontaneously " from his sovereign will. The Contracting Powers recog-" nize the high value of this communication. It is clearly " understood that it cannot in any case give to the said " Powers the right to interfere, either collectively or sepa-" rately, in the relations of his Majesty the Sultan with

(*p*) *De Martens,* t. xliv. p. 632.

(*q*) *Ib.* 635.

(*r*) Protocols of Conferences held at Paris relative to the general Treaty of Peace, presented to Parliament, 1856.—*Ann. Reg.* 1856, p. 311. *De Martens,* t. xliv. p. 707. The firman referred to will be found (dated Feb. 18, 1856), *ib.* p. 508., and *Ann. Reg.* 1856, p. 337.

"his subjects, nor in the internal administration of his "Empire" (*s*).

CCCCXV. The peculiar International *Status* of the Papacy, combining the position of a temporal sovereign with that of a spiritual Patriarch of the Western Church, was largely discussed in the second volume of the former edition of these Commentaries. This is not the place to notice the various changes which this *status* has undergone since the creation of the Kingdom of Italy, or the events which, while these pages are being written, appear likely to render the temporal sovereignty of the Pope a matter of past history.

The intervention of foreign States in the Papal dominions has generally been founded on the application or permission of the Pope, a remark which seems to take this occurrence out of the category of the question now under discussion—namely, the intervention of Foreign Powers to protect co-religionists, the subjects of another State, contrary to the wish, or without the permission, of the Government of that State. But it must be observed that the grounds upon which France has defended the occupation (*t*), by her soldiers, of the Pontifical States, would go far to warrant Russia in protecting, by an armed force in the dominions of the Porte, the Patriarch of Constantinople.

In November 1866 Baron Ricasoli issued a circular to the Italian prefects, in which he said: "The Roman "question still remains to be solved, but after the fulfilment "of the September Convention that question cannot and "must not be the motive for agitation. The sovereignty of "the Pope is placed by the September Convention in the "position of all other sovereignties (*u*). Italy has promised "France and Europe to remain neutral between the Pope "and the Romans, and to allow this last experiment to be "tried of the vitality of an ecclesiastical Principality with-

(*s*) *Treaty of Paris*, March 30, 1856.

(*t*) Emperor Napoleon's speech to the Chambers, March 1, 1860.—*Ann. Reg.* p. 215.

(*u*) *Ann. Reg.* 1864, p. 242.

" out parallel in the civilized world. Italy must keep her
" promise, and await the certain triumph of her rights
" through the efficacy of the principle of nationality " (*x*).

The events now (October 1870) happening at Rome are the natural fruit of this policy.

(*x*) *Ann. Reg.* 1866, p. 262.

THE END OF VOLUME I.

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APPENDIX I. Page 14.

SOURCES OF INTERNATIONAL LAW.

(*Extract from Suarez, De Legibus et Deo Legislatore*, lib. ii. c. xxix. n. 9.)

Having distinguished *jus gentium* from *jus naturæ*, he proceeds to say of the former: " Ratio hujus juris est, quia humanum genus, " quamvis in varios populos et regna divisum, semper habeat " aliquam unitatem, non solum specificam, sed etiam quasi politicam " et moralem, quam indicat naturale præceptum mutui amoris et " misericordiæ, quod ad omnes extenditur, etiam extraneos et cujus- " cunque nationis. Quapropter licet unaquæque civitas perfecta, " respublica aut regnum sit in se communitas perfecta, et suis mem- " bris constans; nihilo minus quælibet illarum est etiam membrum " aliquo modo hujus universi, prout genus humanum spectat. Nun- " quam enim illæ communitates adeo sunt sibi sufficientes sigillatim, " quin indigeant aliquo mutuo juvamine et societate ac communica- " tione, interdum ad melius esse majoremque utilitatem, interdum " verò et ob moralem necessitatem. Hac ergo ratione indigent " aliquo jure, quo dirigantur et rectè ordinentur in hoc genere com- " municationis et societatis. Et quamvis magna ex parte hoc fiat " per rationem naturalem, non tamen sufficientur et immediate " quoad omnia; ideoque specialia jura potuerunt usu earundem " gentium introduci."

(*Extract from the Traité des Loix, by Domat*, chap. xi. s. 39.)

" Comme tout le genre humain compose *une société universelle*, " divisée en diverses nations, qui ont leurs gouvernemens séparez, " et que les nations ont entr'elles de différentes communications, il a " été nécessaire qu'il y eût des loix qui réglassent l'ordre de ces " communications, et pour les princes entr'eux et pour leurs sujets, " ce qui renferme l'usage des ambassades, des négociations, des " Traités de Paix, et toutes les manières dont les princes et leurs " sujets entretiennent les commerces et les autres liaisons avec leurs " voisins. Et dans les guerres même il y a des loix qui règlent les " manières de déclarer la guerre, qui modèrent les actes d'hostilité,

" qui maintiennent l'usage des médiations, des trèves, des suspen-
" sions d'armes, des compositions, de la sûreté des ôtages, et d'autres
" semblables.

" Toutes ces choses n'ont pû être réglées que par quelques loix;
" et comme les nations n'ont aucune autorité pour s'en imposer
" les unes aux autres, il y a deux sortes de loix, qui leur servent de
" règles. L'une des loix naturelles de l'humanité, de l'hospitalité, de
" la fidélité, et toutes celles qui dépendent de ces premières, et qui
" réglent les manières dont les peuples de différentes nations doivent
" user entr'eux en paix et en guerre. Et l'autre est celle des
" règlemens dont les nations conviennent par des Traités, ou par des
" usages, qu'elles établissent et qu'elles observent réciproquement.
" Et les infractions de ces loix, de ces traités, et de ces usages sont
" réprimées par des guerres ouvertes, et par des représailles, et par
" d'autres voyes proportionnées aux ruptures et aux entreprises.

" Ce sont ces loix communes entre les nations qu'on peut appeler
" et que nous appelons communément le droit des gens; quoique ce
" mot soit pris en un autre sens dans le droit romain, où l'on com-
" prend sous le droit des gens les contrats même; comme les ventes,
" les louages, la société, le dépôt, et autres, par cette raison qu'ils
" sont en usage dans toutes les nations."

(*Extract from Merlin, Répertoire de Jurisprudence*, vol. v. p. 291.)

" Le droit *primitif* des gens est aussi ancien que les hommes, et il
" est par essence aussi invariable que le droit naturel; les devoirs
" des enfans envers leurs pères et leurs mères, l'attachement des
" citoyens pour leur patrie, la bonne foi dans les conventions, n'ont
" jamais dû souffrir aucun changement; et ces devoirs, s'ils n'ont pas
" été toujours remplis, ont toujours dû l'être.

" Quant au droit des gens *secondaire*, il s'est formé, comme on l'a
" déjà dit, par succession de temps. Ainsi, les devoirs réciproques
" des citoyens ont commencé lorsque les hommes ont bâti des villes
" pour vivre en société; les devoirs des sujets envers l'État ont com-
" mencé lorsque les hommes de chaque pays qui ne composaient
" entre eux qu'une même famille soumise au seul gouvernement
" paternel, ont établi au-dessus d'eux une puissance publique qu'ils
" ont déférée à un ou à plusieurs d'entre eux.

" L'ambition, l'intérêt, et les autres sujets de discorde entre les
" puissances voisines, ont donné lieu aux guerres et aux servitudes
" personnelles; telles sont les sources funestes d'une partie de ce
" second droit des gens.

" Les différentes nations, quoique la plupart divisées d'intérêts,
" sont convenues entre elles tacitement d'observer, tant en paix
" qu'en guerre, certaines règles de bienséance, d'humanité et de
" justice, comme de ne point attenter à la personne des ambassadeurs
" ou autres personnes envoyées pour faire des propositions de paix
" ou de trève; de ne point empoisonner les fontaines; de respecter

" les temples; d'épargner les femmes, les vieillards, et les enfans;
" ces usages et plusieurs autres semblables, qui par succession des
" temps ont acquis force de loi, ont formé ce qu'on appelle le *droit*
" *des gens ou le droit commun* aux divers peuples."

(*Extract from Vattel, Prélim.* s. 6.)

" Il faut donc appliquer aux nations les règles du droit naturel,
" pour découvrir quelles sont leurs obligations, et quels sont leurs
" droits; par conséquent *le droit des gens* n'est originairement autre
" chose que *le droit de la nature appliqué aux nations*. Mais comme
" l'application d'une règle ne peut être juste et raisonnable, si elle
" ne se fait d'une manière convenable au sujet, il ne faut pas croire
" que le droit des gens soit précisément et partout le même que le
" droit naturel, aux sujets près, en sorte que l'on n'ait qu'à substi-
" tuer les nations aux particuliers. Une société civile, un État, est
" un sujet bien différent d'un individu humain; d'où résultent, en
" vertu des lois naturelles même, des obligations et des droits bien
" différents en beaucoup de cas; la même règle générale, appliquée
" à deux sujets, ne pouvant opérer des décisions semblables, quand
" les sujets diffèrent; ou une règle particulière, très-juste pour un
" sujet, n'étant point applicable à un second sujet de toute autre
" nature. Il est donc bien des cas, dans lesquels la loi naturelle ne
" décide point d'État à État, comme elle déciderait de particulier à
" particulier. Il faut savoir en faire une application accommodée
" aux sujets; et c'est l'art de l'appliquer ainsi, avec une justesse
" fondée sur la droite raison, qui fait du droit des gens une science
" particulière."

APPENDIX II. PAGE 30.

INTERNATIONAL JURISPRUDENCE OF ANCIENT ROME.

I. GROTIUS is literally inaccurate, as Ompteda remarks, in citing Cicero for a direct assertion that the science of International Jurisprudence was, in the abstract, an excellent thing. But unquestionably, in the passage upon which Grotius relies for this assertion, International Jurisprudence is recognized as a science, and acquaintance with it as the accomplishment of a statesman. Cicero (*a*), speaking of Pompey, says that he possessed "præstabilem " scientiam in fœderibus, pactionibus, conditionibus populorum, " regum, exterarum nationum in universo denique belli jure et " pacis," and it would not be easy to give a juster, better, more complete recognition, or a fuller description of the science of which we are treating. In Sallust, the expression *jus gentium* is

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(*a*) *Orat. pro Lege Manil.*

certainly to be found used in the sense of International Law, and also in some passages of Livy. For instance, when Sallust tells us that Marius, in putting to death the Numidians who had surrendered (*in deditionem acceptos*), acted *contra jus belli*, he speaks of it as a violation of a recognized rule of International Law, applicable now, as then, to a state of war. And Bocchus is made by the same author to claim the part of Numidia conquered from Jugurtha as "*jure belli suam factam.*" Again, Jugurtha maintains that the Senate had no right to prevent him from attacking Adherbal, who had attempted his (Jugurtha's) life "Populum Ro-"manum neque recte, neque pro bono facturum, si ab *jure gentium* "sese prohibuerit" (*b*). In the most barbarous times, ambassadors are said to be "jure gentium sancti" (*c*). In both these instances the meaning would be correctly rendered by the words Law of Nations. There is another passage in the "Bellum Jugurthinum" in which the Law of Nations, with respect to the privilege of the ambassador's *suite*, is clearly distinguished from the Law of Nature: "Fit "reus magis ex æquo bonoque, quam *ex jure gentium* Bomilcar, "*comes* ejus qui Romam fide publica venerat." The expression of Lucan, as to the violation of the Laws of Embassy by the Egyptians, is very strong:

> "Sed neque jus mundi valuit, neque fœdera sancta
> Gentibus."—*Lib.* x. 471–472.

With respect to the use of this expression *jus gentium*, in the compilations of Justinian, it appears generally to be used to signify, sometimes what is called in modern times the Law of Nature, sometimes a positive Law universally instituted by all civilized nations. So, in the Digest (*d*), *acceptilatio*, or the release of a debt, is said to be *juris gentium*; and in modern times English Judges have said that questions relating to marriage are *juris gentium.*

Gaius and other Roman jurists made a twofold partition of *Jus*: into 1. Jus Gentium vel Naturæ; 2. Jus Civile. Ulpian and others made a threefold partition: 1. Jus Gentium; 2. Jus Civile; 3. Jus Naturale—meaning by this to include the interests common both to man and beast. Savigny rightly rejects this last partition, and adheres to the first (*e*).

There are, however, passages in which *jus gentium* clearly does mean International Law. Thus, in the Digest, we read: "Si quis "legatum hostium pulsasset, contra jus gentium id commissum "esse existimatur, quia sancti habentur legati. Et ideo, quum "legati apud nos essent gentis alicujus, quum bellum eis indictum "sit, responsum est, liberos eos manere; id enim juri gentium con-"veniens esse. Itaque eum, qui legatum pulsasset, Quintus Mucius

(*b*) *Sall. Bell. Jugurth.* 225.
(*c*) *Liv.* xxxix. 25.
(*d*) Lib. xlvi. t. iv.
(*e*) *System des R. R.* i. (Beylage I.). See, too, *Cic. de Off.* l. i. 3–5.

" dedi hostibus, quorum erant legati, solitus est respondere; quem
" hostes si non recepissent, quæsitum est, an civis Romanus ma-
" neret quibusdam existimantibus manere, aliis contra, quia quem
" semel populus jussisset dedi, ex civitate expulisse videretur, sicut
" faceret, quum aqua et igne interdiceret. In qua sententia videtur
" Publius Mucius fuisse. Id autem maxime quæsitum est in Hos-
" tilio Mancino, quem Numantini sibi deditum non acceperunt, de
" quo tamen lex postea lata est, ut esset civis Romanus, et Præ-
" turam quoque gessisse dicitur" (*f*).

In the Institutes it is said: " Sed naturalia quidem jura, quæ
" apud omnes gentes peræque servantur, divina quadam provi-
" dentia constituta, semper firma atque immutabilia permanent; ea
" vero quæ ipsa sibi quæque civitas semper constituit, sæpe mutari
" solent, vel tacito consensu populi, vel alia lege postea lata" (*g*).

Here *jus gentium* and *jus naturale*, as the Law of Nature, are clearly synonymous. But in Gaius we find this remarkable passage: after having said that only Roman citizens were competent to enter into a contract in the form *spondes? spondeo*, he continues,
" Unde dicitur, uno casu hoc verbo peregrinum quoque obligari
" posse, velut si Imperator noster Principem alicujus peregrini
" populi de pace ita interroget, Pacem futuram spondes? vel ipse
" eodem modo interrogetur. *Quod nimium subtiliter dictum est;*
" *quia si quid adversus pactionem fiat, non ex stipulatu agitur,*
" *sed jure belli res vindicatur*" (*h*).

The reader who is anxious to prosecute his inquiries further into this not uninteresting subject, would do well to consult the following, among other treatises:

1. Warnkönig, "Vorschule der Institutionen und Pandekten," 83.

2. Savigny, "System des Römischen Rechts," i. 112; and Beylage I. to that volume.

II.—1. Observations upon the "Collegium Fecialium" and the "Jus Feciale." 2. The institution of the "Recuperatores," and the doctrine of the "Recuperatio."

1. Varro gives the following definition of the term: "Feciales,
" quod fidei publicæ inter populos præerant; nam per hos fiebat
" ut justum conciperetur bellum, et inde desitum ut fœdere fides
" pacis constitueretur. Ex his mittebantur antequam conciperetur,
" qui res repeterent, et per hos etiam nunc fit fœdus, quod *fidus*
" Ennius scribit dictum" (*i*).

The Roman institution of the Feciales was perhaps derived originally from the Egyptians, though directly from the Greeks

(*f*) *Dig.* lib. l. t. vii. s. 17.

(*g*) *Inst. de Jur. Nat. Gent. et Civ.* l. i. t. ii. s. 11.

(*h*) The passage is cited by *Savigny, System des R. R.,* vol. iii. (note *c*), p. 310.

(*i*) *Varro, De Lingua Latina,* l. v. s. 86, p. 34 (Leipsic, 1833).

through the medium of their colonies settled in Italy; but it is a memorable characteristic of the Romans, that the founding of an institution having for its object the establishment and maintenance of fixed relations both in war and peace with neighbouring States, should have been almost coeval with the origin of their empire. The Feciales, occupying a middle station between priests and ministers of state, regulated, with as much precision as the heralds of the middle ages, and according to a certain ritual, the forms and usages relating to the treatment of ambassadors, the concluding of treaties, the promulgation and conduct of war (*k*). In these, as in all important concerns, the sanctions of religion were invoked to strengthen the obligations of morality. Cicero says: "Belli quidem "æquitas sanctissimè feciali populi jure præscripta est" (*l*): and the facts recorded in history appear to warrant this description. If a dispute arose between Rome and another independent State, Feciales were sent to demand reparation. If the attempt failed, war was declared according to minute and particular formalities.

It is not within the scope of this work to show how the decay and decline of this remarkable institution accompanied the corruption and overthrow of the republic (*m*).

2. We know from other sources, besides the certain testimony of etymology, that in the very earliest ages both of Greece and Rome the stranger and the enemy were synonymous terms (ἐχθρός, *hostis*) (*n*). To the necessity which dawning civilization soon produced, of maintaining a friendly intercourse with the inhabitants of neighbouring States, as well as to some peculiarities in the condition of the founders of Rome, we owe the institution of the *Recuperatores*, and the doctrine of the *Recuperatio* (*o*).

For in order to satisfy this necessity, treaties were entered upon, in which the administration of justice to the individual subjects of the contracting parties within the dominions of either was mutually guaranteed. Therefore Grotius correctly observes: "Tenetur (*i. e.* rex aut populus) etiam dare operam ut damna "resarciantur: quod officium Romæ erat *recuperatorum*. Gallus "Ælius apud Festum, *Reciperatio cum inter est populum et reges* "*nationesque ac civitates peregrinas, lex convenit, quomodo per* "*reciperatorem reddantur res reciperenturque, resque privatas inter* "*se prosequantur.*"

Sell, to whose very learned work I have already referred, cites the passage from Festus, but makes no mention of Grotius—at least, I can find none.

(*k*) *Sell*, pp. 23-74.
Grotius, *De J. B. et P.* l. ii. c. i. s. 22, p. 168.
(*l*) *Cic. De Off.* l. i.
(*m*) *Ompteda*, *Völkerrechts*, s. 34, p. 146.
(*n*) *Sell*, pp. 2-3, and notes.
(*o*) *Ib.* 339.

The Recuperatores (*p*) were judges chosen for the purpose of deciding questions at issue between the native and the alien ally. Such a treaty, indeed, implied that the parties to it were free and independent States. For as soon as the one became actually subject to the other, the existence of such a treaty was useless, as the conquered might, and generally was compelled to, adopt the laws of the conqueror. Equally useless would such a treaty be in the case of two nations subsisting in so intimate an union as to be, as it were, citizens of one State. And if we bear in mind that in either of these contingencies a *Recuperatio* could have no place, and remember how rapidly the march of the Roman empire reduced foreign countries within one or other of them, we shall not be surprised that the traces of the proper and primary application of this peculiar branch of jurisprudence become fainter as we advance in the history of Rome, and at last disappear altogether from her records (*q*).

But when the *Recuperatio* was no longer strictly applicable, according to the letter of its original institution, because the subject, namely, *two* independent States, was wanting, the principle of this jurisprudence was transferred, by the practical wisdom of Rome, to the arbitration of disputes arising between Romans and the inhabitants of their *colonies*, and also of the *provinces* which it pleased them to leave with the appearances of independent States. Livy records a very striking instance of its application, at the request of the *legate* from Spain to the Senate of Rome.

"Hispaniæ deinde utriusque legati aliquot populorum in senatum "introducti. Ii, de magistratuum Romanorum avaritia superbia- "que conquesti, nisi genibus ab senatu petierunt, ne se socios "fœdiùs spoliari vexarique, quam hostes, patiantur. Quum et alia "indigna quererentur, manifestum autem esset pecunias captas, "L. Canuleio prætori, qui Hispaniam sortitus erat, negotium "datum est, ut in singulos a quibus Hispani pecunias peterent, "quinos *recuperatores* ex ordine senatorio daret, patronosque quos "vellent, sumendi potestatem faceret. Vocatis in curiam legatis "recitatum est senatûs consultum, jussique nominare patronos: "quatuor nominaverunt, M. Porcium Catonem, P. Cornelium Cn. "F. Scipionem, L. Æmilium L. F. Paullum, C. Sulpicium Gallum. "Cum M. Titinio primum, qui prætor A. Manlio, M. Junio con- "sulibus, in citeriore Hispania fuerat, recuperatores sumserunt. "Bis ampliatus, tertio absolutus est reus. . . . . Ad *recuperatores* "adducti a citerioribus populis P. Furius Philus, ab ulterioribus "M. Matienus. Ille, Sp. Postumio, Q. Mucio consulibus, triennio "ante, hic biennio prius, L. Postumio, M. Popillio consulibus, "prætor fuerat. Gravissimis criminibus accusati ambo ampliati-

(*p*) "O rem præclaram vobisque ab hoc retinendam recuperatores," &c.—*Cic. Orat. pro Cæcina*, ss. 22, 24–25.

(*q*) *Sell*, pp. 339–40.

" que : quum dicenda de integro caussa esset, excusati exsilii caussa " solum vertisse " (*r*).

While the Recuperatio existed in its primitive state, it presented a perfect picture of international arbitration upon the claims of *individuals* the subjects of different States, that is, upon questions of Private International Law. The better opinion seems to be, that it took no cognizance directly of questions of Public International Law, which belonged to the province of the Feciales.

The reader is referred to the following works for fuller information on this subject :—

1. Alexandri ab Alexandro Geniales Dies, vol. ii. l. v. c. 3, " Quonam modo per Feciales inirentur fœdera, aut bella indicerentur, " et quid ab exteris servatum est," *ed. Lugd. Bat.* 1673.
2. Sell, Die Recuperatio der Römer, *ed. Braunschweig*, 1837 (*s*).

APPENDIX III. PAGE 45.

(*Extract from the Speech of Lord Grenville upon the Motion for an Address to the Crown, approving of the Convention with Russia in* 1801, *as to the effect of embodying a Principle of General Law in a Treaty.*)

" BUT, among the numerous instances in which such a revisal of the " present Treaty appears to be essential to the public interests, there " is none of such extensive importance as that to which I must next " entreat the particular attention of the House.

" On comparing together the different sections of the third article " of this convention, one great distinction between them cannot fail to " be remarked, even by the most superficial observer. The two first " sections and the fifth, those which relate to the coasting and " colonial trade, and to the proceedings of our maritime tribunals, " are in their frame and operation manifestly prospective. They " provide only for the future arrangement of the objects which they " embrace ; and they profess to extend no further than to the reci- " procal conduct of Great Britain and Russia towards each other.

" The third and fourth sections, on the contrary, those which " treat of contraband of war and of blockaded ports, do each of them " expressly contain, not the concession of any special privilege " henceforth to be enjoyed by the contracting parties only, but the

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(*r*) *Liv.* xliii. 2. *Sell*, pp. 365-6.

(*s*) " Das die in Privatsachen richtenden *Recuperatores* jemals in irgend einer rein öffentlichen Sache entschieden hätten, gleichviel ob die betreffenden Staaten unabhängig, einem Bunde angehörig, oder einem dritten untergeben waren, lässt sich durch keine Zeugnisse der alten belegen; wohl aber sind dergleichen aufzufinden, aus deren das Gegentheil hervorgeht."—*Sell*, p. 57. See, too, p. 84.

" recognition of a universal and pre-existing right, which, as such,
" cannot justly be refused to any other independent State.

" This third section, which relates to contraband of war, is in all
" its parts strictly declaratory. It is introduced by a separate
" preamble, announcing that its object is to prevent 'all ambiguity
" 'or misunderstanding as to what *ought to be considered* as contra-
" band of war.'

" Conformably with this intention, the contracting parties declare
" in the body of the clause what are the only commodities which
" they '*acknowledge as such.*' And this declaration is followed by
" a special reserve, that it 'shall not prejudice their particular
" 'Treaties with other Powers.'

" If the parties had intended to treat of this question only as it
" related to their own conduct towards each other, and to leave it
" in that respect on the same footing on which it stood before the
" formation of the hostile league of 1800, all mention of contraband
" in this part of the present convention would evidently have been
" superfluous; nothing more could in that case be necessary than
" simply to renew the former treaties, which had specified what
" articles of commerce the subjects of the respective Powers might
" carry to the enemies of each other; and, as we find that renewal
" expressly stipulated in another article of this same convention, we
" must, in common justice to its authors, consider this third section
" as introduced for some distinct and separate purpose. It must,
" therefore, unquestionably be understood in that larger sense which
" is announced in its preamble, and which is expressed in the words
" of the declaration which it contains. It must be taken as laying
" down a general rule for all our future discussions with any Power
" whatever, on the subject of military or naval stores, and as esta-
" blishing a principle of law which is to decide universally on the
" just interpretation of this technical term of contraband of war.

" Nor indeed, does it less plainly appear from the conclusion,
" than it does from the preamble, and from the body of this section,
" that it is meant to bear the general and comprehensive sense
" which I have here stated. The reservation which is there made
" of our special treaties with other Powers is manifestly incon-
" sistent with any other more limited construction.

" For if the article had really no other object in its view, than
" to renew or to prolong our former engagements with the Northern
" Crowns, what imaginable purpose can be answered by this con-
" cluding sentence? Was it necessary to declare that a stipulation
" extending only to Russia, to Denmark, and to Sweden, should
" not prejudice our treaties with other Powers? How should
" it possibly have any such effect? How can our treaties with
" Portugal or with America be affected by the renewal of those
" engagements which had long ago declared what articles might
" be carried in Russian or Danish ships? But the case would
" indeed be widely different under the more enlarged construction

" which evidently belongs to this stipulation. The reserve was not
" only prudent, but necessary, when we undertook to lay down a
" universal principle, applying alike to our transactions with every
" independent State. In recognizing a claim of pre-existing right,
" and in establishing a new interpretation of the law of nations, it
" was unquestionably of extreme importance expressly to reserve
" the more favourable practice which our subsisting treaties had
" established with some other Powers.

"And that which was before incongruous and useless would
" therefore, under such circumstances, become, as far as it extends,
" an act of wise and commendable forethought.

" On the whole, therefore, I have no doubt that neutral nations
" will be well warranted in construing this section as declaratory
" of a universal principle, and applicable to every case where con-
" traband of war is not defined by special treaty. Nor could we,
" in my opinion, as this treaty now stands, contend in future wars
" with any shadow of reason, much less with any hope of success,
" against this interpretation, however destructive it must be of all
" our dearest interests. Least of all can we resist it, when we are
" reminded, that in a succeeding article of this very convention we
" have bound ourselves by the most distinct engagement, to regard
" all its principles and stipulations as permanent, and to observe
" them as our constant rule in matters of commerce and navigation;
" expressions exactly corresponding with those by which the parties
" to the two neutral leagues asserted both the permanence and the
" universality of the principles which were first asserted by those
" confederacies, and which the present convention so frequently re-
" cognizes and adopts.

" It is, therefore, highly necessary that your Lordships should
" carefully examine what is this general interpretation which the
" contracting parties have thus solemnly declared; what sense it is
" that they have thus permanently affixed to a term so frequently
" recurring in the practice and law of every civilized nation, and so
" intimately connected with the exercise of our naval rights as that
" of contraband of war."

APPENDIX IV. PAGE 385.

33 *Vict. c.* 14.—*An Act to amend the Law relating to the legal condition of Aliens and British Subjects.* [12th May, 1870.]

" WHEREAS it is expedient to amend the law relating to the legal
" condition of aliens and British subjects:

" Be it enacted by the Queen's most Excellent Majesty, by and
" with the advice and consent of the Lords Spiritual and Temporal,

" and Commons, in this present Parliament assembled, and by the
" authority of the same, as follows:

" 1. This Act may be cited for all purposes as 'The Naturalization
" 'Act, 1870.'

Short title.

" *Status of Aliens in the United Kingdom.*

" 2. Real and personal property of every description may be
" taken, acquired, held, and disposed of by an alien in the same
" manner in all respects as by a natural-born British subject; and
" a title to real and personal property of every description may be
" derived through, from, or in succession to an alien, in the same
" manner in all respects as through, from, or in succession to a natural-
" born British subject: Provided,—

Capacity of an alien as to property.

" (1.) That this section shall not confer any right on an alien to
" hold real property situate out of the United Kingdom,
" and shall not qualify an alien for any office or for any
" municipal, parliamentary, or other franchise:

" (2.) That this section shall not entitle an alien to any right or
" privilege as a British subject, except such rights and
" privileges in respect of property as are hereby expressly
" given to him:

" (3.) That this section shall not affect any estate or interest in
" real or personal property to which any person has or may
" become entitled, either mediately or immediately, in
" possession or expectancy, in pursuance of any disposi-
" tion made before the passing of this Act, or in pursuance
" of any devolution by law on the death of any person
" dying before the passing of this Act.

" 3. Where Her Majesty has entered into a convention with any
" foreign State to the effect that the subjects or citizens of that
" State who have been naturalized as British subjects may divest
" themselves of their status as such subjects, it shall be lawful for
" Her Majesty, by Order in Council, to declare that such convention
" has been entered into by Her Majesty; and from and after the
" date of such Order in Council, any person being originally a sub-
" ject or citizen of the State referred to in such Order, who has been
" naturalized as a British subject, may, within such limit of time as
" may be provided in the convention, make a declaration of alienage,
" and from and after the date of his so making such declaration
" such person shall be regarded as an alien, and as a subject of the
" State to which he originally belonged as aforesaid.

Power of naturalized aliens to divest themselves of their status in certain cases.

" A declaration of alienage may be made as follows; that is to
" say,—If the declarant be in the United Kingdom in the presence
" of any justice of the peace; if elsewhere in Her Majesty's dominions
" in the presence of any judge of any court of civil or criminal juris-
" diction, of any justice of the peace, or of any other officer for the
" time being authorized by law in the place in which the declarant

" is to administer an oath for any judicial or other legal purpose. If " out of Her Majesty's dominions in the presence of any officer in " the diplomatic or consular service of Her Majesty.

How British-born subject may cease to be such.

" 4. Any person who by reason of his having been born within " the dominions of Her Majesty is a natural-born subject, but who " also at the time of his birth became under the law of any foreign " State a subject of such State, and is still such subject, may, if of " full age and not under any disability, make a declaration of alien- " age in manner aforesaid, and from and after the making of such " declaration of alienage such person shall cease to be a British sub- " ject. Any person who is born out of Her Majesty's dominions of " a father being a British subject may, if of full age, and not under " any disability, make a declaration of alienage in manner aforesaid, " and from and after the making of such declaration shall cease to be " a British subject.

Alien not entitled to jury de medietate linguæ.

" 5. From and after the passing of this Act, an alien shall not be " entitled to be tried by a jury de medietate linguæ, but shall be " triable in the same manner as if he were a natural-born subject.

" *Expatriation.*

Capacity of British subject to renounce allegiance to Her Majesty.

" 6. Any British subject who has at any time before, or may at " any time after the passing of this Act, when in any foreign State " and not under any disability, voluntarily become naturalized in " such State, shall from and after the time of his so having become " naturalized in such foreign State, be deemed to have ceased to be " a British subject and be regarded as an alien; Provided,—

" (1.) That where any British subject has before the passing of " this Act voluntarily become naturalized in a foreign " State and yet is desirous of remaining a British subject, " he may, at any time within two years after the passing " of this Act, make a declaration that he is desirous of " remaining a British subject, and upon such declaration " hereinafter referred to as a declaration of British nation- " ality being made, and upon his taking the oath of " allegiance, the declarant shall be deemed to be and to " have been continually a British subject; with this quali- " fication, that he shall not, when within the limits of the " foreign State in which he has been naturalized, be " deemed to be a British subject, unless he has ceased to " be a subject of that State in pursuance of the laws " thereof, or in pursuance of a treaty to that effect:

" (2.) A declaration of British nationality may be made, and the " oath of allegiance be taken as follows; that is to say,— " If the declarant be in the United Kingdom in the pre- " sence of a justice of the peace; if elsewhere in Her " Majesty's dominions in the presence of any judge of " any court of civil or criminal jurisdiction, of any justice

"of the peace, or of any other officer for the time being
"authorized by law in the place in which the declarant
"is to administer an oath for any judicial or other legal
"purpose. If out of Her Majesty's dominions in the
"presence of any officer in the diplomatic or consular
"service of Her Majesty.

"*Naturalization and resumption of British Nationality.*

"7. An alien who, within such limited time before making the "application hereinafter mentioned as may be allowed by one of "Her Majesty's Principal Secretaries of State, either by general "order or on any special occasion, has resided in the United Kingdom for a term of not less than five years, or has been in the "service of the Crown for a term of not less than five years, and "intends, when naturalized, either to reside in the United Kingdom, "or to serve under the Crown, may apply to one of Her Majesty's "Principal Secretaries of State for a certificate of naturalization.

Certificate of naturalization.

"The applicant shall adduce in support of his application such "evidence of his residence or service, and intention to reside or "serve, as such Secretary of State may require. The said Secretary of State, if satisfied with the evidence adduced, shall take the "case of the applicant into consideration, and may, with or without "assigning any reason, give or withhold a certificate as he thinks "most conducive to the public good, and no appeal shall lie from "his decision, but such certificate shall not take effect until the "applicant has taken the oath of allegiance.

"An alien to whom a certificate of naturalization is granted shall "in the United Kingdom be entitled to all political and other rights, "powers, and privileges, and be subject to all obligations, to which a "natural-born British subject is entitled or subject in the United "Kingdom, with this qualification, that he shall not, when within "the limits of the foreign State of which he was a subject previously "to obtaining his certificate of naturalization, be deemed to be a "British subject unless he has ceased to be a subject of that State "in pursuance of the laws thereof, or in pursuance of a treaty to "that effect.

"The said Secretary of State may in manner aforesaid grant a "special certificate of naturalization to any person with respect to "whose nationality as a British subject a doubt exists, and he may "specify in such certificate that the grant thereof is made for the "purpose of quieting doubts as to the right of such person to be a "British subject, and the grant of such special certificate shall not "be deemed to be any admission that the person to whom it was "granted was not previously a British subject.

"An alien who has been naturalized previously to the passing of "this Act may apply to the Secretary of State for a certificate of "naturalization under this Act, and it shall be lawful for the said

"Secretary of State to grant such certificate to such naturalized alien
"upon the same terms and subject to the same conditions in and
"upon which such certificate might have been granted if such alien
"had not been previously naturalized in the United Kingdom.

Certificate of re-admission to British nationality.

"8. A natural-born British subject who has become an alien in "pursuance of this Act, and is in this Act referred to as a statutory "alien, may, on performing the same conditions and adducing the "same evidence as is required in the case of an alien applying for a "certificate of nationality, apply to one of Her Majesty's Principal "Secretaries of State for a certificate hereinafter referred to as a "certificate of re-admission to British nationality, re-admitting him "to the status of a British subject. The said Secretary of State "shall have the same discretion as to the giving or withholding of "the certificate as in the case of a certificate of naturalization, and "an oath of allegiance shall in like manner be required previously "to the issuing of the certificate.

"A statutory alien to whom a certificate of re-admission to British "nationality has been granted shall, from the date of the certificate "of re-admission, but not in respect of any previous transaction, "resume his position as a British subject; with this qualification, "that within the limits of the foreign State of which he became a "subject he shall not be deemed to be a British subject unless he "has ceased to be a subject of that foreign State according to the "laws thereof, or in pursuance of a treaty to that effect.

"The jurisdiction by this Act conferred on the Secretary of State "in the United Kingdom in respect of the grant of a certificate of "re-admission to British nationality, in the case of any statutory "alien being in any British possession, may be exercised by the "governor of such possession; and residence in such possession "shall, in the case of such person, be deemed equivalent to residence "in the United Kingdom.

Form of oath of allegiance.

"9. The oath in this Act referred to as the oath of allegiance "shall be in the form following; that is to say,

"'I   do swear that I will be faithful and bear "'true allegiance to Her Majesty Queen Victoria, her heirs and "'successors, according to law. So help me GOD.'

"*National status of married women and infant children.*

National status of married women and infant children.

"10. The following enactments shall be made with respect to the "national status of women and children:

"(1.) A married woman shall be deemed to be a subject of the "State of which her husband is for the time being a "subject:

"(2.) A widow being a natural-born British subject, who has "become an alien by or in consequence of her marriage, "shall be deemed to be a statutory alien, and may as "such at any time during widowhood obtain a certificate

" of re-admission to British nationality in manner pro-
" vided by this Act:

"(3.) Where the father being a British subject, or the mother " being a British subject and a widow, becomes an alien " in pursuance of this Act, every child of such father or " mother who during infancy has become resident in the " country where the father or mother is naturalized, and " has, according to the laws of such country, become " naturalized therein, shall be deemed to be a subject of " the State of which the father or mother has become a " subject, and not a British subject:

"(4.) Where the father, or the mother being a widow, has " obtained a certificate of re-admission to British nation- " ality, every child of such father or mother who during " infancy has become resident in the British dominions " with such father or mother, shall be deemed to have " resumed the position of a British subject to all intents:

"(5.) Where the father, or the mother being a widow, has " obtained a certificate of naturalization in the United " Kingdom, every child of such father or mother who " during infancy has become resident with such father or " mother in any part of the United Kingdom, shall be " deemed to be a naturalized British subject.

" *Supplemental Provisions.*

Regulations as to registration.

"11. One of Her Majesty's Principal Secretaries of State may " by regulation provide for the following matters:—

"(1.) The form and registration of declarations of British " nationality:

"(2.) The form and registration of certificates of naturalization " in the United Kingdom:

"(3.) The form and registration of certificates of re-admission " to British nationality:

"(4.) The form and registration of declarations of alienage:

"(5.) The registration by officers in the diplomatic or consular " service of Her Majesty of the births and deaths of " British subjects who may be born or die out of Her " Majesty's dominions, and of the marriages of persons " married at any of Her Majesty's embassies or lega- " tions:

"(6.) The transmission to the United Kingdom for the purpose " of registration or safe keeping, or of being produced as " evidence of any declarations or certificates made in " pursuance of this Act out of the United Kingdom, or " of any copies of such declarations or certificates, also of " copies of entries contained in any register kept out of

" the United Kingdom in pursuance of or for the purpose
" of carrying into effect the provisions of this Act:

"(7.) With the consent of the Treasury the imposition and application of fees in respect of any registration authorized to be made by this Act, and in respect of the making any declaration or the grant of any certificate authorized to be made or granted by this Act.

" The said Secretary of State, by a further regulation, may " repeal, alter, or add to any regulation previously made by him in " pursuance of this section.

" Any regulation made by the said Secretary of State in pur- " suance of this section shall be deemed to be within the powers " conferred by this Act, and shall be of the same force as if it had " been enacted in this Act, but shall not so far as respects the " imposition of fees be in force in any British possession, and shall " not, so far as respects any other matter, be in force in any British " possession in which any Act or ordinance to the contrary of or " inconsistent with any such direction may for the time being be in " force.

Regulations as to evidence.

" 12. The following regulations shall be made with respect to " evidence under this Act:—

" (1.) Any declaration authorized to be made under this Act may " be proved in any legal proceeding by the production of " the original declaration, or of any copy thereof certified " to be a true copy by one of Her Majesty's Principal " Secretaries of State, or by any person authorized by " regulations of one of Her Majesty's Principal Secretaries " of State to give certified copies of such declaration, and " the production of such declaration or copy shall be " evidence of the person therein named as declarant " having made the same at the date in the said declara- " tion mentioned:

" (2.) A certificate of naturalization may be proved in any legal " proceeding by the production of the original certificate, " or of any copy thereof certified to be a true copy by " one of Her Majesty's Principal Secretaries of State, or " by any person authorized by regulations of one of Her " Majesty's Principal Secretaries of State to give certified " copies of such certificate:

" (3.) A certificate of re-admission to British nationality may be " proved in any legal proceeding by the production of the " original certificate, or of any copy thereof certified to be " a true copy by one of Her Majesty's Principal Secre- " taries of State, or by any person authorized by regula- " tions of one of Her Majesty's Principal Secretaries of " State to give certified copies of such certificate:

" (4.) Entries in any register authorized to be made in pursuance " of this Act shall be proved by such copies and certified

" in such manner as may be directed by one of Her
" Majesty's Principal Secretaries of State, and the copies
" of such entries shall be evidence of any matters by this
" Act or by any regulation of the said Secretary of State
" authorized to be inserted in the register:

"(5.) The Documentary Evidence Act, 1868, shall apply to any
" regulation made by a Secretary of State, in pursuance
" of or for the purpose of carrying into effect any of the
" provisions of this Act.

"*Miscellaneous.*

Saving of letters of denization.

"13. Nothing in this Act contained shall affect the grant of
" letters of denization by Her Majesty.

Saving as to British ships.

"14. Nothing in this Act contained shall qualify an alien to be
" the owner of a British ship.

Saving of allegiance prior to expatriation.

"15. Where any British subject has in pursuance of this Act
" become an alien, he shall not thereby be discharged from any
" liability in respect of any acts done before the date of his so
" becoming an alien.

Power of colonies to legislate with respect to naturalization.

"16. All laws, statutes, and ordinances which may be duly made
" by the legislature of any British possession for imparting to any
" person the privileges, or any of the privileges, of naturalization, to
" be enjoyed by such person within the limits of such possession,
" shall within such limits have the authority of law, but shall be
" subject to be confirmed or disallowed by Her Majesty in the same
" manner, and subject to the same rules in and subject to which
" Her Majesty has power to confirm or disallow any other laws,
" statutes, or ordinances in that possession.

Definition of terms.

"17. In this Act, if not inconsistent with the context or subject-
" matter thereof,—

" 'Disability' shall mean the status of being an infant, lunatic,
" idiot, or married woman:

" 'British possession' shall mean any colony, plantation, island,
" territory, or settlement within Her Majesty's dominions, and
" not within the United Kingdom, and all territories and
" places under one legislature are deemed to be one British
" possession for the purposes of this Act:

" 'The Governor of any British possession' shall include any
" person exercising the chief authority in such possession:

" 'Officer in the diplomatic service of Her Majesty' shall mean
" any ambassador, minister or chargé d'affaires, or secretary of
" legation, or any person appointed by such ambassador,
" minister, chargé d'affaires, or secretary of legation to execute
" any duties imposed by this Act on an officer in the diplomatic
" service of Her Majesty:

" 'Officer in the consular service of Her Majesty' shall mean
" and include consul-general, consul, vice-consul, and consular

" agent, and any person for the time being discharging the " duties of consul-general, consul, vice-consul, and consular " agent.

" *Repeal of Acts mentioned in Schedule.*

Repeal of Acts.

" 18. The several Acts set forth in the first and second parts of " the schedule annexed hereto shall be wholly repealed, and the " Acts set forth in the third part of the said schedule shall be " repealed to the extent therein mentioned; provided that the repeal " enacted in this Act shall not affect—

" (1.) Any right acquired or thing done before the passing of " this Act:

" (2.) Any liability accruing before the passing of this Act:

" (3.) Any penalty, forfeiture, or other punishment incurred or to " be incurred in respect of any offence committed before " the passing of this Act:

" (4.) The institution of any investigation or legal proceeding or " any other remedy for ascertaining or enforcing any " such liability, penalty, forfeiture, or punishment as " aforesaid."

SCHEDULE.

NOTE.—Reference is made to the repeal of the "whole Act" where portions have been repealed before, in order to preclude henceforth the necessity of looking back to previous Acts.

This Schedule, so far as respects Acts prior to the reign of George the Second, other than Acts of the Irish Parliament, refers to the edition prepared under the direction of the Record Commission, intituled "The Statutes " of the Realm; printed by Command of His Majesty King George the " Third, in pursuance of an Address of the House of Commons of Great " Britain. From original Records and authentic Manuscripts."

PART I.

ACTS WHOLLY REPEALED, OTHER THAN ACTS OF THE IRISH PARLIAMENT.

Date.	Title.
7 Jas. 1. c. 2.	An Act that all such as are to be naturalized or restored in blood shall first receive the sacrament of the Lord's Supper, and the oath of allegiance, and the oath of supremacy.
11 Will. 3. c. 6. (*a*)	An Act to enable His Majesty's natural-born subjects to inherit the estate of their ancestors, either lineal or collateral, notwithstanding their father or mother were aliens.
13 Geo. 2. c. 7.	An Act for naturalizing such foreign Protestants and others therein mentioned, as are settled or shall settle in any of His Majesty's colonies in America.

(*a*) 11 & 12 Wm. 3. (Ruff.)

Date.	Title.
20 Geo. 2. c. 44. -	An Act to extend the provisions of an Act made in the thirteenth year of His present Majesty's reign, intituled "An Act for naturalizing "foreign Protestants and others therein "mentioned, as are settled or shall settle in "any of His Majesty's colonies in America," to other foreign Protestants who conscientiously scruple the taking of an oath.
13 Geo. 3. c. 25. -	An Act to explain two Acts of Parliament, one of the thirteenth year of the reign of His late Majesty, "for naturalizing such foreign Protes-"tants and others, as are settled or shall settle "in any of His Majesty's colonies in America," and the other of the second year of the reign of His present Majesty, "for naturalizing such "foreign Protestants as have served or shall "serve as officers or soldiers in His Majesty's "Royal American regiment, or as engineers in "America."
14 Geo. 3. c. 84. -	An Act to prevent certain inconveniences that may happen by bills of naturalization.
16 Geo. 3. c. 52. -	An Act to declare His Majesty's natural-born subjects inheritable to the estates of their ancestors, whether lineal or collateral, in that part of Great Britain called Scotland, notwithstanding their father or mother were aliens.
6 Geo. 4. c. 67. -	An Act to alter and amend an Act passed in the seventh year of the reign of His Majesty King James the First, intituled "An Act that all "such as are to be naturalized or restored in "blood shall first receive the sacrament of the "Lord's Supper and the oath of allegiance and "the oath of supremacy."
7 & 8 Vict. c. 66. -	An Act to amend the laws relating to aliens.
10 & 11 Vict. c. 83.-	An Act for the naturalization of aliens.

Part II.

ACTS OF THE IRISH PARLIAMENT WHOLLY REPEALED.

Date.	Title.
14 & 15 Chas. 2. c. 13.	An Act for encouraging Protestant strangers and others to inhabit and plant in the kingdom of Ireland.
2 Anne, c. 14. -	An Act for naturalizing of all Protestant strangers in this kingdom.
19 & 20 Geo. 3. c. 29.	An Act for naturalizing such foreign merchants, traders, artificers, artizans, manufacturers, workmen, seamen, farmers, and others as shall settle in this kingdom.
23 & 24 Geo. 3. c. 38.	An Act for extending the provisions of an Act passed in this kingdom in the nineteenth and twentieth years of His Majesty's reign, intituled "An Act for naturalizing such foreign

Date	Title.	
	"merchants, traders, artificers, artizans, manu-"facturers, workmen, seamen, farmers, and "others as shall settle in this kingdom."	
36 Geo. 3. c. 48. -	An Act to explain and amend an Act, intituled "An Act for naturalizing such foreign mer-"chants, traders, artificers, artizans, manu-"facturers, workmen, seamen, farmers, and "others who shall settle in this kingdom."	

Part III.

ACTS PARTIALLY REPEALED.

		Extent of repeal.
4 Geo. 1. c. 9. - (Act of Irish Parliament.)	An Act for reviving, continuing, and amending several statutes made in this kingdom heretofore temporary.	So far as it makes perpetual the Act of 2 Anne, c. 14.
6 Geo. 4. c. 50. -	An Act for consolidating and amending the laws relative to Jurors and Juries.	The whole of sect. 47.
3 & 4 Will. 4. c. 91.	An Act consolidating and amending the laws relating to Jurors and Juries in Ireland.	The whole of sect. 37.

TREATY OF NATURALIZATION WITH THE UNITED STATES.

(*Convention between Her Majesty and the United States of America relative to Naturalization. Signed at London, May* 13, 1870.) [Ratifications exchanged at London, August 10, 1870.]

"Her Majesty the Queen of the United Kingdom of Great Britain "and Ireland, and the President of the United States of America, "being desirous to regulate the citizenship of British subjects who "have emigrated, or who may emigrate, from the British dominions "to the United States of America, and of citizens of the United "States of America who have emigrated, or who may emigrate, from "the United States of America to the British dominions, have re-"solved to conclude a convention for that purpose, and have named "as their plenipotentiaries, that is to say:—

"Her Majesty the Queen of the United Kingdom of Great Britain "and Ireland, the Right Honourable George William Frederick, "Earl of Clarendon, Baron Hyde of Hindon, a Peer of the United "Kingdom, a Member of her Britannic Majesty's Most Honourable "Privy Council, Knight of the Most Noble Order of the Garter, "Knight Grand Cross of the Most Honourable Order of the Bath, "Her Britannic Majesty's Principal Secretary of State for Foreign "Affairs;

"And the President of the United States of America, John "Lothrop Motley, Esquire, Envoy Extraordinary and Minister "Plenipotentiary of the United States of America to Her Britannic "Majesty;

"Who, after having communicated to each other their respective "full powers, found to be in good and due form, have agreed upon "and concluded the following articles:—

"ARTICLE I.—British subjects who have become, or shall become, "and are naturalized according to law within the United States of "America as citizens thereof, shall, subject to the provisions of "Article II., be held by Great Britain to be in all respects and for "all purposes citizens of the United States, and shall be treated as "such by Great Britain.

"Reciprocally, citizens of the United States of America who have "become, or shall become, and are naturalized according to law "within the British dominions as British subjects, shall, subject to "the provisions of Article II., be held by the United States to be in "all respects and for all purposes British subjects, and shall be "treated as such by the United States.

"ARTICLE II.—Such British subjects as aforesaid who have be-"come and are naturalized as citizens within the United States, shall "be at liberty to renounce their naturalization and to resume their "British nationality, provided that such renunciation be publicly "declared within two years after the twelfth day of May, 1870.

"Such citizens of the United States as aforesaid who have become "and are naturalized within the dominions of Her Britannic Majesty "as British subjects, shall be at liberty to renounce their natural-"ization and to resume their nationality as citizens of the United "States, provided that such renunciation be publicly declared within "two years after the exchange of the ratifications of the present con-"vention.

"The manner in which this renunciation may be made and "publicly declared shall be agreed upon by the Governments of the "respective countries.

"ARTICLE III.—If any such British subject as aforesaid, na-"turalized in the United States, should renew his residence within "the dominions of Her Britannic Majesty, Her Majesty's Government "may, on his own application and on such conditions as that Go-"vernment may think fit to impose, re-admit him to the character "and privileges of a British subject, and the United States shall not, "in that case, claim him as a citizen of the United States on account "of his former naturalization.

"In the same manner, if any such citizen of the United States "as aforesaid, naturalized within the dominions of Her Britannic "Majesty, should renew his residence in the United States, the "United States Government may, on his own application and on "such conditions as that Government may think fit to impose, re-"admit him to the character and privileges of a citizen of the United

" States, and Great Britain shall not, in that case, claim him as a " British subject on account of his former naturalization.

" Article IV.—The present convention shall be ratified by Her " Britannic Majesty and by the President of the United States, by " and with the advice and consent of the Senate thereof, and the " ratifications shall be exchanged at London as soon as may be " within twelve months from the date hereof.

" In witness whereof the respective plenipotentiaries have signed " the same, and have affixed thereto their respective seals.

" Done at London the thirteenth day of May, in the year of our " Lord 1870.

(L.S.) " CLARENDON.
(L.S.) " JOHN LOTHROP MOTLEY."

APPENDIX V. Pages 22 & 264.

THE ANNEXATION OF OUDE (*a*).

The following is the official proclamation of the annexation of Oude:—

" By a treaty concluded in the year 1801, the Hon. East India " Company engaged to protect the Sovereign of Oude against every " foreign and domestic enemy, while the Sovereign of Oude, upon " his part, bound himself to establish 'such a system of administra- " 'tion, to be carried into effect by his own officers, as should be " 'conducive to the prosperity of his subjects, and calculated to " 'secure the lives and properties of the inhabitants.'

" The obligations which the treaty imposed upon the Hon. East " India Company have been observed by it, for more than half a " century, faithfully, constantly, and completely.

" In all that time, though the British Government itself has been " engaged in frequent wars, no foreign foe has ever set his foot on " the soil of Oude; no rebellion has ever threatened the stability of " its throne. British troops have been stationed in close proximity " to the King's person; and their aid has never been withheld when- " ever his power was wrongfully defied.

" On the other hand, one chief and vital stipulation of the treaty " has been wholly disregarded by every successive ruler of Oude; " and the pledge, which was given for the establishment of such a " system of administration as should secure the lives and properties " of the people of Oude, and be conducive to their prosperity, has " from first to last been deliberately and systematically violated.

(*a*) *Ann. Reg.* 1856, p. 248.

See also *Johnson* v. *M'Kintosh*, 8 *Wheaton's* (*American*) *Reports*, p. 543—a case as to grants of land by Indian tribes, in which the law relative to Grant and Conquest is much discussed.

" By reason of this violation of the compact made, the British
" Government might long since have justly declared the treaty void,
" and might have withdrawn its protection from the rulers of Oude.
" But it has hitherto been reluctant to have recourse to measures
" which would be fatal to the power and authority of a Royal race,
" who, whatever their faults towards their own subjects, have ever
" been faithful and true to their friendship with the English nation.

" Nevertheless, the British Government has not failed to labour
" during all that time, earnestly and perseveringly, for the deliverance
" of the people of Oude from the grievous oppression and misrule
" which they have suffered.

" Many years have passed since the Governor-General, Lord
" William Bentinck, perceiving that every previous endeavour to
" ameliorate the condition of the people of Oude had been thwarted
" or evaded, made a formal declaration to the Court of Lucknow,
" that it would become necessary that he should proceed to assume
" the direct management of the Oude territories.

" The words and the menace which were employed by Lord
" William Bentinck were eight years ago repeated in person by Lord
" Hardinge to the King. The Sovereign of Oude was on that day
" solemnly bid remember that, whatever might now happen, 'it
" 'would be manifest to all the world that he had received a friendly
" 'and a timely warning.'

" But the friendly intentions of the British Government have been
" wholly defeated by the obstinacy, or incapacity, or apathy of the
" Viziers and Kings of Oude. Disinterested counsel and indignant
" censure, alternating through more than 50 years with repeated
" warning, remonstrance, and threats, have all proved ineffectual and
" vain. The chief condition of the treaty remains unfulfilled; the
" promise of the King rests unperformed; and the people of Oude
" are still the victims of incompetency, corruption, and tyranny
" without remedy or hope of relief.

" It is notorious throughout the land that the King, like most
" of his predecessors, takes no real share in the direction of public
" affairs.

" The powers of government throughout his dominions are for the
" most part abandoned to worthless favourites of the Court, or to
" violent and corrupt men, unfit for their duties and unworthy
" trust.

" The collectors of the revenue hold sway over their districts with
" uncontrollable authority, extorting the utmost payment from the
" people, without reference to past or present engagements.

" The King's troops, with rare exceptions undisciplined and
" disorganized, and defrauded of their pay by those to whom it is
" entrusted, are permitted to plunder the villages for their own sup-
" port, so that they have become a lasting scourge to the country
" they are employed to protect.

" Gangs of freebooters infest the districts. Law and justice are

" unknown, armed violence and bloodshed are daily events, and
" life and property are nowhere secure for an hour.

" The time has come when the British Government can no longer
" tolerate in Oude these evils and abuses, while its position under
" the treaty serves indirectly to sustain or continue to the Sovereign
" that protection which alone upholds the power whereby such evils
" are inflicted.

" Fifty years of sad experience have proved that the treaty of
" 1801 has wholly failed to secure the happiness and prosperity of
" Oude; and have conclusively shown that no effectual security can
" be had for the release of the people of that country from the
" grievous oppression they have long endured, unless the exclusive
" administration of the territories of Oude shall be permanently
" transferred to the British Government.

" To that end it has been declared, by the special authority and
" consent of the Hon. the Court of Directors, that the treaty of
" 1801, disregarded and violated by each succeeding Sovereign of
" Oude, is henceforth wholly null and void.

" His Majesty Wajid Ali Shah was invited to enter into a new
" engagement, whereby the government of the territories of Oude
" should be vested exclusively and for ever in the Hon. East India
" Company, while ample provision should be made for the dignity,
" affluence, and honour of the King and of his family.

" But His Majesty the King refused to enter into the amicable
" agreement which was offered for his acceptance.

" Inasmuch, then, as His Majesty Wajid Ali Shah, in common
" with all his predecessors, has refused, or evaded, or neglected to
" fulfil the obligation of the treaty of 1801, whereby he was bound
" to establish within his dominions such a system of administration
" as should be conducive to the prosperity and happiness of his sub-
" jects; and inasmuch as the treaty he thereby violated has been
" declared to be null and void; and inasmuch as His Majesty has
" refused to enter into other agreements which were offered to him
" in lieu of such treaty; and inasmuch as the terms of that treaty,
" if it had still remained in force, forbade the employment of British
" officers in Oude, without which no efficient system of administra-
" tion could be established there, it is manifest to all that the British
" Government had but one alternative before it.

" Either it must altogether desert the people of Oude and de-
" liver them up helpless to oppression and tyranny, which, acting
" under the restrictions of treaty, it has already too long appeared
" to countenance; or it must put forth its own great power on
" behalf of a people for whose happiness it more than 50 years ago
" engaged to interpose, and must at once assume to itself the exclu-
" sive and permanent administration of the territories of Oude.

" The British Government has had no hesitation in choosing the
" latter alternative.

" Wherefore proclamation is hereby made that the government of

" the territories of Oude is henceforth vested exclusively and for
" ever in the Hon. East India Company.

" All Amils, Nazims, Chuckledars, and other servants of the " Durbar, all officers civil and military, the soldiers of the State, " and all the inhabitants of Oude, are required to render henceforth " implicit and exclusive obedience to the officers of the British " Government.

" If any officer of Durbar, Jageerdar, Zemindar, or other person, " shall refuse to render such obedience, if he shall withhold the pay- " ment of revenue, or shall otherwise dispute or defy the authority " of the British Government, he shall be declared a rebel, his person " shall be seized, and his jageers or lands shall be confiscated to the " State.

" To those who shall immediately and quietly submit themselves " to the authority of the British Government, whether Amils, Public " Officers, Jageerdars, Zemindars, or other inhabitants of Oude, " full assurance is hereby given of protection, consideration, and " favour.

" The revenue of the districts shall be determined on a fair and " settled basis.

" The gradual improvement of the Oude territories shall be " steadily pursued.

" Justice shall be measured out with an equal hand.

" Protection shall be given to life and property, and every man " shall enjoy henceforth his just rights without fear of molestation.

" By order of the Most Noble the Governor-General of India in " Council.

"S. E. EDMONSTONE."

APPENDIX VI. Page 293.

PRESCRIPTION.

(*Extract from the Commentaries of Donellus.* (lib. iv. c. iv. p. 334.) *De usucapionibus longi temporis præscriptionibus*, &c.)

" Postremo etiam privata traditione res alienæ invitis dominis ad " nos transeunt jure civili, si usus et justa possessio diuturnior ac- " cesserit. Sic enim res quæruntur jure civili per usum et posses- " sionem. Hanc acquisitionem nunc referimus inter eos modos " quibus invito domindo acquisitio contingit: et rectè. Nam et res " ita habet, ut quamvis dominus, nolit rem suam usucapi ab eo, qui " eam *bona fide* possidet, tamen per statutum tempus possessa, pos- " sessori acquiratur, ut postea dicetur. Juris quidem interpretatione " usucapio alienationis species habetur; quasi existimetur alienare, " qui patitur usucapi (*l. alienationis. D. de verb. significat.*). Qua " ratione et inter genera alienationis usucapio recenseri solet in " ratione dominii amittendi, de quo suo loco, sed ductum hoc est ex

"eo, quod videtur, et quod ut plurimùm accidit: quando quidem "existimatur unusquisque scire res suas, et a quo possideantur, et "cum sciet, posse interrumpere usucapionem rem suam repetendo. "Verùm hoc non semper ita fit. Quid enim, si heres ignoret res "aliquas hereditarias, quæ ab alio possidentur? Quid si sciat "dominus rem suam ab aliquo possideri, sed non audeat cum eo "contendere judicio, quia ejus potentiam metuat? Quid, si ideo "non interpellet possessorem, quia in jure errans putet nihilominus "sibi jus suum semper salvum manere? In quibus omnibus nemo "dicet, si res usucapitur aliter quàm invito domino, possessori "acquiri. Constat tamen acquiri. Hoc ergo sentio, etsi ita res "possideatur invito domino, tamen si possideatur per legitimum "tempus, impleri usucapionem proinde et acquisitionem invito "domino: quæ ideo ad hunc locum pertinet" (*a*).

APPENDIX VII. Page 466.

RIGHT OF JURISDICTION OVER PERSONS AND THINGS.

"16 & 17 *Vict.* c. 107.—*An Act to amend and consolidate the* "*Laws relating to the Customs of the United Kingdom and of the* "Isle of Man, *and certain Laws relating to Trade and Naviga-* "*tion and the* British *Possessions.* [20th August, 1853.]

"Sec. 150.—The following goods may, by Proclamation or "Order in Council, be prohibited either to be exported or carried "coastwise:—arms, ammunition, and gunpowder, military and "naval stores, and any articles which Her Majesty shall judge "capable of being converted into or made useful in increasing the "quantity of military or naval stores, provisions, or any sort of "victual which may be used as food by man, and if any goods so "prohibited shall be exported from the United Kingdom, or carried "coastwise or be water-borne to be so exported or carried, they "shall be forfeited."

In accordance with the provisions of this Statute, soon after the breaking out of the war with Russia (Saturday, February 18, 1854), the Queen issued the following Proclamation:—

"By the Queen—A Proclamation.

"Victoria R.

"Whereas, by the Customs Consolidation Act, 1853, certain "goods may be prohibited either to be exported or carried coast- "wise; and whereas we, by and with the advice of our Privy "Council, deem it expedient and necessary to prohibit the goods "hereinafter-mentioned either to be exported or carried coast- "wise; we, by and with the advice aforesaid, do hereby order "and direct that, from and after the date hereof, all Arms, Am-

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(*a*) *Hugonis Donelli Comment. de Jure Civili* (Franco. 1589), lib. iv. c. iv. p. 334.

" MUNITION, and GUNPOWDER, MILITARY and NAVAL STORES, and the
" following articles—being articles which we have judged capable
" of being converted into, or made useful in increasing the quantity
" of military or naval stores—that is to say, marine engines, screw
" propellers, paddle wheels, cylinders, cranks, shafts, boilers, tubes
" for boilers, boiler plates, fire bars, and every article or any other
" component part of an engine or boiler, or any article whatsoever
" which is, or can, or may become applicable for the manufac-
" ture of marine machinery, shall be and the same are hereby
" prohibited either to be exported from the United Kingdom or
" carried coastwise.

" Given at our Court at Buckingham Palace, this eighteenth
" day of February, in the year of our Lord One thousand eight
" hundred and fifty-four, and in the seventeenth year of our
" reign.

" GOD SAVE THE QUEEN."

British Foreign Enlistment Act.

" 59*th George III. c.* 69.—*An Act to prevent the Enlisting or*
" *Engagement of His Majesty's Subjects to serve in Foreign*
" *Service, and the fitting out or equipping, in His Majesty's*
" *Dominions, Vessels for warlike Purposes, without His Ma-*
" *jesty's Licence* (*a*). [3rd July, 1819.]

" Whereas the enlistment or engagement of His Majesty's subjects
" to serve in war in foreign service, without His Majesty's licence,
" and the fitting out and equipping and arming of vessels by His
" Majesty's subjects without His Majesty's licence, for warlike
" operations in or against the dominions or territories of any
" foreign prince, state, potentate, or persons exercising or assuming
" to exercise the powers of government in or over any foreign
" country, colony, province, or part of any province, or against the
" ships, goods, or merchandise of any foreign prince, state, potentate,
" or persons as aforesid, or their subjects, may be prejudicial to
" and tend to endanger the peace and welfare of this kingdom:
" And whereas the laws in force are not sufficiently effectual for
" preventing the same: Be it therefore enacted by the King's most
" excellent Majesty, by and with the advice and consent of the
" Lords Spiritual and Temporal, and Commons, in this present
" Parliament assembled, and by the authority of the same, that
" from and after the passing of this Act, an Act passed in the ninth
" year of the reign of His late Majesty King George the Second,
" intituled 'An Act to prevent the listing His Majesty's subjects to
" 'serve as soldiers without His Majesty's licence;' and also an Act
" passed in the twenty-ninth year of the reign of His said late
" Majesty King George the Second, intituled 'An Act to prevent

9 G. 2, c. 30.

29 G. 2, c.

(*a*) " Non est singulis concedendum quod per magistratum fieri potest."
—*Dig.* 4–6, *de Reg. Jur.*

" 'His Majesty's Subjects from serving as Officers under the French " 'King; and for better enforcing an Act passed in the Ninth Year " 'of His present Majesty's Reign, to prevent the enlisting His " 'Majesty's Subjects to serve as Soldiers without His Majesty's " 'Licence; and for obliging such of His Majesty's Subjects as shall " 'accept Commissions in the Scotch Brigade in the Service of the " 'States General of the United Provinces, to take the Oaths of " 'Allegiance and Abjuration;' and also an Act passed in Ireland " in the eleventh year of the reign of His said late Majesty King " George the Second, intituled 'An Act for the more effectual " 'preventing the enlisting of His Majesty's Subjects to serve as " 'Soldiers in Foreign Service without His Majesty's Licence;' and " also an Act passed in Ireland in the nineteenth year of the reign " of His said late Majesty King George the Second, intituled 'An " 'Act for the more effectual preventing His Majesty's Subjects " 'from entering into Foreign Service, and for publishing an Act of " 'the Seventh Year of King William the Third, intituled "An Act " 'to prevent Foreign Education;"' and all and every the clauses and " provisions in the said several Acts contained, shall be and the same " are hereby repealed.

Irish Act, 11 G. 2.

Irish Act, 19 G. 2.

Recited Acts repealed.

Subjects enlisting or engaging to enlist or serve in foreign service, military or naval, guilty of misdemeanor.

" 2. And be it further declared and enacted that if any natural-" born subject of His Majesty, his heirs and successors, without " the leave or licence of His Majesty, his heirs or successors, for " that purpose first had and obtained, under the sign manual of " His Majesty, his heirs or successors, or signified by Order in " Council, or by proclamation of His Majesty, his heirs or succes-" sors, shall take or accept, or shall agree to take or accept, any " military commission, or shall otherwise enter into the military " service as a commissioned or non-commissioned officer, or shall " enlist or enter himself to enlist, or shall agree to enlist or to enter " himself to serve as a soldier, or to be employed or shall serve in " any warlike or military operation, in the service of or for or under " or in aid of any foreign prince, state, potentate, colony, province, " or part of any province or people, or of any person or persons " exercising or assuming to exercise the powers of government in or " over any foreign country, colony, province, or part of any province " or people, either as an officer or soldier, or in any other military " capacity; or if any natural-born subject of His Majesty shall, " without such leave or licence as aforesaid, accept, or agree to take " or accept any commission, warrant, or appointment as an officer, " or shall enlist or enter himself, or shall agree to enlist or enter " himself, to serve as a sailor or marine, or to be employed or " engaged, or shall serve in and on board any ship or vessel of war, " or in and on board any ship or vessel used or fitted out, or " equipped or intended to be used for any warlike purpose, in the " service of or for or under or in aid of any foreign power, prince, " state, potentate, colony, province, or part of any province or " people, or of any person or persons exercising or assuming to

" exercise the powers of government in or over any foreign country,
" colony, province, or part of any province or people; or if any
" natural-born subject of His Majesty shall, without such leave and
" licence as aforesaid, engage, contract, or agree to go, or shall go
" to any foreign state, country, colony, province, or part of any
" province, or to any place beyond the seas, with an intent or in
" order to enlist or enter himself to serve, or with intent to serve in
" any warlike or military operation whatever, whether by land or
" by sea, in the service of or for or under or in aid of any foreign
" prince, state, potentate, colony, province, or part of any province
" or people, or in the service of or for or under or in aid of any
" person or persons exercising or assuming to exercise the powers
" of government in or over any foreign country, colony, province,
" or part of any province or people, either as an officer or a soldier,
" or in any other military capacity, or as an officer or sailor, or
" marine, in any such ship or vessel as aforesaid, although no
" enlisting money or pay or reward shall have been or shall be
" in any or either of the cases aforesaid actually paid to or received
" by him, or by any person to or for his use or benefit; or if any
" person whatever, within the United Kingdom of Great Britain
" and Ireland, or in any part of His Majesty's dominions elsewhere,
" or in any country, colony, settlement, island, or place belonging to
" or subject to His Majesty, shall hire, retain, engage, or procure,
" or shall attempt or endeavour to hire, retain, engage, or procure,
" any person or persons whatever to enlist, or to enter or engage to
" enlist, or to serve or to be employed in any such service or
" employment as aforesaid, as an officer, soldier, sailor, or marine,
" either in land or sea service, for or under or in aid of any foreign
" prince, state, potentate, colony, province, or part of any province
" or people, or for or under or in aid of any person or persons
" exercising or assuming to exercise any powers of government as
" aforesaid, or to go or to agree to go or embark from any part
" of His Majesty's dominions, for the purpose or with intent to be
" so enlisted, entered, engaged, or employed as aforesaid, whether
" any enlisting money, pay, or reward shall have been or shall be
" actually given or received, or not; in any or either of such cases,
" every person so offending shall be deemed guilty of a misde-
" meanor, and upon being convicted thereof, upon any information
" or indictment, shall be punishable by fine and imprisonment, or
" either of them, at the discretion of the court before which such
" offender shall be convicted.

All persons retaining or procuring others to enlist, guilty of the like offence.

" 3. Provided always, and be it enacted, that nothing in this
" Act contained shall extend or be construed to extend to render
" any person or persons liable to any punishment or penalty under
" this Act, who at any time before the first day of August one
" thousand eight hundred and nineteen, within any part of the
" United Kingdom, or of the Islands of Jersey, Guernsey, Alderney,
" or Sark, or at any time before the first day of November one thou-

Act not to extend to persons enlisted or serving before the times herein specified.

" sand eight hundred and nineteen, in any part or place out of the
" United Kingdom, or of the said Islands, shall have taken or
" accepted, or agreed to take or accept any military commission, or
" shall have otherwise enlisted into any military service as a com-
" missioned or non-commissioned officer, or shall have enlisted, or
" entered himself to enlist, or shall have agreed to enlist or to enter
" himself to serve as a soldier, or shall have served, or having so
" served shall, after the said first day of August one thousand eight
" hundred and nineteen, continue to serve in any warlike or mili-
" tary operation, either as an officer or soldier, or in any other
" military capacity, or shall have accepted, or agreed to take or
" accept any commission, warrant, or appointment as an officer, or
" shall have enlisted or entered himself to serve, or shall have
" served, or having so served shall continue to serve, as a sailor,
" or marine, or shall have been employed or engaged, or shall have
" served, or having so served shall, after the said first day of
" August, continue to serve in and on board any ship or vessel of
" war, used or fitted out, or equipped or intended for any warlike
" purpose; or shall have engaged, or contracted or agreed to go, or
" shall have gone to, or having so gone to shall, after the said first
" day of August, continue in any foreign state, country, colony,
" province, or part of a province, or to or in any place beyond the
" seas, unless such person or persons shall embark at or proceed
" from some port or place within the United Kingdom or the
" Islands of Jersey, Guernsey, Alderney, or Sark, with intent to
" serve as an officer, soldier, sailor, or marine, contrary to the pro-
" visions of this Act, after the said first day of August, or shall
" embark or proceed from some port or place out of the United
" Kingdom or the Islands of Jersey, Guernsey, Alderney, or Sark
" with such intent as aforesaid, after the said first day of November,
" or who shall, before the passing of this Act, and within the said
" United Kingdom, or the said Islands, or before the first day of
" November one thousand eight hundred and nineteen, in any port
" or place out of the said United Kingdom, or the said Islands,
" have hired, retained, engaged, or procured, or attempted or en-
" deavoured to hire, retain, engage, or procure any person or persons
" whatever, to enlist or to enter, or to engage to enlist or to serve,
" or be employed in any such service or employment as aforesaid,
" as an officer, soldier, sailor, or marine, either in land or sea service,
" or to go, or agree to go or embark for the purpose or with the
" intent to be so enlisted, entered, or engaged, or employed, contrary
" to the prohibitions respectively in this Act contained, anything in
" this Act contained to the contrary in anywise notwithstanding;
" but that all and every such persons and person shall be in such
" state and condition, and no other, and shall be liable to such fines,
" penalties, forfeitures, and disabilities, and none other, as such
" person or persons was or were liable and subject to before the
" passing of this Act, and as such person or persons would have

" been in, and been liable and subject to, in case this Act and the
" said recited Acts by this Act repealed had not been passed or
" made.

Justices to issue warrants for the apprehension of offenders.

"4. And be it further enacted, that it shall and may be lawful
" for any justice of the peace residing at or near to any port or place
" within the United Kingdom of Great Britain and Ireland, where
" any offence made punishable by this Act as a misdemeanor shall
" be committed, on information on oath of any such offence, to issue
" his warrant for the apprehension of the offender, and to cause him
" to be brought before such justice, or any justice of the peace; and
" it shall be lawful for the justice of the peace before whom such
" offender shall be brought, to examine into the nature of the offence
" upon oath, and to commit such person to gaol, there to remain
" until delivered by due course of law, unless such offender shall
" give bail, to the satisfaction of the said justice, to appear and
" answer to any information or indictment to be preferred against
" him, according to law, for the said offence; and that all such
" offences which shall be committed within that part of the United
" Kingdom called England, shall and may be proceeded and tried
" in His Majesty's Court of King's Bench at Westminster, and the
" venue in such case laid at Westminster, or at the assizes or session
" of Oyer and Terminer and gaol delivery, or at any quarter or
" general sessions of the peace in and for the county or place where
" such offence was committed; and that all such offences which
" shall be committed within that part of the United Kingdom called
" Ireland, shall and may be prosecuted in His Majesty's Court of
" King's Bench at Dublin, and the venue be laid at Dublin, or at
" any assizes or session of Oyer and Terminer and gaol delivery, or
" at any quarter or general sessions of the peace in and for the
" county or place where such offence was committed; and all such
" offences as shall be committed in Scotland, shall and may be pro-
" secuted in the Court of Justiciary in Scotland, or any other Court
" competent to try criminal offences committed within the county,
" shire, or stewartry within which such offence was committed; and
" where any offence made punishable by this Act as a misdemeanor
" shall be committed out of the said United Kingdom, it shall be
" lawful for any justice of the peace residing near to the port or
" place where such offence shall be committed, on information on
" oath of any such offence, to issue his warrant for the apprehension
" of the offender, and to cause him to be brought before such justice,
" or any other justice of the peace for such place; and it shall be
" lawful for the justice of the peace before whom such offender shall
" be brought, to examine into the nature of the offence upon oath,
" and to commit such person to gaol, there to remain till delivered
" by due course of law, or otherwise to hold such offender to bail to
" answer for such offence in the Superior Court competent to try
" and having jurisdiction to try criminal offences committed in such
" port or place; and all such offences committed at any place out of

Where offences shall be tried.

"the said United Kingdom shall and may be prosecuted and tried "in any Superior Court of His Majesty's dominions competent to "try and having jurisdiction to try criminal offences committed at "the place where such offence shall be committed (*b*).

Vessels with persons on board engaged in foreign service may be detained at any port in His Majesty's dominions.

"5. And be it further enacted, that in case any ship or vessel in "any port or place within His Majesty's dominions shall have on "board any such person or persons who shall have been enlisted or "entered to serve, or shall have engaged or agreed or been pro-"cured to enlist or enter or serve, or who shall be departing from "His Majesty's dominions for the purpose and with the intent of "enlisting or entering to serve, or to be employed, or of serving or "being engaged or employed in the service of any foreign prince, "state, or potentate, colony, province, or part of any province or "people, or of any person or persons exercising or assuming to "exercise the powers of government in or over any foreign colony, "province, or part of any province or people, either as an officer, "soldier, sailor, or marine, contrary to the provisions of this Act, "it shall be lawful for any of the principal officers of His Majesty's "customs, where any such officers of the customs shall be, and in "any part of His Majesty's dominions in which there are no officers "of His Majesty's customs, for any governor or persons having the "chief civil command, upon information or oath given before them "respectively, which oath they are hereby respectively authorized "and empowered to administer, that such person or persons as "aforesaid is or are on board such ship or vessel, to detain and "prevent any such ship or vessel, or to cause such ship or vessel to "be detained and prevented from proceeding to sea on her voyage "with such persons as aforesaid on board: Provided, nevertheless, "that no principal officer, governor, or person shall act as aforesaid, "upon such information upon oath as aforesaid, unless the party so "informing shall not only have deposed in such information that "the person or persons on board such ship or vessel hath or have "been enlisted or entered to serve, or hath or have engaged or "agreed or been procured to enlist or enter or serve, or is or are "departing as aforesaid, for the purpose and with the intent of "enlisting or entering to serve or to be employed, or of serving, or "being engaged or employed in such service as aforesaid, but shall "also have set forth in such information upon oath the facts or "circumstances upon which he forms his knowledge or belief, ena-"bling him to give such information upon oath; and that all and "every person and persons convicted of wilfully false swearing in "any such information upon oath shall be deemed guilty of and "suffer the penalties on persons convicted of wilful and corrupt "perjury.

Oath to be made as to facts and circumstances.

(*b*) 16 & 17 Vict. c. 107, s. 309, as to how claim or appearance is to be entered to an information.

"6. And be it further enacted, that if any master or other person "having or taking the charge or command of any ship or vessel, in "any part of the United Kingdom of Great Britain and Ireland, "or in any part of His Majesty's dominions beyond the seas, shall "knowingly and willingly take on board, or if such master or other "person having the command of any such ship or vessel, or any "owner or owners of any such ship or vessel, shall knowingly "engage to take on board any person or persons who shall "have been enlisted or entered to serve, or shall have engaged or "agreed or been procured to enlist or enter or serve, or who shall "be departing from His Majesty's dominions for the purpose and "with the intent of enlisting or entering to serve, or to be employed, "or of serving, or being engaged or employed in any naval or "military service, contrary to the provisions of this Act, such master "or owner or other person as aforesaid shall forfeit and pay the sum "of fifty pounds for each and every such person so taken or en-"gaged to be taken on board; and moreover every such ship or "vessel, so having on board, conveying, carrying, or transporting "any such person or persons, shall and may be seized and detained "by the collector, comptroller, surveyor, or other officer of the "customs, until such penalty or penalties shall be satisfied and paid, "or until such master or person, or the owner or owners of such "ship or vessel, shall give good and sufficient bail, by recognizance "before one of His Majesty's justices of the peace, for the payment "of such penalty or penalties.

Penalty on masters of ships, &c., taking on board persons enlisted contrary to this Act, 50*l.* for each person.

"7. And be it further enacted, that if any person, within any part "of the United Kingdom, or in any part of His Majesty's dominions "beyond the seas, shall, without the leave and licence of His Majesty "for that purpose first had and obtained as aforesaid, equip, furnish, "fit out, or arm, or attempt or endeavour to equip, furnish, fit out, "or arm, or procure to be equipped, furnished, fitted out, or armed, "or shall knowingly aid, assist, or be concerned in the equipping, "furnishing, fitting out, or arming of any ship or vessel, with intent "or in order that such ship or vessel shall be employed in the "service of any foreign prince, state, or potentate, or of any foreign "colony, province, or part of any province or people, or of any "person or persons exercising or assuming to exercise any powers "of government in or over any foreign state, colony, province, or "part of any province or people, as a transport or store ship, or with "intent to cruize or commit hostilities against any prince, state, or "potentate, or against the subjects or citizens of any prince, state, "or potentate, or against the persons exercising or assuming to "exercise the powers of government in any colony, province, or "part of any province or country, or against the inhabitants of any "foreign colony, province, or part of any province or country, with "whom His Majesty shall not then be at war; or shall, within the "United Kingdom, or any of His Majesty's dominions, or in any "settlement, colony, territory, island, or place belonging or subject

Penalty on persons fitting out armed vessels to aid in military operations with any foreign powers; without licence.

Or issuing commissions for ships.

" to His Majesty, issue or deliver any commission for any ship or " vessel, to the intent that such ship or vessel shall be employed as " aforesaid, every such person so offending shall be deemed guilty of " a misdemeanor, and shall, upon conviction thereof, upon any in- " formation or indictment, be punished by fine and imprisonment, " or either of them, at the discretion of the Court in which such " offender shall be convicted; and every such ship or vessel, with " the tackle, apparel, and furniture, together with all the materials, " arms, ammunition, and stores, which may belong to or be on board " of any such ship or vessel, shall be forfeited; and it shall be law- " ful for any officer of His Majesty's customs or excise, or any officer " of His Majesty's navy, who is by law empowered to make seizures, " for any forfeiture incurred under any of the laws of customs or " excise, or the laws of trade and navigation, to seize such ships and " vessels aforesaid, and in such places and in such manner in which " the officers of His Majesty's customs or excise and the officers of " His Majesty's navy are empowered respectively to make seizures " under the laws of customs and excise, or under the laws of trade " and navigation; and that every such ship and vessel, with the " tackle, apparel, and furniture, together with all the materials, arms, " ammunition, and stores which may belong to or be on board of such " ship or vessel, may be prosecuted and condemned in the like man- " ner, and in such Courts as ships or vessels may be prosecuted and " condemned for any breach of the laws made for the protection of " the revenues of customs and excise, or of the laws of trade and " navigation.

Penalty for aiding the warlike equipment of vessels of foreign states, &c.

" 8. And be it further enacted, that if any person in any part of " the United Kingdom of Great Britain and Ireland, or in any part " of His Majesty's dominions beyond the seas, without the leave and " licence of His Majesty for that purpose first had and obtained as " aforesaid, shall, by adding to the number of the guns of such " vessel, or by changing those on board for other guns, or by the " addition of any equipment for war, increase or augment, or procure " to be increased or augmented, or shall be knowingly concerned in " increasing or augmenting the warlike force of any ship or vessel of " war, or cruizer, or other armed vessel which at the time of her " arrival in any part of the United Kingdom, or any of His Majesty's " dominions, was a ship of war, cruizer, or armed vessel in the " service of any foreign prince, state, or potentate, or of any person " or persons exercising or assuming to exercise any powers of " government in or over any colony, province, or part of any pro- " vince or people belonging to the subjects of any such prince, state, " or potentate, or to the inhabitants of any colony, province, or part " of any province or country under the control of any person or " persons so exercising or assuming to exercise the powers of govern- " ment, every such person so offending shall be deemed guilty of a " misdemeanor, and shall, upon being convicted thereof, upon any " information or indictment, be punished by fine and imprisonment,

"or either of them, at the discretion of the Court before which such "offender shall be convicted.

"9. And be it further enacted, that offences made punishable by "the provisions of this Act, committed out of the United Kingdom, "may be prosecuted and tried in His Majesty's Court of King's "Bench at Westminster, and the venue in such case laid at Westminster in the county of Middlesex.

Offences committed out of the kingdom may be tried at Westminster.

"10. And be it further enacted, that any penalty or forfeiture "inflicted by this Act may be prosecuted, sued for, and recovered "by action of debt, bill, plaint, or information, in any of His Majesty's Courts of Record at Westminster or Dublin, or in the Court "of Exchequer, or in the Court of Session in Scotland, in the name "of His Majesty's Attorney-General for England or Ireland, or His "Majesty's Advocate for Scotland respectively, or in the name of "any person or persons whatsoever; wherein no essoign, protection, "privilege, wager of law, nor more than one imparlance shall be "allowed; and in every action or suit the person against whom "judgment shall be given for any penalty or forfeiture under this "Act shall pay double costs (*c*) of suit; and every such action or suit "shall and may be brought at any time within twelve months after "the offence committed, and not afterwards; and one moiety of every "penalty to be recovered by virtue of this Act shall go and be applied to His Majesty, his heirs or successors, and the other moiety "to the use of such person or persons as shall first sue for the same, "after deducting the charges of prosecution from the whole.

How penalties shall be sued for and recovered.

Double costs.

Limitation of actions.

"11. And be it further enacted, that if any action or suit shall "be commenced, either in Great Britain or elsewhere, against any "person or persons for anything done in pursuance of this Act, all "rules and regulations, privileges and protections, as to maintaining "or defending any suit or action, and pleading therein, or any costs "thereon, in relation to any acts, matters, or things done, or that may "be done by any officer of customs or excise, or by any officer of "His Majesty's navy, under any Act of Parliament in force on or "immediately before the passing of this Act, for the protection of the "revenues of customs and excise, or prevention of smuggling, shall "apply and be in full force in any such action or suit as shall be "brought for anything done in pursuance of this Act, in as full and "ample a manner to all intents and purposes as if the same privileges and protections were repeated and re-enacted in this Act.

Former rules established by law to be applied to actions commenced in pursuance of this Act.

"12. Provided always and be it further enacted, that nothing in "this Act contained shall extend or be construed to extend, to "subject to any penalty any person who shall enter into the military "service of any prince, state, or potentate in Asia, with leave or "licence, signified in the usual manner, from the Governor-General "in Council, or Vice-President in Council, of Fort William in Bengal, "or in conformity with any orders or regulations issued or sanctioned by such Governor-General or Vice-President in Council."

Penalties not to extend to persons entering into military service in Asia.

(*c*) Repealed by 5 & 6 Vict. c. 97.

Proclamation issued by Her Majesty on the breaking out of the civil war in the United States of America.

" By the Queen.—A Proclamation.

" VICTORIA R.

" Whereas we are happily at peace with all sovereigns, powers, and " States:

" And whereas hostilities have unhappily commenced between the " Government of the United States of America and certain States " styling themselves the Confederate States of America:

" And whereas we, being at peace with the Government of the " United States, have declared our royal determination to maintain " a strict and impartial neutrality in the contest between the said " contending parties:

" We therefore have thought fit, by and with the advice of our " Privy Council, to issue this our Royal Proclamation:

" And we do hereby strictly charge and command all our loving " subjects to observe a strict neutrality in and during the aforesaid " hostilities, and to abstain from violating or contravening either the " laws and statutes of the realm in this behalf, or the law of nations " in relation thereto, as they will answer to the contrary at their " peril:

" And whereas in and by a certain statute made and passed in the " 59th year of His Majesty King George III., intituled 'An Act to " 'prevent the Enlisting or Engagement of His Majesty's Subjects " 'to serve in Foreign Service, and the fitting out or equipping in " 'His Majesty's Dominions Vessels for warlike Purposes, without " 'His Majesty's Licence,' it is amongst other things declared and " enacted as follows (*the 2nd Section is here given at length*).

" And it is in and by the said Act further enacted, that (*the 7th " Section is here given at length*).

" And it is in and by the said Act further enacted, that (*the 8th " Section is here given at length*).

" Now, in order that none of our subjects may unwarily render " themselves liable to the penalties imposed by the said statute, we " do hereby strictly command that no person or persons whatsoever " do commit any act, matter, or thing whatsoever contrary to the " provisions of the said statute, upon pain of the several penalties by " the said statute imposed, and of our high displeasure.

" And we do hereby further warn all our loving subjects, and all " persons whatsoever entitled to our protection, that if any of them " shall presume, in contempt of this our Royal Proclamation, and of " our high displeasure, to do any acts in derogation of their duty as " subjects of a neutral sovereign, in the said contest, or in violation or " contravention of the law of nations in that behalf; as for example, " and more especially by entering into the military service of either of " the said contending parties, as commissioned or non-commissioned

" officers or soldiers; or by serving as officers, sailors, or marines on
" board any ship or vessel of war, or transport, of or in the service of
" either of the said contending parties; or by serving as officers,
" sailors, or marines on board any privateer bearing letters of marque
" of or from either of the said contending parties; or by engaging to
" go or going to any place beyond the seas, with intent to enlist or
" engage in any such service, or by procuring or attempting to pro-
" cure within Her Majesty's dominions at home or abroad others to
" do so; or by fitting out, arming, or equipping any ship or vessel
" to be employed as a ship of war, or privateer, or transport, by either
" of the said contending parties; or by breaking or endeavouring to
" break any blockade lawfully and actually established by or on behalf
" of either of the said contending parties; or by carrying officers,
" soldiers, despatches, arms, military stores, or materials, or any article
" or articles considered and deemed to be contraband of war, accord-
" ing to the law or modern usage of nations, for the use or service of
" either of the said contending parties; all persons so offending will
" incur and be liable to the several penalties and penal consequences
" by the said statute or by the law of nations in that behalf imposed
" or denounced.

" And we do hereby declare that all our subjects and persons
" entitled to our protection who may misconduct themselves in
" the premises will do so at their peril and of their own wrong;
" and that they will in nowise obtain any protection from us
" against any liabilities or penal consequences, but will, on the
" contrary, incur our high displeasure by such misconduct.

" Given at our Court, at the White Lodge, Richmond Park, this
" 13th day of May, in the year of our Lord One thousand eight
" hundred and sixty-one, and in the 24th year of our reign.

" God save the Queen."

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of our Sovereign Lady the Queen v. *James Carlin* (*ship 'Salvador'*), *from the Vice-Admiralty Court of the Bahamas; delivered* 28*th June*, 1870.

Present:—Lord Cairns, Sir James W. Colvile, the Judge of the High Court of Admiralty, Sir Robert Phillimore, Sir Joseph Napier.

" This is an appeal from the decision of the Vice-Admiralty Court
" of the Bahamas, upon an information filed on behalf of the Crown
" before that Court under the Foreign Enlistment Act, with regard
" to the ship *Salvador*, and seeking her confiscation.

" The clause in the Foreign Enlistment Act which has to be con-
" sidered is the seventh. It has frequently been remarked that the
" interpretation of that clause is attended with some difficulty,
" mainly owing to the great quantity of words which are used in

" the clause; but endeavouring for the moment to set aside the ver-
" biage of the clause, it is obvious that, in order to constitute an
" offence under it, five propositions must be established. In the
" first place, the ship, which in other respects is found to be acting
" within the meaning of the clause, must be acting without the
" leave and licence of the Sovereign of this country. That is the
" first element of the charge under the clause. The second is this,
" the ship must be equipped, furnished, fitted out or armed, or there
" must be a procuring, or an attempt or endeavour to equip, furnish,
" fit out, or arm the ship. The third is that the equipping, furnish-
" ing, fitting out, or arming of the ship must be done with the in-
" tent or in order that the ship or vessel shall be employed in the
" service of some 'foreign prince, state, or potentate, or some foreign
" 'colony, province, or part of any province or people, or of any
" 'person or persons exercising, or assuming to exercise any powers
" 'of government in or over any foreign state, colony, province, or
" 'part of any province or people.'

" Then the fourth element in the charge is this, there must be an
" intent to employ the ship in one of two capacities, either 'as a
" 'transport or store-ship against any prince, state, or potentate;' or
" 'with intent to cruise or commit hostilities against any prince,
" 'state, or potentate.' I pause for the purpose of observing that
" the words are not very happily chosen which represent her as
" being employed 'as a transport or store-ship against any prince,
" 'state, or potentate;' but it is clear, open as the words may be to
" criticism, that the intent is that the ship should be employed in
" one of the two capacities I have mentioned, and not only so, but
" employed 'against,' that is in the way of aggression against some
" foreign prince, potentate, or state. This should be done, as I have
" already said, against some prince, state, or potentate, 'or against
" 'the subjects or citizens of any prince, state, or potentate, or against
" 'the persons exercising or assuming to exercise the powers of
" 'government in any colony, province, or part of any province or
" 'country, or against the inhabitants of any foreign colony, pro-
" 'vince, or part of any province or country.' And the fifth element
" is that this foreign state or potentate, and so on, should be one
" with whom the Sovereign of this country should not then be at
" war.

" Those are the five elements which go to make up the whole
" charge under the seventh clause.

" Now, with regard to the first which I have mentioned, the
" absence of leave and licence on the part of Her Majesty, no ques-
" tion arises.

" With regard to the second, namely, that there must be an
" equipping, furnishing, fitting up, or arming, or a procuring, or an
" attempt to do so, no question can arise in this case when we read
" the evidence of Mr. Dumaresq, the Receiver-General and Treasurer
" of the Island, who states the condition in which he found the ship,

" and the preparations made on board of her, which seem to their " Lordships to amount to a fitting out or arming, or an attempt to " do so, within the meaning of this clause. The learned Judge of " the Vice-Admiralty Court seems to have entertained no doubt " himself upon this part of the case.

" I pass over the third element which I mentioned, for the mo- " ment, in order to say that upon the fourth and fifth heads to which " I have referred there can also be no doubt entertained, as it seems " to their Lordships; and here, again, no doubt was entertained by " the learned Judge of the Court below. It is quite clear that the " ship was intended to be used as a transport or store-ship against a " prince, state, or potentate with whom Her Majesty is not now at war. " She was to be used obviously as a transport or store-ship for the " purpose of conveying to Cuba men and materials; and in that " way to do the duty of a transport ship, and so to inflict injury " upon the Spanish Government, who at that time were, and are " now, the lawful authority having the dominion over Cuba. Here, " again, no doubt was entertained by the learned Judge in the " Court below, and no doubt could be entertained by any one who " looks at the evidence of Mr. Dumaresq, to whom I have already " adverted, and also the evidence of Mr. Butler, at page 24, both of " whom state what the report was which was made to themselves by " Carlin, the master of this vessel, as to her conduct when she went " to the coast of Cuba,—how she landed all the men she had on " board, plainly for the purpose of taking part in the insurrection " which was going on in Cuba,—how they abandoned the ship when " they saw a Spanish ship of war in sight,—how they were pre- " pared to set fire to their ship if the Spanish ship approached them, " —and how afterwards, when they found that they were unnoticed, " they took possession of the *Salvador* again, and brought her " back to Nassau.

" That leaves uncovered only the third element of charge in this " clause, and it is upon that alone that the learned Judge of the " Vice-Admiralty Court entertained any doubt.

" The third element is, that the ship must be employed in this " way in the service of some 'foreign prince, state, or potentate, or " 'of any foreign colony, province, or part of any province or people, " 'or of any person or persons exercising or assuming to exercise any " 'powers of government in or over any foreign state, colony, pro- " 'vince, or part of any province or people.' It is to be observed " that this part of the section is in the alternative. The ship may " be employed in the service of a foreign prince, state, or potentate, " or foreign state, colony, province, or part of any province or people; " that is to say, if you find any consolidated body in the foreign " state, whether it be the potentate, who has the absolute dominion, " or the Government, or a part of the province or of the people, or " the whole of the province or the people acting for themselves, that " is sufficient. But by way of alternative, it is suggested that there

" may be a case where, although you cannot say that the province
" or the people, or a part of the province or people are employing
" the ship, there yet may be some person or persons who may be
" exercising, or assuming to exercise powers of government in the
" foreign colony or state, drawing the whole of the material aid for
" the hostile proceedings from abroad; and therefore, by way of
" alternative, it is stated to be sufficient if you find the ship pre-
" pared or acting in the service of 'any person or persons exercising
" 'or assuming to exercise any powers of government in or over any
" 'foreign state, colony, province, or part of any province or people;'
" but that alternative need not be resorted to if you find the ship is
" fitted out and armed for the purpose of being employed in the
" service of any foreign state or people, or part of any province or
" people.

" Upon that the observation of the learned Judge was this:—
" 'We have no evidence of the object of the insurrection, who are
" 'the leaders, what portion of Cuba they have possession of, in what
" 'manner this insurrection is controlled or supported, or in what
" 'manner they govern themselves. How, therefore, can I say that
" 'they are assuming the powers of government in or over any part
" 'of the island of Cuba?'

" Now, it appears to their Lordships that the error into which the
" learned Judge below fell, was in confining his attention to what
" I have termed the second alternative of this part of the clause, and
" in disregarding the first part of the alternative. It may be (it is
" not necessary to decide whether it is so or not) that you could not
" state who were the person or persons, or that there were any per-
" son or persons exercising, or assuming to exercise powers of
" government in Cuba, in opposition to the Spanish authorities.
" That may be so: their Lordships express no opinion upon that
" subject, but they will assume that there might be a difficulty in
" bringing the case within that second alternative of the clause; but
" their Lordships are clearly of opinion that there is no difficulty in
" bringing the case under the first alternative of the clause, because
" their Lordships find these propositions established beyond all
" doubt,—there was an insurrection in the island of Cuba; there
" were insurgents who had formed themselves into a body of people
" acting together, undertaking and conducting hostilities; these in-
" surgents, beyond all doubt, formed part of the province or people
" of Cuba; and beyond all doubt the ship in question was to be
" employed, and was employed, in connection with and in the ser-
" vice of this body of insurgents.

" Those propositions being established, as their Lordships think
" they clearly are established, both by the evidence of Mr. Dumaresq
" and Mr. Butler, to which I have already referred, and further, by
" the evidence of the three witnesses, Loinaz at page 36, Wells at
" page 7, and Mama at page 25, their Lordships think that the
" requisitions of the 7th clause in this respect are entirely fulfilled,

" and that the case is made out under this head, as it is upon all " other heads of the clause.

" Their Lordships, therefore, will humbly recommend to Her " Majesty that the decision of the Vice-Admiralty Court should be " reversed, and that judgment should be pronounced for the Crown, " according to the prayer of the Information.

" It has been intimated to their Lordships, that on the 7th of " February there was a decree by their Lordships for the appraise- " ment and sale of the vessel. She has been sold, and the net pro- " ceeds, £163 4*s.* 8*d.*, paid into Her Majesty's Commissariat chest " in the Bahamas. The Colonial Government, it appears, have " incurred expenses to the amount of £145 5*s.* 10*d.* in keeping the " vessel while she was under arrest, and they claim to be reimbursed " those expenses out of the proceeds of the sale. That, of course, " will be proper, and if it is necessary to make that part of this " Order, it will be done."

In 1863 and 1864, in the case of the *Alexandra*, this statute was much discussed in the Exchequer Chamber and the House of Lords. The case was separately printed by Messrs. Eyre and Spottiswoode, and will also be found in the usual Reports.

Act of Congress, with Notes (extracted from Dunlop's Digest of the General Laws of the United States, ed. 1856.)

American Foreign Enlistment Act.

" *Chap.* 88.—*An Act* (*a*) *in addition to the 'Act for the punishment of " 'certain crimes against the United States,' and to repeal the Acts " therein mentioned.* [April 20, 1818.]

Fine $2000 and imprisonment for citizens accepting commissions within the United States, &c., to serve foreign states.

" That if any citizen of the United States shall, within the terri- " tory or jurisdiction thereof, accept and exercise a commission to " serve a foreign prince, state, colony, district, or people in war, by " land or by 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 misdemeanor, and shall " be fined not more than two thousand dollars, and shall be im- " prisoned not exceeding three years.

" Sec. 2. That if any person shall, within the territory or juris- " diction of the United States, enlist or enter himself, or hire or

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(*a*) This Act re-enacts the Acts of 1794, ch. 50, 1797, ch. 58, and of 1817, ch. 58, with some addition, and by adding the words "colony, district, or people."—7 *Wheat.* 489, *The Gran Para.*

The object of the laws was to put an end to the slave trade, and to prevent the introduction of slaves from foreign countries.—11 *Peters*, 73, *United States* v. *the ship Garonne*, *United States* v. *Skiddy.*

Slaves of Louisiana taken by their owners to France in 1835, and brought back with their own consent, is not a case within the Acts.—11 *Peters*, 73, *United States* v. *Skiddy.*

For any person in the United States enlisting others, &c., to serve a foreign state, &c.

" retain another person to enlist or enter himself, or to go beyond " the limits or jurisdiction of the United States with intent to be " enlisted or entered 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 misdemeanor, " and shall be fined not exceeding one thousand dollars, and be " imprisoned not exceeding three years: Provided that this Act " shall not be construed to extend to any subject or citizen of any " foreign prince, state, colony, district, or people, who shall trans- " iently be within the United States, and shall on board of any " vessel of war, letter of marque, or privateer, which, at the time of " its arrival within the United States, was fitted and equipped as " such, enlist or enter himself, or hire or retain another subject " or citizen of the same foreign prince, state, colony, district, or " people (*b*), who is transiently within the United States, to enlist " or enter himself to serve such foreign prince, state, colony, " district, or people, on board such vessel of war, letter of marque, " or privateer, if the United States shall then be at peace with such " foreign prince, state, colony, district, or people.

Fitting out or attempting to fit out.

" Sec. 3. That if any person shall within the limits of the United " States fit out and arm, or attempt (*c*) to fit out and arm, or procure " to be fitted out and armed, or shall knowingly be concerned in the " furnishing, fitting out, or (*d*) arming of any ship or vessel with

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(*b*) The intent must be a fixed one, and not contingent, and formed within the United States, and before the vessel leaves the United States. —4 *Peters*, 445, 466, *United States* v. *Quincy*; 3 *Dal.* 307, *Moodie* v. *The Alfred.*

The law does not prohibit the sailing of armed vessels belonging to our citizens, out of our ports, on bond, &c., that they will not be employed to commit hostilities against powers at peace with us.—6 *Peters*, 466; *Johnson, J.*

The indictment charged the fitting out of the *Bolivar* with intent that she should be employed in the service of a foreign people, that is to say, in the service of the United Provinces of Rio de la Plata; held, that, although the United Provinces were recognized by the United States, the charge, under the inuendo, was sufficiently laid.—6 *Peters*, 445, 467, *United States* v. *Quincy*.

(*c*) An effort to fit out will satisfy the law.—6 *Peters*, 445–464.

The vessel was fitted out and repaired at Baltimore, and, with some warlike munitions on bond given, sailed for St. Thomas, where she was fully armed and cruised under a Buenos Ayrean commission. This was held to be an attempt.—6 *Peters*, 445, *United States* v. *Quincy*.

(*d*) Either will constitute the offence.—6 *Peters*, 445, 464, *United States* v. *Quincy*. It is not necessary to charge the fitting *and* arming.

The owner is liable under the Act, if he authorized and superintended the fitting and arming, without being personally present.

It is not essential that the fitment should have been completed. It is not necessary that even equipment of a slave voyage should have been

" intent (*e*) that such ship or vessel shall be employed in the service
" of any foreign prince or state (*f*), or of any colony, district, or
" people, to cruize or commit hostilities against the subjects, citizens,
" or property of any foreign prince or state, or of any colony,
" district, or people (*g*) with whom the United States are at peace,
" or shall issue or deliver a commission within the territory or
" jurisdiction of the United States for any ship or vessel, to the
" intent that she may be employed as aforesaid, every person so
" offending shall be deemed guilty of a high misdemeanor, and shall
" be fined not more than ten thousand dollars, and imprisoned not
" more than three years; and every such ship or vessel, with her
" tackle, apparel, and furniture, together with all materials, arms,
" ammunition, and stores, which may have been procured for the
" building and equipment thereof, shall be forfeited, one half to the
" use of the informer, and the other half to the use of the United
" States.

The vessel, &c., forfeited.

Half to the informer.

" Sec. 4. That if any citizen or citizens of the United States
" shall, without the limits thereof, fit out and arm, or attempt to fit
" out and arm, or procure to be fitted out and armed, or shall know-
" ingly aid or be concerned in the furnishing, fitting out, or arming,
" any private ship or vessel of war, or privateer, with intent that
" such ship or vessel shall be employed to cruize or commit hostili-
" ties upon the citizens of the United States, or their property, or
" shall take the command of, or enter on board of any such ship or
" vessel for the intent aforesaid, or shall purchase any interest in
" any such ship or vessel, with a view to share in the profits thereof,
" such person so offending shall be deemed guilty of a high misde-
" meanor, and fined not more than ten thousand dollars, and im-
" prisoned not more than ten years; and the trial for such offence,
" if committed without the limits of the United States, shall be in
" the district in which the offender shall be apprehended or first
" brought.

For citizens fitting out or arming, &c., or aiding.

To be tried where apprehended, or first brought.

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taken on board in the port of the United States. In this case part of the equipment of the *General Winder* for a slaving voyage was shipped on another vessel for St. Thomas, and then transhipped to the *General Winder*.

The particulars of the fitting out need not be set out in the indictment; they are minute acts, incapable of exact specification, 473, 475.

The indictment should allege that the vessel was built, fitted, &c., within the jurisdiction of the United States, 476, 477, and "with intent to employ the vessel" in the slave trade; and alleging that "the intent" was "that the vessel should be employed in the slave trade" was not sufficient, 476.—12 *Wheat.* 460, *United States* v. *Gooding*.

(*e*) Although the arms and ammunition were cleared as cargo, and the men enlisted as for a mercantile voyage.—7 *Wheat.* 471, 486, *The Gran Para*.

(*f*) That is, a Government acknowledged by the United States.—6 *Peters*, 467.

(*g*) Note (*b*), sec. 2.

Augmenting in the United States the force of foreign-armed vessels.

"Sec. 5. That if any person shall, within the territory or jurisdiction of the United States, increase or augment, or procure to "be increased or augmented, or shall knowingly be concerned in "increasing or augmenting the force of any ship of war, cruizer, or "other armed vessel, which, at the time of her arrival within the "United States, was a ship of war, or cruizer, or armed vessel, in "the service of any foreign prince or state, or of any colony, district, or people, or belonging to the subjects or citizens of any "such prince or state, colony, district, or people, the same being "at war with any foreign prince or state, or of any colony, district, "or people with whom the United States are at peace, by adding to "the number of the guns of such vessel, or by changing those on "board of her for guns of a larger calibre, or by the addition "thereto of any equipment solely applicable to war, every person "so offending shall be deemed guilty of a high misdemeanor, shall "be fined not more than one thousand dollars, and be imprisoned "not more than one year.

Setting on foot within the United States any military expedition against a friendly power.

"Sec. 6. That if any person shall, within the territory or jurisdiction of the United States, begin or set on foot, or provide or "prepare the means for, any military expedition or enterprise, to "be carried on from thence against the territory or dominions of "any foreign prince or state, or of any colony, district, or people "with whom the United States are (at) peace, every person so "offending shall be deemed guilty of a high misdemeanor, and "shall be fined not exceeding three thousand dollars, and imprisoned not more than three years (*h*).

District Courts to have cognizance of.

"Sec. 7. That the District Courts shall take cognizance of complaints, by whomsoever instituted, in cases of captures made "within the waters of the United States or within a marine league "of the coasts or shores thereof.

The President may employ the forces or the militia for suppressing such expeditions.

"Sec. 8. That in every case in which a vessel shall be fitted out "and armed, or attempted to be fitted out and armed, or in which "the force of any vessel of war, cruizer, or other armed vessel shall "be increased or augmented, or in which any military expedition or "enterprise shall be begun or set on foot, contrary to the provisions "and prohibitions of this Act; and in every case of the capture of a "ship or vessel within the jurisdiction or protection of the United "States as before defined, and in every case in which any process "issuing out of any Court of the United States shall be disobeyed "or resisted by any person or persons having the custody of any "vessel of war, cruizer, or other armed vessel of any foreign prince "or state, or of any colony, district, or people, or of any subjects or "citizens of any foreign prince or state, or of any colony, district, "or people, in every such case it shall be lawful for the President of "the United States, or such other person as he shall have empowered "for that purpose, to employ such part of the land or naval forces

(*h*) Fenian invaders of Canada have been tried and punished under this section by United States Court, 1870.

"of the United States, or of the militia thereof, for the purpose of "taking possession of and detaining any such ship or vessel, with "her prize or prizes, if any, in order to the execution of the pro- "hibitions and penalties of this Act, and to the restoring the prize "or prizes in the cases in which restoration shall have been "adjudged, and also for the purpose of preventing the carrying on "of any such expedition or enterprise from the territories or juris- "diction of the United States against the territories or dominions "of any foreign prince or state, or of any colony, district, or people "with whom the United States are at peace.

May employ the forces or the militia to compel the departure of vessels.

"Sect. 9. That it shall be lawful for the President of the United "States, or such person as he shall empower for that purpose, to "employ such part of the land or naval forces of the United States, "or of the militia thereof, as shall be necessary to compel any foreign "ship or vessel to depart the United States in all cases in which, by "the laws of nations or the treaties of the United States, they ought "not to remain within the United States.

Owners, &c., of armed vessels sailing to give bond not to commit hostilities, &c.

"Sec. 10. That the owners or consignees of every armed ship or "vessel sailing out of the ports of the United States, belonging wholly "or in part to citizens thereof, shall enter into bond to the United "States, with sufficient sureties, prior to clearing out the same, in "double the amount of the value of the vessel and cargo on board, "including her armament, that the said ship or vessel shall not be "employed by such owners to cruize or commit hostilities against the "subjects, citizens, or property of any foreign prince or state, or of "any colony, district, or people with whom the United States are "at peace.

Collectors to detain vessels built for warlike purposes and about to depart when probably they are intended against a friendly power.

"Sec. 11. That the collectors of the customs be, and they are "hereby respectively authorized and required to detain any vessel "manifestly built for warlike purposes, and about to depart the "United States, of which the cargo shall principally consist of arms "and munitions of war, when the number of men shipped on board "or other circumstances shall render it probable that such vessel is "intended to be employed by the owner or owners to cruize or "commit hostilities upon the subjects, citizens, or property of any "foreign prince or state, or of any colony, district, or people with "whom the United States are at peace, until the decision of the "President be had thereon, or until the owner or owners shall give "such bond and security as is required of the owners of armed "ships by the preceding section of this Act.

5 June 1794, c. 50; 14 June 1797, c. 1; 24 April 1800, c. 35, and 3 March

"Sec. 12. That the Act passed on the 5th day of June, 1794, "entitled 'An Act in addition to the Act for the Punishment of "'certain Crimes against the United States,' continued in force, for "a limited time, by the Act of the 2nd of March, 1797, and per- "petuated by the Act passed on the 24th of April, 1800, and the "Act passed on the 14th day of June, 1797, entitled 'An Act to "'prevent Citizens of the United States from privateering against "'Nations in Amity with, or against the Citizens of, the United

1817, c. 58, repealed.

"'States,' and the Act passed the 3rd day of March, 1817, entitled "'An Act more effectually to preserve the neutral Relations of the "'United States,' be and the same are hereby severally repealed: "*Provided, nevertheless*, that persons having heretofore offended "against any of the Acts aforesaid may be prosecuted, convicted, "and punished as if the same were not repealed; and no forfeiture "heretofore incurred by a violation of any of the Acts aforesaid "shall be affected by such repeal.

Not to prevent the punishment of treason, &c.

"Sec. 13. That nothing in the foregoing Act shall be construed "to prevent the prosecution or punishment of treason, or any piracy "defined by the laws of the United States."

"33 & 34 *Vict. c.* 90.—*An Act to regulate the conduct of* "*Her Majesty's Subjects during the existence of hostilities between* "*foreign States with which Her Majesty is at peace.* [9th August, "1870.]

"Whereas it is expedient to make provision for the regulation of the "conduct of Her Majesty's subjects during the existence of hostili- "ties between foreign States with which Her Majesty is at peace:

"Be it enacted by the Queen's most Excellent Majesty, by and "with the advice and consent of the Lord's Spiritual and Tem- "poral, and Commons, in this present Parliament assembled, and by "the authority of the same, as follows:

"*Preliminary.*

Short title of Act.

"1. This Act may be cited for all purposes as 'The Foreign En- "'listment Act, 1870.'

Application of Act.

"2. This Act shall extend to all the dominions of Her Majesty, "including the adjacent territorial waters.

Commencement of Act.

"3. This Act shall come into operation in the United Kingdom "immediately on the passing thereof, and shall be proclaimed in "every British possession by the governor thereof as soon as may be "after he receives notice of this Act, and shall come into operation "in that British possession on the day of such proclamation, and "the time at which this Act comes into operation in any place is, "as respects such place, in this Act referred to as the commencement "of this Act.

"*Illegal Enlistment.*

Penalty on enlistment in service of foreign State.

"4. If any person, without the licence of Her Majesty, being a "British subject, within or without Her Majesty's dominions, accepts "or agrees to accept any commission or engagement in the military "or naval service of any foreign State at war with any foreign State "at peace with Her Majesty, and in this Act referred to as a friendly "State, or whether a British subject or not within Her Majesty's "dominions, induces any other person to accept or agree to accept

" any commission or engagement in the military or naval service of " any such foreign State as aforesaid,—

" He shall be guilty of an offence against this Act, and shall be " punishable by fine and imprisonment, or either of such " punishments, at the discretion of the court before which the " offender is convicted; and imprisonment, if awarded, may " be either with or without hard labour.

Penalty on leaving Her Majesty's dominions with intent to serve a foreign State.

" 5. If any person, without the licence of Her Majesty, being a " British subject, quits or goes on board any ship with a view of " quitting Her Majesty's dominions, with intent to accept any com- " mission or engagement in the military or naval service of any " foreign State at war with a friendly State, or, whether a British " subject or not, within Her Majesty's dominions, induces any other " person to quit or to go on board any ship with a view of quitting " Her Majesty's dominions with the like intent,—

" He shall be guilty of an offence against this Act, and shall be " punishable by fine and imprisonment, or either of such " punishments, at the discretion of the court before which " the offender is convicted; and imprisonment, if awarded, " may be either with or without hard labour.

Penalty on embarking persons under false representations as to service.

" 6. If any person induces any other person to quit Her Majesty's " dominions or to embark on any ship within Her Majesty's do- " minions under a misrepresentation or false representation of the " service in which such person is to be engaged, with the intent or " in order that such person may accept or agree to accept any com- " mission or engagement in the military or naval service of any " foreign State at war with a friendly State,—

" He shall be guilty of an offence against this Act, and shall be " punishable by fine and imprisonment, or either of such " punishments, at the discretion of the court before which " the offender is convicted; and imprisonment, if awarded, " may be either with or without hard labour.

Penalty on taking illegally enlisted persons on board ship.

" 7. If the master or owner of any ship, without the licence of " Her Majesty, knowingly either takes on board, or engages to take on " board, or has on board such ship within Her Majesty's dominions " any of the following persons, in this Act referred to as illegally " enlisted persons; that is to say,—

" (1.) Any person who, being a British subject within or without " the dominions of Her Majesty, has, without the licence " of Her Majesty, accepted or agreed to accept any com- " mission or engagement in the military or naval service " of any foreign State at war with any friendly State:

" (2.) Any person, being a British subject, who, without the " licence of Her Majesty, is about to quit Her Majesty's " dominions with intent to accept any commission or " engagement in the military or naval service of any " foreign State at war with a friendly State:

" (3.) Any person who has been induced to embark under a mis-

" representation or false representation of the service in
" which such person is to be engaged, with the intent or
" in order that such person may accept or agree to accept
" any commission or engagement in the military or
" naval service of any foreign State at war with a friendly
" State :

" Such master or owner shall be guilty of an offence against this
" Act, and the following consequences shall ensue; that is to say,—

" (1.) The offender shall be punishable by fine and imprisonment,
" or either of such punishments, at the discretion of the
" court before which the offender is convicted; and im-
" prisonment, if awarded, may be either with or without
" hard labour; and

" (2.) Such ship shall be detained until the trial and conviction
" or acquittal of the master or owner, and until all
" penalties inflicted on the master or owner have been
" paid, or the master or owner has given security for the
" payment of such penalties to the satisfaction of two
" justices of the peace, or other magistrate or magistrates
" having the authority of two justices of the peace: and

" (3.) All illegally enlisted persons shall immediately on the
" discovery of the offence be taken on shore, and shall
" not be allowed to return to the ship.

" *Illegal Shipbuilding and Illegal Expeditions.*

Penalty on illegal ship building and illegal expeditions.

" 8. If any person within Her Majesty's dominions, without the
" licence of Her Majesty, does any of the following acts; that is to
" say,—

" (1.) Builds or agrees to build, or causes to be built, any ship with
" intent or knowledge, or having reasonable cause to be-
" lieve, that the same shall or will be employed in the
" military or naval service of any foreign State at war
" with any friendly State: or

" (2.) Issues or delivers any commission for any ship with intent
" or knowledge, or having reasonable cause to believe that
" the same shall or will be employed in the military or
" naval service of any foreign State at war with any
" friendly State: or

" (3.) Equips any ship with intent or knowledge, or having
" reasonable cause to believe, that the same shall or will
" be employed in the military or naval service of any
" foreign State at war with any friendly State: or

" (4.) Despatches, or causes or allows to be despatched, any ship
" with intent or knowledge, or having reasonable cause to
" believe, that the same shall or will be employed in the
" military or naval service of any foreign State at war with
" any friendly State:

" Such person shall be deemed to have committed an offence
" against this Act, and the following consequences shall ensue:

"(1.) The offender shall be punishable by fine and imprisonment, "or either of such punishments, at the discretion of the "court before which the offender is convicted; and im- "prisonment, if awarded, may be either with or without "hard labour.

"(2.) The ship in respect of which any such offence is committed, "and her equipment, shall be forfeited to Her Majesty:

"Provided that a person building, causing to be built, or equipping "a ship in any of the cases aforesaid, in pursuance of a contract "made before the commencement of such war as aforesaid, shall not "be liable to any of the penalties imposed by this section in respect "of such building or equipping if he satisfies the conditions follow- "ing; that is to say,—

"(1.) If forthwith upon a proclamation of neutrality being issued "by Her Majesty he gives notice to the Secretary of State "that he is so building, causing to be built, or equipping "such ship, and furnishes such particulars of the contract "and of any matters relating to, or done, or to be done "under the contract as may be required by the Secretary "of State:

"(2.) If he gives such security, and takes and permits to be taken "such other measures, if any, as the Secretary of State "may prescribe for ensuring that such ship shall not be "despatched, delivered, or removed without the licence "of Her Majesty until the termination of such war as "aforesaid.

Presumption as to evidence in case of illegal ship.

"9. Where any ship is built by order of or on behalf of any "foreign State when at war with a friendly State, or is delivered to "or to the order of such foreign State, or any person who to the "knowledge of the person building is an agent of such foreign State, "or is paid for by such foreign State or such agent, and is employed "in the military or naval service of such foreign State, such ship "shall, until the contrary is proved, be deemed to have been built "with a view to being so employed, and the burden shall lie on the "builder of such ship of proving that he did not know that the ship "was intended to be so employed in the military or naval service of "such foreign State.

Penalty on aiding the warlike equipment of foreign ships

"10. If any person within the dominions of Her Majesty, and "without the licence of Her Majesty,—

"By adding to the number of the guns, or by changing those on "board for other guns, or by the addition of any equipment for war, "increases or augments, or procures to be increased or augmented, or "is knowingly concerned in increasing or augmenting the warlike "force of any ship which at the time of her being within the dominions "of Her Majesty was a ship in the military or naval service of any "foreign State at war with any friendly State,—

"Such person shall be guilty of an offence against this Act, and "shall be punishable by fine and imprisonment, or either of "such punishments, at the discretion of the court before which

"the offender is convicted; and imprisonment, if awarded, "may be either with or without hard labour.

Penalty on fitting out naval or military expeditions without licence.

"11. If any person within the limits of Her Majesty's dominions, "and without the licence of Her Majesty,—

"Prepares or fits out any naval or military expedition to proceed "against the dominions of any friendly State, the following conse-"quences shall ensue:

"(1.) Every person engaged in such preparation or fitting out, or "assisting therein, or employed in any capacity in such "expedition, shall be guilty of an offence against this Act, "and shall be punishable by fine and imprisonment, or "either of such punishments, at the discretion of the court "before which the offender is convicted; and imprisonment, "if awarded, may be either with or without hard labour.

"(2). All ships, and their equipments, and all arms and munitions "of war, used in or forming part of such expedition, shall be "forfeited to Her Majesty.

Punishment of accessories.

"12. Any person who aids, abets, counsels, or procures the com-"mission of any offence against this Act shall be liable to be tried "and punished as a principal offender.

Limitation of term of imprisonment.

"13. The term of imprisonment to be awarded in respect of any "offence against this Act shall not exceed two years.

"*Illegal Prize.*

Illegal prize brought into British ports restored.

"14. If, during the continuance of any war in which Her Majesty "may be neutral, any ship, goods, or merchandise captured as prize "of war within the territorial jurisdiction of Her Majesty, in "violation of the neutrality of this realm, or captured by any ship "which may have been built, equipped, commissioned, or despatched, "or the force of which may have been augmented, contrary to the "provisions of this Act, are brought within the limits of Her "Majesty's dominions by the captor, or any agent of the captor, or "by any person having come into possession thereof with know-"ledge that the same was prize of war so captured as aforesaid, it "shall be lawful for the original owner of such prize, or his agent, "or for any person authorized in that behalf by the Government "of the foreign State to which such owner belongs, to make "application to the Court of Admiralty for seizure and detention "of such prize, and the court shall, on due proof of the facts, order "such prize to be restored.

"Every such order shall be executed and carried into effect in "the same manner, and subject to the same right of appeal, as in "case of any order made in the exercise of the ordinary juris-"diction of such court; and in the meantime and until a final order "has been made on such application the court shall have power to "make all such provisional and other orders as to the care or custody "of such captured ship, goods, or merchandise, and (if the same "be of perishable nature, or incurring risk of deterioration) for the

" sale thereof, and with respect to the deposit or investment of the
" proceeds of any such sale, as may be made by such court in the
" exercise of its ordinary jurisdiction.

" *General Provision.*

Licence by Her Majesty how granted.

" 15. For the purposes of this Act, a licence by Her Majesty shall " be under the sign manual of Her Majesty, or be signified by Order " in Council or by proclamation of Her Majesty.

" *Legal Procedure.*

Jurisdiction in respect of offences by persons against Act.

" 16. Any offence against this Act shall, for all purposes of and " incidental to the trial and punishment of any person guilty of any " such offence, be deemed to have been committed either in the place " in which the offence was wholly or partly committed, or in any " place within Her Majesty's dominions in which the person who " committed such offence may be.

Venue in respect of offences by persons.

24 & 25 Vict. c. 97.

" 17. Any offence against this Act may be described in any indict- " ment or other document relating to such offence, in cases where " the mode of trial requires such a description, as having been com- " mitted at the place where it was wholly or partly committed, or " it may be averred generally to have been committed within Her " Majesty's dominions, and the venue or local description in the " margin may be that of the county, city, or place in which the trial " is held.

Power to remove offenders for trial.

" 18. The following authorities, that is to say, in the United " Kingdom any judge of a superior court, in any other place within " the jurisdiction of any British court of justice, such court, or, if " there are more courts than one, the court having the highest " criminal jurisdiction in that place, may, by warrant or instrument " in the nature of a warrant in this section included in the term " ' warrant,' direct that any offender charged with an offence against " this Act shall be removed to some other place in Her Majesty's " dominions for trial in cases where it appears to the authority " granting the warrant that the removal of such offender would be " conducive to the interests of justice, and any prisoner so removed " shall be triable at the place to which he is removed, in the same " manner as if his offence had been committed at such place.

" Any warrant for the purposes of this section may be addressed " to the master of any ship or to any other person or persons, and " the person or persons to whom such warrant is addressed shall " have power to convey the prisoner therein named to any place or " places named in such warrant, and to deliver him, when arrived " at such place or places, into the custody of any authority de- " signated by such warrant.

" Every prisoner shall, during the time of his removal under any " such warrant as aforesaid be deemed to be in the legal custody of " the person or persons empowered to remove him.

Jurisdic-

" 19. All proceedings for the condemnation and forfeiture of a

tion in respect of forfeiture of ships for offences against Act.

" ship, or ship and equipment, or arms and munitions of war, in " pursuance of this Act shall require the sanction of the Secretary " of State or such chief executive authority as is in this Act men- " tioned, and shall be had in the Court of Admiralty, and not in " any other court; and the Court of Admiralty shall, in addition to " any power given to the court by this Act, have in respect of any " ship or other matter brought before it in pursuance of this Act all " powers which it has in the case of a ship or matter brought before " it in the exercise of its ordinary jurisdiction.

Regulations as to proceedings against the offender and against the ship.

" 20. Where any offence against this Act has been committed by " any person by reason whereof a ship, or ship and equipment, or " arms and munitions of war, has or have become liable to for- " feiture, proceedings may be instituted contemporaneously or not, " as may be thought fit, against the offender in any court having " jurisdiction of the offence, and against the ship, or ship and equip- " ment, or arms and munitions of war, for the forfeiture in the " Court of Admiralty; but it shall not be necessary to take pro- " ceedings against the offender because proceedings are instituted " for the forfeiture, or to take proceedings for the forfeiture because " proceedings are taken against the offender.

Officers authorized to seize offending ships.

" 21. The following officers, that is to say,—

" (1.) Any officer of customs in the United Kingdom, subject " nevertheless to any special or general instructions from " the Commissioners of Customs or any officer of the " Board of Trade, subject nevertheless to any special or " general instructions from the Board of Trade;

" (2.) Any officer of customs or public officer in any British " possession, subject nevertheless to any special or general " instructions from the governor of such possession;

" (3.) Any commissioned officer on full pay in the military service " of the Crown, subject nevertheless to any special or " general instructions from his commanding officer;

" (4.) Any commissioned officer on full pay in the naval service " of the Crown, subject nevertheless to any special or " general instructions from the Admiralty or his superior " officer,

" may seize or detain any ship liable to be seized or detained in " pursuance of this Act, and such officers are in this Act referred to " as the 'local authority;' but nothing in this Act contained shall " derogate from the power of the Court of Admiralty to direct any " ship to be seized or detained by any officer by whom such court " may have power under its ordinary jurisdiction to direct a ship " to be seized or detained.

Powers of officers authorized to seize ships.

" 22. Any officer authorized to seize or detain any ship in respect " of any offence against this Act may, for the purpose of enforcing " such seizure or detention, call to his aid any constable or officers " of police, or any officers of Her Majesty's army or navy or marines, " or any excise officers or officers of customs, or any harbour-master

" or dock-master, or any officers having authority by law to make
" seizures of ships, and may put on board any ship so seized or
" detained any one or more of such officers to take charge of the
" same, and to enforce the provisions of this Act, and any officer
" seizing or detaining any ship under this Act may use force, if
" necessary, for the purpose of enforcing seizure or detention, and if
" any person is killed or maimed by reason of his resisting such
" officer in the execution of his duties, or any person acting under
" his orders, such officer so seizing or detaining the ship, or other
" person, shall be freely and fully indemnified as well against the
" Queen's Majesty, her heirs and successors, as against all persons
" so killed, maimed, or hurt.

Special power of Secretary of State or chief executive authority to detain ship.

" 23. If the Secretary of State or the chief executive authority is
" satisfied that there is a reasonable and probable cause for believ-
" ing that a ship within Her Majesty's dominions has been or is
" being built, commissioned, or equipped contrary to this Act, and
" is about to be taken beyond the limits of such dominions, or that
" a ship is about to be despatched contrary to this Act, such Secre-
" tary of State or chief executive authority shall have power to
" issue a warrant stating that there is reasonable and probable cause
" for believing as aforesaid, and upon such warrant the local au-
" thority shall have power to seize and search such ship, and to
" detain the same until it has been either condemned or released by
" process of law, or in manner hereinafter mentioned.

" The owner of the ship so detained, or his agent, may apply to
" the Court of Admiralty for its release, and the court shall as soon
" as possible put the matter of such seizure and detention in course
" of trial between the applicant and the Crown.

" If the applicant establish to the satisfaction of the court that
" the ship was not and is not being built, commissioned, or equipped,
" or intended to be despatched, contrary to this Act, the ship shall
" be released and restored.

" If the applicant fail to establish to the satisfaction of the court
" that the ship was not and is not being built, commissioned, or
" equipped, or intended to be despatched, contrary to this Act, then
" the ship shall be detained till released by order of the Secretary
" of State or chief executive authority.

" The court may in cases where no proceedings are pending for
" its condemnation release any ship detained under this section on
" the owner giving security to the satisfaction of the court that the
" ship shall not be employed contrary to this Act, notwithstanding
" that the applicant may have failed to establish to the satisfaction
" of the court that the ship was not and is not being built, com-
" missioned, or intended to be despatched contrary to this Act.
" The Secretary of State or the chief executive authority may like-
" wise release any ship detained under this section on the owner
" giving security to the satisfaction of such Secretary of State or
" chief executive authority that the ship shall not be employed

" contrary to this Act, or may release the ship without such security " if the Secretary of State or chief executive authority think fit so " to release the same.

" If the court be of opinion that there was not reasonable and " probable cause for the detention, and if no such cause appear in " the course of the proceedings, the court shall have power to de- " clare that the owner is to be indemnified by the payment of costs " and damages in respect of the detention, the amount thereof to be " assessed by the court, and any amount so assessed shall be payable " by the Commissioners of the Treasury out of any moneys legally " applicable for that purpose. The Court of Admiralty shall also " have power to make a like order for the indemnity of the owner, " on the application of such owner to the court, in a summary " way, in cases where the ship is released by the order of the " Secretary of State or the chief executive authority, before any " application is made by the owner or his agent to the court for " such release.

" Nothing in this section contained shall affect any proceedings " instituted or to be instituted for the condemnation of any ship " detained under this section where such ship is liable to forfeiture, " subject to this provision, that if such ship is restored in pursuance " of this section all proceedings for such condemnation shall be " stayed; and where the court declares that the owner is to be " indemnified by the payment of costs and damages for the detainer, " all costs, charges, and expenses incurred by such owner in or about " any proceedings for the condemnation of such ship shall be added " to the costs and damages payable to him in respect of the detention " of the ship.

" Nothing in this section contained shall apply to any foreign " non-commissioned ship despatched from any part of Her Majesty's " dominions after having come within them under stress of weather " or in the course of a peaceful voyage, and upon which ship no " fitting out or equipping of a warlike character has taken place in " this country.

Special power of local authority to detain ship.

" 24. Where it is represented to any local authority, as defined " by this Act, and such local authority believes the representation, " that there is a reasonable and probable cause for believing that a " ship within Her Majesty's dominions has been or is being built, " commissioned, or equipped contrary to this Act, and is about to " be taken beyond the limits of such dominions, or that a ship is about " to be despatched contrary to this Act, it shall be the duty of such " local authority to detain such ship, and forthwith to communicate " the fact of such detention to the Secretary of State or chief execu- " tive authority.

" Upon the receipt of such communication the Secretary of State " or chief executive authority may order the ship to be released if " he thinks there is no cause for detaining her, but if satisfied that " there is reasonable and probable cause for believing that such " ship was built, commissioned, or equipped or intended to be

" despatched in contravention of this Act, he shall issue his warrant " stating that there is reasonable and probable cause for believing as " aforesaid, and upon such warrant being issued further proceedings " shall be had as in cases where the seizure or detention has taken " place on a warrant issued by the Secretary of State without any " communication from the local authority.

" Where the Secretary of State or chief executive authority orders " the ship to be released on the receipt of a communication from the " local authority without issuing his warrant, the owner of the ship " shall be indemnified by the payment of costs and damages in respect " of the detention upon application to the Court of Admiralty in a " summary way in like manner as he is entitled to be indemnified " where the Secretary of State having issued his warrant under this " Act releases the ship before any application is made by the owner " or his agent to the court for such release.

Power of Secretary of State or executive authority to grant search warrant.

" 25. The Secretary of State or the Chief executive authority may, " by warrant, empower any person to enter any dockyard or other " place within Her Majesty's dominions and inquire as to the desti- " nation of any ship which may appear to him to be intended to be " employed in the naval or military service of any foreign State at " war with a friendly State, and to search such ship.

Exercise of powers of Secretary of State or chief executive authority.

" 26. Any powers or jurisdiction by this Act given to the Secretary " of State may be exercised by him throughout the dominions of " Her Majesty, and such powers and jurisdiction may also be exer- " cised by any of the following officers, in this Act referred to as " the chief executive authority, within their respective jurisdictions; " that is to say,—

" (1.) In Ireland by the Lord Lieutenant or other the chief " governor or governors of Ireland for the time being, or " the chief secretary to the Lord Lieutenant:

" (2.) In Jersey by the Lieutenant Governor:

" (3.) In Guernsey, Alderney, and Sark, and the dependent islands " by the Lieutenant Governor.

" (4.) In the Isle of Man by the Lieutenant Governor:

" (5.) In any British possession by the Governor.

" A copy of any warrant issued by a Secretary of State or by any " officer authorized in pursuance of this Act to issue such warrant " in Ireland, the Channel Islands, or the Isle of Man shall be laid " before Parliament.

Appeal from Court of Admiralty.

" 27. An appeal may be had from any decision of a Court of " Admiralty under this Act to the same tribunal and in the same " manner to and in which an appeal may be had in cases within the " ordinary jurisdiction of the court as a Court of Admiralty.

Indemnity to officers.

" 28. Subject to the provisions of this Act providing for the " award of damages in certain cases in respect of the seizure or de- " tention of a ship by the Court of Admiralty no damages shall be " payable, and no officer or local authority shall be responsible, " either civilly or criminally, in respect of the seizure or detention " of any ship in pursuance of this Act.

Indemnity to Secretary of State or chief executive authority.

" 29. The Secretary of State shall not, nor shall the chief executive " authority, be responsible in any action or other legal proceedings " whatsoever for any warrant issued by him in pursuance of this " Act, or be examinable as a witness, except at his own request, in " any court of justice in respect of the circumstances which led to " the issue of the warrant.

" *Interpretation Clause.*

Interpretation of terms.

" 30. In this Act, if not inconsistent with the context, the following " terms have the meanings hereinafter respectively assigned to " them; that is to say,—

"Foreign State:"

" ' Foreign State' includes any foreign prince, colony, province, " or part of any province or people, or any person or persons " exercising or assuming to exercise the powers of government " in or over any foreign country, colony, province, or part of " any province or people:

"Military service:"

" ' Military service' shall include military telegraphy and any " other employment whatever, in or in connection with any " military operation:

"Naval service:"

" ' Naval service' shall, as respects a person, include service as " a marine, employment as a pilot in piloting or directing the " course of a ship of war or other ship when such ship of war " or other ship is being used in any military or naval operation, " and any employment whatever on board a ship of war, trans- " port, store ship, privateer or ship under letters of marque; " and as respects a ship, include any user of a ship as a trans- " port, store ship, privateer or ship under letters of marque:

"United Kingdom:"

" ' United Kingdom' includes the Isle of Man, the Channel " Islands, and other adjacent islands:

"British possession:"

" ' British possession' means any territory, colony, or place being " part of Her Majesty's dominions, and not part of the United " Kingdom, as defined by this Act:

"The Secretary of State:"

" ' The Secretary of State' shall mean any one of Her Majesty's " Principal Secretaries of State:

"Governor:"

" ' The Governor' shall as respects India mean the Governor- " General or the governor of any presidency, and where a " British possession consists of several constituent colonies, " mean the Governor-General of the whole possession or the " Governor of any of the constituent colonies, and as respects " any other British possession it shall mean the officer for the " time being administering the government of such possession; " also any person acting for or in the capacity of a governor " shall be included under the term 'Governor:'

"Court of Admiralty:"

" ' Court of Admiralty' shall mean the High Court of Admiralty " of England or Ireland, the Court of Session of Scotland, or " any Vice-Admiralty Court within Her Majesty's dominions:

"Ship:"

" ' Ship' shall include any description of boat, vessel, floating " battery, or floating craft; also any description of boat,

" vessel, or other craft or battery, made to move either on " the surface of or under water, or sometimes on the surface of " and sometimes under water:

" 'Building' in relation to a ship shall include the doing any act " towards or incidental to the construction of a ship, and all " words having relation to building shall be construed accord- " ingly:

" Building:"

" 'Equipping' in relation to a ship shall include the furnishing " a ship with any tackle, apparel, furniture, provisions, arms, " munitions, or stores, or any other thing which is used in " or about a ship for the purpose of fitting or adapting her " for the sea or for naval service, and all words relating to " equipping shall be construed accordingly:

" Equipping:"

" 'Ship and equipment' shall include a ship and everything in or " belonging to a ship:

" Ship and equipment:"

" 'Master' shall include any person having the charge or command of a ship.

" Master."

" *Repeal of Acts, and Saving Clauses.*

" 31. From and after the commencement of this Act, an Act " passed in the fifty-ninth year of the reign of His late Majesty " King George the Third, chapter sixty-nine, intituled 'An Act to " 'prevent the enlisting or engagement of His Majesty's subjects to " 'serve in foreign service, and the fitting out or equipping, in His " 'Majesty's dominions, vessels for warlike purposes, without His " 'Majesty's licence,' shall be repealed: Provided that such repeal " shall not affect any penalty, forfeiture, or other punishment in- " curred or to be incurred in respect of any offence committed before " this Act comes into operation, nor the institution of any investi- " gation or legal proceeding, or any other remedy for enforcing any " such penalty, forfeiture, or punishment as aforesaid.

Repeal of Foreign Enlistment Act, 59 G. 3, c. 69.

" 32. Nothing in this Act contained shall subject to forfeiture any " commissioned ship of any foreign State, or give to any British court " over or in respect of any ship entitled to recognition as a com- " missioned ship of any foreign State any jurisdiction which it would " not have had if this Act had not passed.

Saving as to commissioned foreign ships.

" 33. Nothing in this Act contained shall extend or be construed " to extend to subject to any penalty any person who enters into the " military service of any prince, State, or potentate in Asia, with " such leave or licence as is for the time being required by law in " the case of subjects of Her Majesty entering into the military " service of princes, States, or potentates in Asia."

Penalties not to extend to persons entering into military service in Asia. 59 G. 3, c. 69, s. 12.

APPENDIX VIII. Page 392.

(*Extract from Ortolan, Diplomatie de la Mer,* t. ii. p. 441.)

" *Avis du Conseil d'État sur la Compétence en matière de Délits " commis à bord des Vaisseaux neutres, dans les Ports et Rades " de France.* [20 novembre 1806.]

" Le Conseil d'État qui, d'après le renvoi à lui fait par Sa Ma- " jesté, a entendu le rapport de la section de législation sur celui " de grand-juge ministre de la justice, tendant à régler les limites " de la juridiction que les Consuls des États-Unis d'Amérique, " aux ports de Marseille et d'Anvers, réclament, par rapport aux " délits commis à bord des vaisseaux de leur nation, étant dans les " ports et rades de France ;—Considérant qu'un vaisseau neutre " ne peut être indéfiniment considéré comme lieu neutre, et que la " protection qui lui est accordée dans les ports français ne saurait " dessaisir à la juridiction territoriale, pour tout ce qui touche aux " intérêts de l'État ;—Qu'ainsi, le vaisseau neutre admis dans un " port de l'État, est de plein droit soumis aux lois de police qui " régissent le lieu où il est reçu ;—Que les gens de son équipage " sont également justiciables des tribunaux du pays pour les délits " qu'ils y commettraient, même à bord, envers des personnes étran- " gères à l'équipage, ainsi que pour les Conventions civiles qu'ils " pourraient faire avec elles ;—Mais, que si jusque-là, la juridic- " tion territoriale est hors de doute, il n'en est pas ainsi à l'égard " des délits qui se commettent à bord du vaisseau neutre, de la part " d'un homme de l'équipage ;—Qu'en ce cas, les droits de la Puis- " sance neutre doivent être respectés, comme s'agissant de la disci- " pline intérieure du vaisseau, dans laquelle l'autorité locale ne doit " pas s'ingérer, toutes les fois que son secours n'est pas réclamé, " ou que la tranquillité du port n'est pas compromise ;—Est d'avis " que cette distinction, indiquée par le rapport du grand-juge et " conforme à l'usage, est la seule règle qu'il convienne de suivre en " cette matière ;—Et appliquant cette doctrine aux deux espèces " particulières pour lesquelles ont réclamé les Consuls des États- " Unis ;—Considérant que dans l'une de ces affaires, il s'agit d'une " rixe passée dans le canot du navire américain *La Newton*, entre " deux matelots du même navire, et dans l'autre d'une blessure " grave faite par le capitaine en second du navire *La Sally*, à l'un " de ses matelots, pour avoir disposé du canot sans son ordre ;

" Est d'avis qu'il y a lieu d'accueillir la réclamation, et d'interdire " aux tribunaux français la connaissance des deux affaires pré- " citées."

" 15 *Vict. c.* 26.—*An Act to enable Her Majesty to carry into effect " Arrangements made with Foreign Powers for the Apprehension " of Seamen who desert from their Ships.* [17th June, 1852.]

" Whereas arrangements have been made with certain foreign " Powers for the recovery of seamen deserting from the ships of " such Powers when in British ports, and for the recovery of sea- " men deserting from British ships when in the ports of such " Powers: And whereas it is expedient to enable Her Majesty to " carry such arrangements into effect, and likewise to enable Her " Majesty to carry into effect any similar arrangements of a like " nature which may be made hereafter: Be it enacted by the " Queen's most Excellent Majesty, by and with the advice and " consent of the Lords Spiritual and Temporal, and Commons, in " this present Parliament assembled, and by the authority of the " same, as follows:

Her Majesty may by Order in Council declare that deserters from foreign ships may be apprehended and given up.

" 1. Whenever it is made to appear to Her Majesty that due " facilities are or will be given for recovering and apprehending " seamen who desert from British merchant ships in the terri- " tories of any foreign Power, Her Majesty may, by Order in " Council stating that such facilities are or will be given, declare " that seamen, not being slaves, who desert from merchant ships " belonging to a subject of such Power, when within Her Majesty's " dominions or the territories of the East India Company, shall be " liable to be apprehended and carried on board their respective " ships, and may limit the operation of such Order, and may render " the operation thereof subject to such conditions and qualifications, " if any, as may be deemed expedient.

Upon publication of Order in Council justices shall aid in recovering deserters from the ships of foreign Powers, and may apprehend them, and send them on board.

" 2. Upon such publication as hereinafter mentioned of any such " Order in Council, then, during such time as the same remains in " force, and subject to such limitations and qualifications, if any, as " may be therein contained, every justice of the peace or other " officer having jurisdiction in the case of seamen who desert from " British merchant ships in Her Majesty's dominions or in the " territories of the East India Company shall, on application being " made by a Consul of the foreign Power to which such Order in " Council relates, or his deputy or representative, aid in appre- " hending any seaman or apprentice who deserts from any mer- " chant ship belonging to a subject of such Power, and may for " that purpose, upon complaint on oath duly made, issue his war- " rant for the apprehension of any such deserter, and, upon due " proof of the desertion, order him to be conveyed on board the " vessel to which he belongs, or to be delivered to the master or " mate of such vessel, or to the owner of such vessel or his agent, to " be so conveyed; and thereupon it shall be lawful for the person " ordered to convey such deserter, or for the master or mate of

"s ch vessel, or the owner or his agent (as the case may require), to "convey him on board accordingly.

Penalty on persons harbouring such deserters.

"3. If any person protects or harbours any deserter who is "liable to be apprehended under this Act, knowing or having "reason to believe that he has deserted, such person shall for every "offence be liable to a penalty not exceeding ten pounds, and "every such penalty shall be recovered, paid, and applied in the "same manner as penalties for harbouring or protecting deserters "from British merchant ships.

Orders to be published in the *London Gazette*.

"4. Every Order in Council to be made under the authority of "this Act shall be published in the *London Gazette* as soon as may "be after the making thereof.

Orders may be revoked or altered.

"5. Her Majesty may by Order in Council from time to time "revoke or alter any Order in Council previously made under the "authority of this Act.

Short title.

"6. This Act may be cited as the 'Foreign Deserters Act, 1852.'"

APPENDIX IX. PAGE 437.

"33 & 34 *Vict. c.* 52.—*An Act for amending the law relating to* "*the extradition of criminals.* [August 9, 1870.]

"WHEREAS it is expedient to amend the law relating to the sur- "render to foreign States of persons accused or convicted of the "commission of certain crimes within the jurisdiction of such "States, and to the trial of criminals surrendered by foreign States "to this country:

"Be it enacted by the Queen's most Excellent Majesty, by and "with the advice and consent of the Lords Spiritual and Temporal, "and Commons, in this present Parliament assembled, and by the "authority of the same, as follows:

"*Preliminary.*

Short title.

"1. This Act may be cited as 'The Extradition Act, 1870.'

Where arrangement for surrender of criminals made, Order in Council to apply Act.

"2. Where an arrangement has been made with any foreign State "with respect to the surrender to such State of any fugitive "criminals, Her Majesty may, by Order in Council, direct that this "Act shall apply in the case of such foreign State.

"Her Majesty may, by the same or any subsequent Order, limit "the operation of the Order, and restrict the same to fugitive "criminals who are in or suspected of being in the part of Her "Majesty's dominions specified in the Order, and render the opera- "tion thereof subject to such conditions, exceptions, and qualifica- "tions as may be deemed expedient.

"Every such Order shall recite or embody the terms of the

" arrangement, and shall not remain in force for any longer period
" than the arrangement.

" Every such Order shall be laid before both Houses of Parliament
" within six weeks after it is made, or, if Parliament be not then
" sitting, within six weeks after the then next meeting of Parlia-
" ment, and shall also be published in the *London Gazette*.

Restrictions on surrender of criminals.

" 3. The following restrictions shall be observed with respect to
" the surrender of fugitive criminals:

" (1.) A fugitive criminal shall not be surrendered if the offence
" in respect of which his surrender is demanded is one of
" a political character, or if he prove to the satisfaction of
" the police magistrate or the court before whom he is
" brought on Habeas corpus, or to the Secretary of State,
" that the requisition for his surrender has in fact been
" made with a view to try or punish him for an offence
" of a political character:

" (2.) A fugitive criminal shall not be surrendered to a foreign
" State unless provision is made by the law of that State,
" or by arrangement, that the fugitive criminal shall not,
" until he has been restored or had an opportunity of
" returning to Her Majesty's dominions, be detained or
" tried in that foreign State for any offence committed
" prior to his surrender other than the extradition crime
" proved by the facts on which the surrender is grounded:

" (3.) A fugitive criminal who has been accused of some offence
" within English jurisdiction not being the offence for
" which his surrender is asked, or is undergoing sentence
" under any conviction in the United Kingdom, shall not
" be surrendered until after he has been discharged,
" whether by acquittal or on expiration of his sentence
" or otherwise:

" (4.) A fugitive criminal shall not be surrendered until the expi-
" ration of fifteen days from the date of his being com-
" mitted to prison to await his surrender.

Provisions of arrangement for surrender.

" 4. An Order in Council for applying this Act in the case of any
" foreign State shall not be made unless the arrangement—

" (1.) provides for the determination of it by either party to it
" after the expiration of a notice not exceeding one year;
" and,

" (2.) is in conformity with the provisions of this Act, and in
" particular with the restrictions on the surrender of
" fugitive criminals contained in this Act.

Publication and effect of Order.

" 5. When an Order applying this Act in the case of any foreign
" State has been published in the *London Gazette*, this Act (after
" the date specified in the Order, or, if no date is specified, after the
" date of the publication) shall, so long as the Order remains in
" force, but subject to the limitations, restrictions, conditions, ex-
" ceptions, and qualifications, if any, contained in the Order, apply

" in the case of such foreign State. An Order in Council shall be " conclusive evidence that the arrangement therein referred to " complies with the requisitions of this Act, and that this Act " applies in the case of the foreign State mentioned in the Order, " and the validity of such Order shall not be questioned in any legal " proceedings whatever.

Liability of criminal to surrender.

" 6. Where this Act applies in the case of any foreign State, every " fugitive criminal of that State who is in or suspected of being in " any part of Her Majesty's dominions, or that part which is specified " in the Order applying this Act (as the case may be), shall be liable " to be apprehended and surrendered in manner provided by this " Act, whether the crime in respect of which the surrender is sought " was committed before or after the date of the Order, and whether " there is or is not any concurrent jurisdiction in any court of Her " Majesty's dominions over that crime.

Order of Secretary of State for issue of warrant in United Kingdom if crime is not of a political character.

" 7. A requisition for the surrender of a fugitive criminal of any " foreign State, who is in or suspected of being in the United King- " dom, shall be made to a Secretary of State by some person recog- " nized by the Secretary of State as a diplomatic representative of " that foreign State. A Secretary of State may, by order under his " hand and seal, signify to a police magistrate that such requisition " has been made, and require him to issue his warrant for the " apprehension of the fugitive criminal.

" If the Secretary of State is of opinion that the offence is one of " a political character, he may, if he think fit, refuse to send any " such order, and may also at any time order a fugitive criminal " accused or convicted of such offence to be discharged from custody.

Issue of warrant by police magistrate, justice, etc.

" 8. A warrant for the apprehension of a fugitive criminal, whether " accused or convicted of crime, who is in or suspected of being in " the United Kingdom, may be issued—

" 1. by a police magistrate on the receipt of the said order of the " Secretary of State, and on such evidence as would in his " opinion justify the issue of the warrant if the crime had " been committed or the criminal convicted in England; " and

" 2. by a police magistrate or any justice of the peace in any part " of the United Kingdom, on such information or com- " plaint and such evidence or after such proceedings as " would in the opinion of the person issuing the warrant " justify the issue of a warrant if the crime had been com- " mitted or the criminal convicted in that part of the " United Kingdom in which he exercises jurisdiction.

" Any person issuing a warrant under this section without an order " from a Secretary of State shall forthwith send a report of the fact " of such issue, together with the evidence and information or com- " plaint, or certified copies thereof, to a Secretary of State, who may " if he think fit order the warrant to be cancelled, and the person " who has been apprehended on the warrant to be discharged.

"A fugitive criminal, when apprehended on a warrant issued "without the order of a Secretary of State, shall be brought before "some person having power to issue a warrant under this section, "who shall by warrant order him to be brought and the prisoner "shall accordingly be brought before a police magistrate.

"A fugitive criminal apprehended on a warrant issued without "the order of a Secretary of State shall be discharged by the "police magistrate, unless the police magistrate, within such reason-"able time as, with reference to the circumstances of the case, he "may fix, receives from a Secretary of State an order signifying "that a requisition has been made for the surrender of such "criminal.

Hearing of case and evidence of political character of crime.

"9. When a fugitive criminal is brought before the police "magistrate, the police magistrate shall hear the case in the same "manner, and have the same jurisdiction and powers, as near as "may be, as if the prisoner were brought before him charged with "an indictable offence committed in England.

"The police magistrate shall receive any evidence which may be "tendered to show that the crime of which the prisoner is accused or "alleged to have been convicted is an offence of a political character "or is not an extradition crime.

Committal or discharge of prisoner.

"10. In the case of a fugitive criminal accused of an extradition "crime, if the foreign warrant authorizing the arrest of such criminal "is duly authenticated, and such evidence is produced as (subject to "the provisions of this Act) would, according to the law of England, "justify the committal for trial of the prisoner if the crime of which "he is accused had been committed in England, the police magis-"trate shall commit him to prison, but otherwise shall order him to "be discharged.

"In the case of a fugitive criminal alleged to have been convicted "of an extradition crime, if such evidence is produced as (subject "to the provisions of this Act) would, according to the law of "England, prove that the prisoner was convicted of such crime, the "police magistrate shall commit him to prison, but otherwise shall "order him to be discharged.

"If he commits such criminal to prison, he shall commit him to "the Middlesex House of Detention, or to some other prison in "Middlesex, there to await the warrant of a Secretary of State for "his surrender, and shall forthwith send to a Secretary of State a "certificate of the committal, and such report upon the case as he "may think fit.

Surrender of fugitive to foreign State by warrant of Secretary of State.

"11. If the police magistrate commits a fugitive criminal to "prison, he shall inform such criminal that he will not be surren-"dered until after the expiration of fifteen days, and that he has a "right to apply for a writ of Habeas corpus.

"Upon the expiration of the said fifteen days, or, if a writ of "Habeas corpus is issued, after the decision of the court upon the "return to the writ, as the case may be, or after such further period

" as may be allowed in either case by a Secretary of State, it shall " be lawful for a Secretary of State, by warrant under his hand and " seal, to order the fugitive criminal (if not delivered on the " decision of the court) to be surrendered to such person as may in " his opinion be duly authorized to receive the fugitive criminal by " the foreign State from which the requisition for the surrender " proceeded, and such fugitive criminal shall be surrendered " accordingly.

" It shall be lawful for any person to whom such warrant is di- " rected and for the person so authorized as aforesaid to receive, " hold in custody, and convey within the jurisdiction of such foreign " State the criminal mentioned in the warrant; and if the criminal " escapes out of any custody to which he may be delivered on or in " pursuance of such warrant, it shall be lawful to retake him in the " same manner as any person accused of any crime against the laws " of that part of Her Majesty's dominions to which he escapes may " be retaken upon an escape.

Discharge of persons apprehended if not conveyed out of United Kingdom within two months.

" 12. If the fugitive criminal who has been committed to prison " is not surrendered and conveyed out of the United Kingdom " within two months after such committal, or, if a writ of Habeas " corpus is issued, after the decision of the court upon the return to " the writ, it shall be lawful for any judge of one of Her Majesty's " Superior Courts at Westminster, upon application made to him by " or on behalf of the criminal, and upon proof that reasonable notice " of the intention to make such application has been given to a " Secretary of State, to order the criminal to be discharged out of " custody, unless sufficient cause is shown to the contrary.

Execution of warrant of police magistrate.

" 13. The warrant of the police magistrate issued in pursuance " of this Act may be executed in any part of the United Kingdom " in the same manner as if the same had been originally issued or " subsequently indorsed by a justice of the peace having jurisdiction " in the place where the same is executed.

Depositions to be evidence. 6 & 7 Vict. c. 76.

" 14. Depositions or statements on oath, taken in a foreign State, " and copies of such original depositions or statements, and foreign " certificates of or judicial documents stating the fact of conviction, " may, if duly authenticated, be received in evidence in proceedings " under this Act.

Authentication of depositions and warrants. 29 & 30 Vict. c. 121.

" 15. Foreign warrants and depositions or statements on oath, and " copies thereof, and certificates of or judicial documents stating the " fact of a conviction, shall be deemed duly authenticated for the " purposes of this Act if authenticated in manner provided for the " time being by law or authenticated as follows:—

" (1.) If the warrant purports to be signed by a judge, magis- " trate, or officer of the foreign State where the same was " issued;

" (2.) If the depositions or statements or the copies thereof pur- " port to be certified under the hand of a judge, magis- " trate, or officer of the foreign State where the same

" were taken to be the original depositions or statements,
" or to be true copies thereof, as the case may require; and

" (3.) If the certificate of or judicial document stating the fact of " conviction purports to be certified by a judge, magis- " trate, or officer of the foreign State where the conviction " took place; and

" if in every case the warrants, depositions, statements, copies, " certificates, and judicial documents (as the case may be) are " authenticated by the oath of some witness or by being sealed with " the official seal of the minister of justice, or some other minister of " state: And all courts of justice, justices, and magistrates shall " take judicial notice of such official seal, and shall admit the docu- " ments so authenticated by it to be received in evidence without " further proof.

" *Crimes committed at sea.*

Jurisdiction as to crimes committed at sea.

" 16. Where the crime in respect of which the surrender of a " fugitive criminal is sought was committed on board any vessel on " the high seas which comes into any port of the United Kingdom, " the following provisions shall have effect:

" 1. This Act shall be construed as if any stipendiary magistrate " in England or Ireland, and any sheriff or sheriff substi- " tute in Scotland, were substituted for the police magis- " trate throughout this Act, except the part relating to the " execution of the warrant of the police magistrate:

" 2. The criminal may be committed to any prison to which the " person committing him has power to commit persons " accused of the like crime:

" 3. If the fugitive criminal is apprehended on a warrant issued " without the order of a Secretary of State, he shall be " brought before the stipendiary magistrate, sheriff, or " sheriff substitute who issued the warrant, or who has " jurisdiction in the port where the vessel lies, or in the " place nearest to that port.

" *Fugitive Criminals in British Possessions.*

Proceedings as to fugitive criminals in British possessions.

" 17. This Act when applied by Order in Council shall, unless it " is otherwise provided by such Order, extend to every British pos- " session in the same manner as if throughout this Act the British " possession were substituted for the United Kingdom or England, " as the case may require, but with the following modifications; " namely,

" (1.) The requisition for the surrender of a fugitive criminal who " is in or suspected of being in a British possession may " be made to the governor of that British possession by " any person recognized by that governor as a consul- " general, consul, or vice-consul, or (if the fugitive cri- " minal has escaped from a colony or dependency of the

"foreign State on behalf of which the requisition is made)
"as the governor of such colony or dependency:

"(2.) No warrant of a Secretary of State shall be required, and "all powers vested in or acts authorized or required to be "done under this Act by the police magistrate and the "Secretary of State, or either of them, in relation to the "surrender of a fugitive criminal, may be done by the "governor of the British possession alone:

"(3.) Any prison in the British possession may be substituted "for a prison in Middlesex:

"(4.) A judge of any court exercising in the British possession "the like powers as the Court of Queen's Bench exercises "in England may exercise the power of discharging a "criminal when not conveyed within two months out of "such British possession.

Saving of laws of British possessions.

"18. If by any law or ordinance, made before or after the passing "of this Act by the Legislature of any British possession, provision "is made for carrying into effect within such possession the surrender "of fugitive criminals who are in or suspected of being in such British possession, Her Majesty may, by the Order in Council applying this Act in the case of any foreign State, or by any subsequent "Order, either

"suspend the operation within any such British possession of this "Act, or of any part thereof, so far as it relates to such "foreign State, and so long as such law or ordinance continues in force there, and no longer;

"or direct that such law or ordinance, or any part thereof, shall "have effect in such British possession, with or without "modifications and alterations, as if it were part of this Act.

"*General Provisions.*

Criminal surrendered by foreign State not triable for previous crime.

"19. Where, in pursuance of any arrangement with a foreign "State, any person accused or convicted of any crime which, if committed in England, would be one of the crimes described in the "first schedule to this Act is surrendered by that foreign State, such "person shall not, until he has been restored or had an opportunity "of returning to such foreign State, be triable or tried for any offence "committed prior to the surrender in any part of Her Majesty's "dominions other than such of the said crimes as may be proved by "the facts on which the surrender is grounded.

As to use of forms in second schedule.

"20. The forms set forth in the second schedule to this Act, or "forms as near thereto as circumstances admit, may be used in all "matters to which such forms refer, and in the case of a British "possession may be so used, *mutatis mutandis*, and when used shall "be deemed to be valid and sufficient in law.

Revocation, &c., of Order in Council.

"21. Her Majesty may, by Order in Council, revoke or alter, "subject to the restrictions of this Act, any Order in Council made "in pursuance of this Act, and all the provisions of this Act with

"respect to the original Order shall (so far as applicable) apply, "*mutatis mutandis*, to any such new Order.

Application of Act in Channel Islands and Isle of Man.

"22. This Act (except so far as relates to the execution of "warrants in the Channel Islands) shall extend to the Channel "Islands and the Isle of Man in the same manner as if they were part "of the United Kingdom; and the royal courts of the Channel "Islands are hereby respectively authorized and required to register "this Act.

Saving for Indian treaties.

"23. Nothing in this Act shall affect the lawful powers of Her "Majesty or of the Governor-General of India in Council to make "treaties for the extradition of criminals with Indian native States, "or with other Asiatic States conterminous with British India, or to "carry into execution the provisions of any such treaties made either "before or after the passing of this Act.

Power of foreign State to obtain evidence in United Kingdom.

"24. The testimony of any witness may be obtained in relation "to any criminal matter pending in any court or tribunal in a foreign "State in like manner as it may be obtained in relation to any civil "matter under the Act of the session of the nineteenth and twen-"tieth years of the reign of Her present Majesty, chapter one "hundred and thirteen, intituled 'An Act to provide for taking "'evidence in Her Majesty's Dominions in relation to civil and "'commercial matters pending before foreign tribunals;' and all "the provisions of that Act shall be construed as if the term civil "matter included a criminal matter, and the term cause included "a proceeding against a criminal: Provided that nothing in this "section shall apply in the case of any criminal matter of a political "character.

Foreign State includes dependencies.

"25. For the purposes of this Act, every colony, dependency, and "constituent part of a foreign State, and every vessel of that State, "shall (except where expressly mentioned as distinct in this Act) be "deemed to be within the jurisdiction of and to be part of such "foreign State.

Definition of terms.

"26. In this Act, unless the context otherwise requires,—

"British possession:"

"The term 'British possession' means any colony, plantation, "island, territory, or settlement within Her Majesty's dominions, "and not within the United Kingdom, the Channel Islands, "and Isle of Man; and all colonies, plantations, islands, terri-"tories, and settlements under one legislature, as hereinafter "defined, are deemed to be one British possession:

"Legislature:"

"The term 'legislature' means any person or persons who can "exercise legislative authority in a British possession, and "where there are local legislatures as well as a central legisla-"ture, means the central legislature only:

"Governor:"

"The term 'governor' means any person or persons administering "the government of a British possession, and includes the "governor of any part of India:

"Extradition crime:"

"The term 'extradition crime' means a crime which, if com-"mitted in England or within English jurisdiction, would be "one of the crimes described in the first schedule to this Act:

'Conviction:"

"The terms 'conviction' and 'convicted' do not include or refer "to a conviction which under foreign law is a conviction for "contumacy, but the term 'accused person' includes a person "so convicted for contumacy:

"Fugitive criminal:"

"Fugitive criminal of a foreign State:"

"The term 'fugitive criminal' means any person accused or "convicted of an extradition crime committed within the juris- "diction of any foreign State who is in or is suspected of being "in some part of Her Majesty's dominions; and the term "'fugitive criminal of a foreign State' means a fugitive "criminal accused or convicted of an extradition crime com- "mitted within the jurisdiction of that State:

"Secretary of State:'

"The term 'Secretary of State' means one of Her Majesty's "Principal Secretaries of State:

"Police magistrate:"

"The term 'police magistrate' means a chief magistrate of the "metropolitan police courts, or one of the other magistrates of "the metropolitan police court in Bow Street:

"Justice of the peace:"

"The term 'justice of the peace' includes in Scotland any sheriff, "sheriff's substitute, or magistrate:

"Warrant."

"The term 'warrant,' in the case of any foreign State, includes "any judicial document authorizing the arrest of a person "accused or convicted of crime.

"*Repeal of Acts.*

Repeal of Acts in third schedule.

"27. The Acts specified in the third schedule to this Act are "hereby repealed as to the whole of Her Majesty's dominions; and "this Act (with the exception of anything contained in it which "is inconsistent with the treaties referred to in the Acts so repealed) "shall apply (as regards crimes committed either before or after the "passing of this Act), in the case of the foreign States with which "those treaties are made, in the same manner as if an Order in "Council referring to such treaties had been made in pursuance of "this Act, and as if such Order had directed that every law and "ordinance which is in force in any British possession with respect "to such treaties should have effect as part of this Act.

"Provided that if any proceedings for or in relation to the sur- "render of a fugitive criminal have been commenced under the said "Acts previously to the repeal thereof, such proceedings may be "completed, and the fugitive surrendered, in the same manner as if "this Act had not passed."

SCHEDULES.

FIRST SCHEDULE.

LIST OF CRIMES.

The following list of crimes is to be construed according to the law existing in England, or in a British possession, (as the case may be,) at the date of the alleged crime, whether by common law or by statute made before or after the passing of this Act:

Murder, and attempt and conspiracy to murder.

Manslaughter.

Counterfeiting and altering money and uttering counterfeit or altered money.

Forgery, counterfeiting, and altering, and uttering what is forged or counterfeited or altered.

Embezzlement and larceny.

Obtaining money or goods by false pretences.

Crimes by bankrupts against bankruptcy law.

Fraud by a bailee, banker, agent, factor, trustee, or director, or member, or public officer of any company made criminal by any Act for the time being in force.

Rape.

Abduction.

Child stealing.

Burglary and housebreaking.

Arson.

Robbery with violence.

Threats by letter or otherwise with intent to extort.

Piracy by law of nations.

Sinking or destroying a vessel at sea, or attempting or conspiring to do so.

Assaults on board a ship on the high seas with intent to destroy life or to do grievous bodily harm.

Revolt or conspiracy to revolt by two or more persons on board a ship on the high seas against the authority of the master.

SECOND SCHEDULE.

Form of Order of Secretary of State to the Police Magistrate.

To the chief magistrate of the metropolitan police courts *or* other magistrate of the metropolitan police court in Bow Street [*or* the stipendiary magistrate at].

Whereas, in pursuance of an arrangement with , referred to in an Order of Her Majesty in Council dated the day of , a requisition has been made to me, , one of Her Majesty's Principal Secretaries of State, by , the diplomatic representative of , for the surrender of , late of , accused [*or* convicted] of the commission of the crime of within the jurisdiction of : Now I

hereby, by this my order under my hand and seal, signify to you that such requisition has been made, and require you to issue your warrant for the apprehension of such fugitive, provided that the conditions of The Extradition Act, 1870, relating to the issue of such warrant, are in your judgment complied with.

Given under the hand and seal of the undersigned, one of Her Majesty's Principal Secretaries of State, this day of 18 .

Form of Warrant of Apprehension by Order of Secretary of State.

Metropolitan police district, [*or* county *or* borough of] to wit. } To all and each of the constables of the metropolitan police force [*or* of the county *or* borough of].

WHEREAS the Right Honourable one of Her Majesty's Principal Secretaries of State, by order under his hand and seal, hath signified to me that requisition hath been duly made to him for the surrender of late of accused [*or* convicted] of the commission of the crime of within the jurisdiction of : This is therefore to command you in Her Majesty's name forthwith to apprehend the said pursuant to The Extradition Act, 1870, wherever he may be found in the United Kingdom or Isle of Man, and bring him before me or some other [*magistrate sitting in this court], to show cause why he should not be surrendered in pursuance of the said Extradition Act, for which this shall be your warrant.

Given under my hand and seal at [*Bow Street, one of the police courts of the metropolis] this day of 18 .

J. P.

* *Note.*—Alter as required.

Form of Warrant of Apprehension without Order of Secretary of State.

Metropolitan police district, [*or* county *or* borough of] to wit. } To all and each of the constables of the metropolitan police force [*or* of the county *or* borough of].

WHEREAS it has been shown to the undersigned, one of Her Majesty's justices of the peace in and for the metropolitan police district [*or* the said county *or* borough of] that late of is accused [*or* convicted] of the commission of the crime of within the jurisdiction of : This is therefore to command you in Her Majesty's name forthwith to apprehend the said and to bring him before me or some other magistrate sitting at this court [*or* one of Her Majesty's justices of the peace in and for the county [*or* borough] of] to be further dealt with according to law, for which this shall be your warrant.

Given under my hand and seal at Bow Street, one of the police courts of the metropolis, [*or* in the county *or* borough aforesaid] this day of 18 .

J. P.

Form of Warrant for bringing Prisoner before the Police Magistrate.

County [*or* borough of] to wit. } To constable of the police force of and to all other peace officers in the said county [*or* borough] of

WHEREAS late of accused [*or* alleged to be convicted of] the commission of the crime of within the jurisdiction of has been apprehended and brought before the undersigned, one of Her Majesty's justices of the peace in and for the said county [*or* borough] of : And whereas by The Extradition Act, 1870, he is required to be brought before the chief magistrate of the metropolitan police court, or one of the police magistrates of the metropolis sitting at Bow Street, within the metropolitan police district [*or* the stipendiary magistrate for]: This is therefore to command you the said constable in Her Majesty's name forthwith to take and convey the said to the metropolitan police district [*or* the said] and there carry him before the said chief magistrate or one of the police magistrates of the metropolis sitting at Bow Street within the said district [*or* before a stipendiary magistrate sitting in the said] to show cause why he should not be surrendered in pursuance of The Extradition Act, 1870, and otherwise to be dealt with in accordance with law, for which this shall be your warrant.

Given under my hand and seal at in the county [*or* borough] aforesaid, this day of 18 .

J. P.

Form of Warrant of Committal.

Metropolitan police district [*or* the county *or* borough of] to wit } To one of the constables of the metropolitan police force, [*or* of the police force of the county *or* borough of], and to the keeper of the .

BE it remembered, that on this day of in the year of our Lord late of is brought before me the chief magistrate of the metropolitan police courts [*or* one of the police magistrates of the metropolis] sitting at the police court in Bow Street, within the metropolitan police district, [*or* a stipendiary magistrate for ,] to show cause why he should not be surrendered in pursuance of The Extradition Act, 1870, on the ground of his being accused [*or* convicted] of the commission of the crime of within the jurisdiction of , and forasmuch as no sufficient cause has been shown to me why he should not be surrendered in pursuance of the said Act:

This is therefore to command you the said constable in Her Majesty's name forthwith to convey and deliver the body of the said into the custody of the said keeper of the at , and you the said keeper to receive the said into your custody, and him there safely to keep until he is thence delivered pursuant to the provisions of the said Extradition Act, for which this shall be your warrant.

Given under my hand and seal at Bow Street, one of the police courts of the metropolis, [*or* at the said] this day of 18 .

J. P.

Form of Warrant of Secretary of State for Surrender of Fugitive.

To the keeper of and to .

WHEREAS late of accused [*or* convicted] of the commission of the crime of within the jurisdiction of , was delivered into the custody of you the keeper of by warrant dated pursuant to The Extradition Act, 1870:

Now I do hereby, in pursuance of the said Act, order you the said keeper to deliver the body of the said into the custody of the said , and I command you the said to receive the said into your custody, and to convey him within the jurisdiction of the said , and there place him in the custody of any person or persons appointed by the said to receive him, for which this shall be your warrant.

Given under the hand and seal of the undersigned, one of Her Majesty's Principal Secretaries of State, this day of .

THIRD SCHEDULE.

Year and Chapter.	Title.
6 & 7 Vict. c. 75.	An Act for giving effect to a convention between Her Majesty and the King of the French for the apprehension of certain offenders.
6 & 7 Vict. c. 76.	An Act for giving effect to a treaty between Her Majesty and the United States of America for the apprehension of certain offenders.
8 & 9 Vict. c. 120.	An Act for facilitating execution of the treaties with France and the United States of America for the apprehension of certain offenders.
25 & 26 Vict. c. 70.	An Act for giving effect to a convention between Her Majesty and the King of Denmark for the mutual surrender of criminals.
29 & 30 Vict. c. 121.	An Act for the amendment of the law relating to treaties of extradition.

APPENDIX X. Page 463.

Twenty-four Protocols preceded the signing of the Treaty of Paris. The Twenty-third—often cited on account of "the wish" that an attempt at friendly arbitration should be made before having recourse to war—is as follows:—

(Translation.)

"*Protocol No.* 23.—*Meeting of April* 14, 1856.

"Present: The Plenipotentiaries of Austria, France, Great Britain, "Prussia, Russia, Sardinia, Turkey.

"The Protocol of the preceding sitting and its Annex are read "and approved.

"Count Walewski remarks that it remains for the Congress to "decide upon the draft of Declaration, of which he indicated the "bases in the last meeting, and he demands of the Plenipotentiaries "who had reserved to themselves to take the orders of their respective "Courts in regard to this matter, whether they are authorized to "assent to it.

"Count Buol declares that Austria is happy to concur in an Act "of which she recognizes the salutary influence, and that he has "been furnished with necessary powers to adhere to it.

"Count Orloff expresses himself in the same sense: he adds, "however, that, in adopting the proposition made by the first Pleni-"potentiary of France, his Court cannot bind itself to maintain the "principle of the abolition of privateering and to defend it against "Powers who might not think proper to accede to it.

"The Plenipotentiaries of Prussia, of Sardinia, and of Turkey, "having equally given their assent, the Congress adopts the draft "annexed to the present Protocol, and appoints the next meeting for "the signature of it.

"The Earl of Clarendon having demanded permission to lay "before the Congress a proposition which it appears to him ought "to be favourably received, states that the calamities of war are still "too present to every mind not to make it desirable to seek out "every expedient calculated to prevent their return; that a stipu-"lation had been inserted in Article VII. of the Treaty of Peace, "recommending that in case of difference between the Porte and "one or more of the other signing Powers, recourse should be had "to the mediation of a friendly State before resorting to force.

"The first Plenipotentiary of Great Britain conceives that this "happy innovation might receive a more general application, and "thus become a barrier against conflicts which frequently only break "forth because it is not always possible to enter into explanation "and to come to an understanding.

"He proposes, therefore, to agree upon a resolution calculated to "afford to the maintenance of peace that chance of duration here-

" after, without prejudice, however, to the independence of Govern-
" ments.

" Count Walewski declares himself authorized to support the idea " expressed by the first Plenipotentiary of Great Britain; he gives the " assurance that the Plenipotentiaries of France are wholly disposed " to concur in the insertion in the Protocol of a wish which, being " fully in accordance with the tendencies of our epoch, would not " in any way fetter the free action of Governments.

" Count Buol would not hesitate to concur in the opinion of the " Plenipotentiaries of Great Britain and of France, if the resolution " of the Congress is to have the form indicated by Count Walewski, " but he could not take, in the name of his Court, an absolute en-" gagement calculated to limit the independence of the Austrian " Cabinet.

" The Earl of Clarendon replies that each Power is and will be " the sole judge of the requirements of its honour and of its interests; " that it is by no means his intention to restrict the authority of the " Governments, but only to afford them the opportunity of not " having recourse to arms whenever differences may be adjusted by " other means.

" Baron Manteuffel gives the assurance that the King, his august " master, completely shares the ideas set forth by the Earl of " Clarendon; that he therefore considers himself authorized to " adhere to them, and to give them the utmost development which " they admit of.

" Count Orloff, while admitting the wisdom of the proposal made " to the Congress, considers that he must refer to his Court respect-" ing it, before he expresses the opinion of the Plenipotentiaries of " Russia.

" Count Cavour, before he gives his opinion, wishes to know " whether, in the intention of the author of the proposition, the wish " to be expressed by the Congress would extend to military inter-" ventions directed against *de facto* Governments, and quotes, as an " instance, the intervention of Austria in the Kingdom of Naples in " 1821.

" Lord Clarendon replies that the wish of the Congress should " allow of the most general application; he observes that if the good " offices of another Power had induced the Government of Greece " to respect the laws of neutrality, France and England would very " probably have abstained from occupying the Piræus with their " troops. He refers to the efforts made by the Cabinet of Great " Britain in 1823, in order to prevent the armed intervention which " took place at that time in Spain.

" Count Walewski adds, that there is no question of stipulating " for a right or of taking an engagement; that the wish expressed " by the Congress cannot in any case oppose limits to the liberty of " judgment of which no Power can divest itself in questions affect-" ing its dignity; that there is therefore no inconvenience in attach-

"ing a general character to the idea entertained by the Earl of "Clarendon, and in giving to it the most extended application.

"Count Buol says that Count Cavour, in speaking in another "sitting of the occupation of the Legations by Austrian troops, for- "got that other foreign troops have been invited into the Roman "States. To-day, while speaking of the occupation by Austria of "the Kingdom of Naples in 1821, he forgets that that occupation "was the result of an understanding between the Five Great Powers "assembled at the Congress of Laybach. In both cases, he attri- "butes to Austria the merit of an initiative and of a spontaneous "action which the Austrian Plenipotentiaries are far from claiming "for her.

"The intervention, adverted to by the Plenipotentiary of Sar- "dinia, took place, he adds, in consequence of the discussions of the "Congress of Laybach; it therefore comes within the scope of the "ideas expressed by Lord Clarendon. Similar cases might perhaps "recur, and Count Buol does not allow that an intervention carried "into effect in consequence of an agreement come to between the "Five Great Powers, can become the object of remonstrances of a "State of the second order.

"Count Buol approves the proposition in the shape that Lord "Clarendon has presented it, as having a humane object; but he "could not assent to it if it were wished to give to it too great an "extension, or to deduce from it consequences favourable to *de facto* "Governments, and to doctrines which he cannot admit.

"He desires besides that the Conference, at the moment of ter- "minating its labours, should not find itself compelled to discuss "irritating questions, calculated to disturb the perfect harmony "which has not ceased to prevail among the Plenipotentiaries.

"Count Cavour declares that he is fully satisfied with the expla- "nations which he has elicited, and he accedes to the proposition "submitted to the Congress.

"Whereupon the Plenipotentiaries do not hesitate to express, "in the name of their Governments, the wish that States between "which any serious misunderstanding may arise, should, before ap- "pealing to arms, have recourse, as far as circumstances might allow, "to the good offices of a friendly Power.

"The Plenipotentiaries hope that the Governments not repre- "sented at the Congress will unite in the sentiment which has in- "spired the wish recorded in the present Protocol."

(The Signatures follow.)

(Translation.)

" *General Treaty between Her Majesty, the Emperor of Austria, the " Emperor of the French, the King of Prussia, the Emperor of " Russia, the King of Sardinia, and the Sultan. Signed at Paris, " March* 30, 1856. [*Ratifications exchanged at Paris, April* 27, " 1856].

" In the Name of Almighty God.

" Their Majesties the Queen of the United Kingdom of Great " Britain and Ireland, the Emperor of the French, the Emperor of " all the Russias, the King of Sardinia, and the Emperor of the " Ottomans, animated by the desire of putting an end to the calami- " ties of war, and wishing to prevent the return of the complications " which occasioned it, resolved to come to an understanding with " His Majesty the Emperor of Austria as to the bases on which " peace might be re-established and consolidated, by securing, " through effectual and reciprocal guarantees, the independence and " integrity of the Ottoman Empire.

" For this purpose their said Majesties named as their Pleni- " potentiaries, that is to say:

" Her Majesty the Queen of the United Kingdom of Great Britain " and Ireland, the Earl of Clarendon and Baron Cowley; His Ma- " jesty the Emperor of Austria, the Count of Buol-Schauenstein " and Baron de Hübner; His Majesty the Emperor of the French, " Count Colonna Walewski and Baron de Bourqueney; His " Majesty the Emperor of all the Russias, Count Orloff and Baron " de Brunnow; His Majesty the King of Sardinia, the Count of " Cavour and the Marquis de Villa-Marina; and His Majesty the " Emperor of the Ottomans, Mouhammed Emin Aali Pasha and " Mehemmed Djemil Bey; which Plenipotentiaries assembled in " Congress at Paris.

" An understanding having been happily established between " them, their Majesties the Queen of the United Kingdom of Great " Britain and Ireland, the Emperor of Austria, the Emperor of the " French, the Emperor of all the Russias, the King of Sardinia, and " the Emperor of the Ottomans, considering that, in the interest of " Europe, His Majesty the King of Prussia, a signing party to the " Convention of the 13th of July, 1841, should be invited to par- " ticipate in the new arrangements to be adopted, and appreciating " the value that the concurrence of His said Majesty would add to " a work of general pacification, invited him to send Plenipotentiaries " to the Congress.

" In consequence, His Majesty the King of Prussia named as his " Plenipotentiaries, that is to say:

" The Baron de Manteuffel and the Count of Hatzfeldt Wilden- " burg-Schoenstein.

" The Plenipotentiaries, after having exchanged their full powers, " found in good and due form, have agreed upon the following " Articles:—

" Art. I.—From the day of the exchange of the ratifications of the
" present Treaty, there shall be peace and friendship between Her
" Majesty the Queen of the United Kingdom of Great Britain and
" Ireland, His Majesty the Emperor of the French, His Majesty the
" King of Sardinia, His Imperial Majesty the Sultan, on the one
" part, and His Majesty the Emperor of all the Russias, on the other
" part; as well as between their heirs and successors, their re-
" pective dominions and subjects, in perpetuity.

" Art. II.—Peace being happily re-established between their said
" Majesties, the territories conquered or occupied by their armies
" during the war shall be reciprocally evacuated.

" Special arrangements shall regulate the mode of the evacuation,
" which shall be as prompt as possible.

" Art. III.—His Majesty the Emperor of all the Russias engages
" to restore to His Majesty the Sultan the town and citadel of Kars,
" as well as the other parts of the Ottoman territory of which the
" Russian troops are in possession.

" Art. IV.—Their Majesties the Queen of the United Kingdom of
" Great Britain and Ireland, the Emperor of the French, the King
" of Sardinia, and the Sultan, engage to restore to His Majesty the
" Emperor of all the Russias, the towns and ports of Sebastopol,
" Balaklava, Kamiesch, Eupatoria, Kertch, Jenikale, Kinburn, as
" well as all other territories occupied by the allied troops.

" Art. V.—Their Majesties the Queen of the United Kingdom of
" Great Britain and Ireland, the Emperor of the French, the Em-
" peror of all the Russias, the King of Sardinia, and the Sultan,
" grant a full and entire amnesty to those of their subjects who may
" have been compromised by any participation whatsoever in the
" events of the war in favour of the cause of the enemy.

" It is expressily understood that such amnesty shall extend to
" the subjects of each of the belligerent parties who may have con-
" tinued, during the war, to be employed in the service of one of
" the other belligerents.

" Art. VI.—Prisoners of war shall be immediately given up on
" either side.

" Art. VII.—Her Majesty the Queen of the United Kingdom of
" Great Britain and Ireland, His Majesty the Emperor of Austria,
" His Majesty the Emperor of the French, His Majesty the King of
" Prussia, His Majesty the Emperor of all the Russias, and His
" Majesty the King of Sardinia, declare the Sublime Porte admitted
" to participate in the advantages of the public law and system
" (*concert*) of Europe. Their Majesties engage, each on his part, to
" respect the independence and the territorial integrity of the Otto-
" man Empire; guarantee in common the strict observance of that
" engagement; and will, in consequence, consider any act tending
" to its violation as a question of general interest.

" Art. VIII.—If there should arise between the Sublime Porte
" and one or more of the other signing Powers, any misunderstand-

" ing which might endanger the maintenance of their relations, the " Sublime Porte, and each of such Powers, before having recourse " to the use of force, shall afford the other contracting parties the " opportunity of preventing such an extremity by means of their " mediation.

" Art. IX.—His Imperial Majesty the Sultan, having, in his " constant solicitude for the welfare of his subjects, issued a firman " which, while ameliorating their condition without distinction of " religion or of race, records his generous intentions towards the " Christian population of his Empire, and wishing to give a further " proof of his sentiments in that respect, has resolved to communicate " to the Contracting Parties the said firman emanating spontaneously " from his sovereign will.

" The Contracting Powers recognize the high value of this com- " munication. It is clearly understood that it cannot, in any case, " give to the said Powers the right to interfere, either collectively " or separately, in the relation of His Majesty the Sultan with his " subjects, nor in the internal administration of his Empire.

" Art. X.—The Convention of the 13th of July, 1841, which " maintains the ancient rule of the Ottoman Empire relative to the " closing of the Straits of the Bosphorus and of the Dardanelles, has " been revised by common consent.

" The Act concluded for that purpose, and in conformity with that " principle, between the High Contracting Parties, is and remains " annexed to the present Treaty, and shall have the same force and " validity as if it formed an integral part thereof.

" Art. XI.—The Black Sea is neutralized: its waters and its " ports, thrown open to the mercantile marine of every nation, are " formally and in perpetuity interdicted to the flag of war, either of " the Powers possessing its coasts, or of any other Power, with the " exceptions mentioned in Articles XIV. and XIX. of the present " Treaty.

" Art. XII.—Free from any impediment, the commerce in the " ports and waters of the Black Sea shall be subject only to regula- " tions of health, customs, and police, framed in a spirit favourable " to the development of commercial transactions.

" In order to afford to the commercial and maritime interests of " every nation the security which is desired, Russia and the Sublime " Porte will admit Consuls into their ports situated upon the coast " of the Black Sea, in conformity with the principles of International " Law.

" Art. XIII.—The Black Sea being neutralized according to " the terms of Article XI., the maintenance or establishment upon its " coast of military-maritime arsenals becomes alike unnecessary and " purposeless; in consequence, His Majesty the Emperor of all the " Russias and His Imperial Majesty the Sultan engage not to establish " or to maintain upon that coast any military-maritime arsenal.

" Art. XIV.—Their Majesties the Emperor of all the Russias

" and the Sultan having concluded a Convention for the purpose of
" settling the force and the number of light vessels, necessary for the
" service of their coasts, which they reserve to themselves to main-
" tain in the Black Sea, that Convention is annexed to the present
" Treaty, and shall have the same force and validity as if it formed
" an integral part thereof. It cannot be either annulled or modified
" without the assent of the Powers signing the present Treaty.

" Art. XV.—The Act of the Congress of Vienna having esta-
" blished the principles intended to regulate the navigation of rivers
" which separate or traverse different States, the Contracting Powers
" stipulate among themselves that those principles shall in future be
" equally applied to the Danube and its mouths. They declare that
" this arrangement henceforth forms a part of the public law of
" Europe, and take it under their guarantee.

" The navigation of the Danube cannot be subjected to any im-
" pediment or charge not expressly provided for by the stipulations
" contained in the following Articles: in consequence, there shall
" not be levied any toll founded solely upon the fact of the naviga-
" tion of the river, nor any duty upon the goods which may be on
" board of vessels. The regulations of police and of quarantine to
" be established for the safety of the States separated or traversed by
" that river shall be so framed as to facilitate, as much as possible,
" the passage of vessels. With the exception of such regulations, no
" obstacle whatever shall be opposed to free navigation.

" Art. XVI.—With the view to carry out the arrangements
" of the preceding Article, a Commission, in which Great Britain,
" Austria, France, Prussia, Russia, Sardinia, and Turkey, shall each
" be represented by one delegate, shall be charged to designate and
" to cause to be executed the works necessary below Isatcha, to clear
" the mouths of the Danube, as well as the neighbouring parts of
" the sea, from the sands and other impediments which obstruct
" them, in order to put that part of the river and the said parts of
" the sea in the best possible state for navigation.

" In order to cover the expenses of such works, as well as of the
" establishments intended to secure and to facilitate the navigation
" at the mouths of the Danube, fixed duties, of a suitable rate,
" settled by the Commission by a majority of votes, may be levied,
" on the express condition that, in this respect as in every other, the
" flags of all nations shall be treated on the footing of perfect equality.

" Art. XVII.—A Commission shall be established, and shall
" be composed of delegates of Austria, Bavaria, the Sublime Porte,
" and Wurtemberg (one for each of those Powers), to whom shall be
" added Commissioners from the three Danubian Principalities,
" whose nomination shall have been approved by the Porte. This
" Commission, which shall be permanent: 1. Shall prepare regula-
" tions of navigation and river police; 2. Shall remove the impedi-
" ments, of whatever nature they may be, which still prevent the
" application to the Danube of the arrangements of the Treaty of

"Vienna; 3. Shall order and cause to be executed the necessary "works throughout the whole course of the river; and 4, Shall, "after the dissolution of the European Commission, see to maintaining the mouths of the Danube and the neighbouring parts of "the sea in a navigable state.

"ART. XVIII.—It is understood that the European Commission shall have completed its task, and that the River Commission shall have finished the works described in the preceding "Article, under Nos. 1 and 2, within the period of two years. The "signing Powers assembled in Conference having been informed of "that fact, shall, after having placed it on record, pronounce the "dissolution of the European Commission, and from that time the "permanent River Commission shall enjoy the same powers as those "with which the European Commission shall have until then been "invested.

"ART. XIX.—In order to ensure the execution of the regulations which shall have been established by common agreement, in "conformity with the principles above declared, each of the Contracting Powers shall have the right to station, at all times, two "light vessels at the mouths of the Danube.

"ART. XX.—In exchange for the towns, ports, and territories "enumerated in Article IV. of the present Treaty, and in order more "fully to secure the freedom of the navigation of the Danube, His "Majesty the Emperor of all the Russias consents to the rectification "of his frontier in Bessarabia.

"The new frontier shall begin from the Black Sea, one kilomètre "to the east of the Lake Bourna Sola, shall run perpendicularly to "the Akerman road, shall follow that road to the *Val de Trajan*, "pass to the south of Bolgrad, ascend the course of the River Yalpuck to the Height of Saratsika, and terminate at Katamori on the "Pruth. Above that point the old frontier between the two Empires "shall not undergo any modification.

"Delegates of the Contracting Powers shall fix, in its details, the "line of the new frontier.

"ART. XXI.—The territory ceded by Russia shall be annexed to "the Principality of Moldavia under the suzerainty of the Sublime "Porte.

"The inhabitants of that territory shall enjoy the rights and privileges secured to the Principalities; and, during the space of "three years, they shall be permitted to transfer their domicile "elsewhere, disposing freely of their property.

"ART. XXII.—The Principalities of Wallachia and Moldavia "shall continue to enjoy under the suzerainty of the Porte, and "under the guarantee of the Contracting Powers, the privileges and "immunities of which they are in possession. No exclusive protection shall be exercised over them by any of the guaranteeing "Powers. There shall be no separate right of interference in their "internal affairs.

" Art. XXIII.—The Sublime Porte engages to preserve to the
" said Principalities an independent and national administration, as
" well as full liberty of worship, of legislation, of commerce, and
" of navigation.

" The laws and statutes at present in force shall be revised. In
" order to establish a complete agreement in regard to such revision,
" a Special Commission, as to the composition of which the High
" Contracting Powers will come to an understanding among them-
" selves, shall assemble, without delay, at Bucharest, together with
" a Commissioner of the Sublime Porte.

" The business of this Commission shall be to investigate the
" present state of the Principalities, and to propose bases for their
" future organization.

" Art. XXIV.—His Majesty the Sultan promises to convoke
" immediately in each of the two Provinces a Divan *ad hoc*, com-
" posed in such a manner as to represent most closely the interests
" of all classes of society. These Divans shall be called upon to
" express the wishes of the people in regard to the definitive organi-
" zation of the Principalities.

" An instruction from the Congress shall regulate the relations
" between the Commission and these Divans.

" Art. XXV.—Taking into consideration the opinion expressed by
" the two Divans, the Commission shall transmit, without delay, to
" the present seat of the Conferences, the result of its own labours.

" The final agreement with the Suzerain Power shall be recorded
" in a Convention to be concluded at Paris between the High Con-
" tracting Parties; and a hatti-sherif, in conformity with the sti-
" pulations of the Convention, shall constitute definitively the
" organization of those Provinces, placed thenceforward under the
" collective guarantee of all the signing Powers.

" Art. XXVI.—It is agreed that there shall be in the Princi-
" palities a national armed force, organized with the view to maintain
" the security of the interior, and to ensure that of the frontiers.
" No impediment shall be opposed to the extraordinary measures of
" defence which, by agreement with the Sublime Porte, they may
" be called upon to take in order to repel any external aggression.

" Art. XXVII.—If the internal tranquillity of the Principalities
" should be menaced or compromised, the Sublime Porte shall
" come to an understanding with the other Contracting Powers
" in regard to the measures to be taken for maintaining or re-
" establishing legal order. No armed intervention can take place
" without previous agreement between those Powers.

" Art. XXVIII.—The Principality of Servia shall continue to
" hold of the Sublime Porte, in conformity with the Imperial
" Hats which fix and determine its rights and immunities, placed
" henceforward under the collective guarantee of the Contracting
" Powers.

" In consequence, the said Principality shall preserve its inde-

"pendent and national administration, as well as full liberty of "worship, of legislation, of commerce, and of navigation.

"Art. XXIX.—The right of garrison of the Sublime Porte, "as stipulated by anterior regulations, is maintained. No armed "intervention can take place in Servia without previous agreement "between the High Contracting Powers.

"Art. XXX.—His Majesty the Emperor of all the Russias and "His Majesty the Sultan maintain, in its integrity, the state of their "possessions in Asia, such as it legally existed before the rupture.

"In order to prevent all local dispute the line of frontier shall be "verified, and, if necessary, rectified, without any prejudice as "regards territory being sustained by either party.

"For this purpose a Mixed Commission, composed of two Russian "Commissioners, two Ottoman Commissioners, one English Com-"missioner, and one French Commissioner, shall be sent to the spot "immediately after the re-establishment of diplomatic relations "between the Court of Russia and the Sublime Porte. Its labours "shall be completed within the period of eight months after the "exchange of the ratifications of the present Treaty.

"Art. XXXI.—The territories occupied during the war by the "troops of their Majesties the Queen of the United Kingdom of "Great Britain and Ireland, the Emperor of Austria, the Emperor "of the French, and the King of Sardinia, according to the terms of "the Conventions signed at Constantinople on the twelfth of March, "one thousand eight hundred and fifty-four, between Great Britain, "France, and the Sublime Porte; on the fourteenth of June of the "same year between Austria and the Sublime Porte; and on the "fifteenth of March, one thousand eight hundred and fifty-five, "between Sardinia and the Sublime Porte; shall be evacuated as "soon as possible after the exchange of the ratifications of the "present Treaty. The periods and the means of execution shall "form the object of an arrangement between the Sublime Porte "and the Powers whose troops have occupied its territory.

"Art. XXXII.—Until the Treaties or Conventions which ex-"isted before the war between the belligerent Powers have been "either renewed or replaced by new Acts, commerce of importation "or of exportation shall take place reciprocally on the footing of the "regulations in force before the war; and in all other matters their "subjects shall be respectively treated upon the footing of the most "favoured nation.

"Art. XXXIII.—The Convention concluded this day between "their Majesties the Queen of the United Kingdom of Great Britain "and Ireland, the Emperor of the French, on the one part, and His "Majesty the Emperor of all the Russias, on the other part, re-"specting the Aland Islands, is and remains annexed to the present "Treaty, and shall have the same force and validity as if it formed "a part thereof.

"Art. XXXIV.—The present Treaty shall be ratified, and the

" ratifications shall be exchanged at Paris in the space of four weeks, " or sooner if possible.

" In witness whereof the respective Plenipotentiaries have signed " the same, and have affixed thereto the seal of their arms.

" Done at Paris, the thirtieth day of the month of March, in the " year one thousand eight hundred and fifty-six."

(The Signatures follow.)

ADDITIONAL AND TRANSITORY ARTICLE.

" The stipulations of the Convention respecting the Straits, signed " this day, shall not be applicable to the vessels of war employed by " the belligerent Powers for the evacuation, by sea, of the territories " occupied by their armies; but the said stipulations shall resume " their entire effect as soon as the evacuation shall be terminated.

" Done at Paris, the thirtieth day of the month of March, in the " year one thousand eight hundred and fifty-six."

(The Signatures follow.)

CONVENTIONS ANNEXED TO THE PRECEDING TREATY.

" 1.—*Convention between Her Majesty, the Emperor of Austria, the " Emperor of the French, the King of Prussia, the Emperor of " Russia, and the King of Sardinia, on the one part, and the " Sultan, on the other part, respecting the Straits of the Dar- " danelles and of the Bosphorus. Signed at Paris, March* 30, " 1856. [*Ratifications exchanged at Paris, April* 27, 1856.]

" In the Name of Almighty God.

" Their Majesties the Queen of the United Kingdom of Great " Britain and Ireland, the Emperor of Austria, the Emperor of the " French, the King of Prussia, the Emperor of all the Russias, " signing parties to the Convention of the thirteenth day of July, " one thousand eight hundred and forty-one; and His Majesty the " King of Sardinia; wishing to record in common their unanimous " determination to conform to the ancient rule of the Ottoman " Empire, according to which the Straits of the Dardanelles and of " the Bosphorus are closed to foreign ships of war, so long as the " Porte is at peace;

" Their said Majesties, on the one part, and His Majesty the " Sultan, on the other, have resolved to renew the Convention con- " cluded at London on the thirteenth day of July, one thousand " eight hundred and forty-one, with the exception of some modi- " fications of detail which do not affect the principle upon which it " rests.

" In consequence their said Majesties have named for that purpose " as their Plenipotentiaries, that is to say:—

" Her Majesty the Queen of the United Kingdom of Great Britain " and Ireland, the Earl of Clarendon and Baron Cowley; His

" Majesty the Emperor of Austria, the Count of Buol-Schauenstein
" and Baron de Hübner; His Majesty the Emperor of the French,
" Count Colonna Walewski and Baron de Bourqueney; His Majesty
" the King of Prussia, the Baron de Manteuffel and the Count of
" Hatzfeldt Wildenburg-Schoenstein; His Majesty the Emperor of
" all the Russias, Count Orloff and Baron de Brunnow; His Majesty
" the King of Sardinia, the Count of Cavour and the Marquis de
" Villa-Marina; and His Majesty the Emperor of the Ottomans,
" Mouhammed Emin Aali Pasha and Mehemmed Djemil Bey; who,
" after having exchanged their full powers, found in good and due
" form, have agreed upon the following Articles:—

" Art. I.—His Majesty the Sultan, on the one part, declares that
" he is firmly resolved to maintain for the future the principle in-
" variably established as the ancient rule of his Empire, and in
" virtue of which it has, at all times, been prohibited for the ships
" of war of foreign Powers to enter the Straits of the Dardanelles
" and of the Bosphorus; and that, so long as the Porte is at peace,
" His Majesty will admit no foreign ship of war into the said
" Straits.

" And their Majesties the Queen of the United Kingdom of Great
" Britain and Ireland, the Emperor of Austria, the Emperor of the
" French, the King of Prussia, the Emperor of all the Russias, and
" the King of Sardinia, on the other part, engage to respect this
" determination of the Sultan, and to conform themselves to the
" principle above declared.

" Art. II.—The Sultan reserves to himself, as in past times, to
" deliver firmans of passage for light vessels under flag of war,
" which shall be employed, as is usual, in the service of the missions
" of foreign Powers.

" Art. III.—The same exception applies to the light vessels under
" flag of war which each of the Contracting Powers is authorized to
" station at the mouths of the Danube in order to secure the execu-
" tion of the regulations relative to the liberty of that river, and
" the number of which is not to exceed two for each Power.

" Art. IV.—The present Convention, annexed to the General
" Treaty signed at Paris this day, shall be ratified, and the ratifica-
" tions shall be exchanged in the space of four weeks, or sooner if
" possible.

" In witness whereof the respective Plenipotentiaries have signed
" the same, and have affixed thereto the seal of their arms.

" Done at Paris, the thirtieth day of the month of March, in the
" year one thousand eight hundred and fifty-six."

(The Signatures follow.)

" 2.—*Convention between the Emperor of Russia and the Sultan,* " *limiting their Naval Force in the Black Sea. Signed at Paris,* " *March* 30, 1856. [*Ratifications exchanged at Paris, April* 27, " 1856.]

" In the Name of Almighty God.

" His Majesty the Emperor of all the Russias, and His Imperial " Majesty the Sultan, taking into consideration the principle of the " neutralization of the Black Sea established by the preliminaries " contained in the Protocol No. 1, signed at Paris on the twenty- " fifth of February of the present year, and wishing, in consequence, " to regulate by common agreement the number and the force of " the light vessels which they have reserved to themselves to main- " tain in the Black Sea for the service of their coasts, have resolved " to sign, with that view, a special Convention, and have named for " that purpose:

" His Majesty the Emperor of all the Russias, the Count Orloff " and Baron de Brunnow; and His Majesty the Emperor of the " Ottomans, Mouhammed Emin Aali Pasha and Mehemmed Djemil " Bey; who, after having exchanged their full powers, found in " good and due form, have agreed upon the following Articles:—

" ART. I.—The High Contracting Parties mutually engage not to " have in the Black Sea any other vessels of war than those of " which the number, the force, and the dimensions are hereinafter " stipulated.

" ART. II.—The High Contracting Parties reserve to themselves " each to maintain in that sea six steam-vessels of fifty mètres in " length at the line of floatation, of a tonnage of eight hundred tons " at the maximum, and four light steam or sailing vessels of a " tonnage which shall not exceed two hundred tons each.

" ART. III.—The present Convention, annexed to the General " Treaty signed at Paris this day, shall be ratified, and the ratifica- " tions shall be exchanged in the space of four weeks, or sooner, if " possible.

" In witness whereof the respective Plenipotentiaries have signed " the same and have affixed thereto the seal of their arms.

" Done at Paris, the thirtieth day of the month of March, in the " year one thousand eight hundred and fifty-six."

(The Signatures follow.)

" 3.—*Convention between Her Majesty, the Emperor of the French,* " *and the Emperor of Russia, respecting the Aland Islands.* " *Signed at Paris, March* 30, 1856. [*Ratifications exchanged* " *at Paris, April* 27, 1856.]

" In the Name of Almighty God.

" Her Majesty the Queen of the United Kingdom of Great Britain " and Ireland, His Majesty the Emperor of the French, and His

" Majesty the Emperor of all the Russias, wishing to extend to the
" Baltic Sea the harmony so happily re-established between them
" in the East, and thereby to consolidate the benefits of the general
" peace, have resolved to conclude a Convention, and have named
" for that purpose:

" Her Majesty the Queen of the United Kingdom of Great Britain
" and Ireland, the Earl of Clarendon and Baron Cowley; His
" Majesty the Emperor of the French, Count Colonna Walewski
" and Baron de Bourqueney; and His Majesty the Emperor of all
" the Russias, Count Orloff and Baron de Brunnow; who, after
" having exchanged their full powers, found in good and due form,
" have agreed upon the following Articles:—

" ART. I.—His Majesty the Emperor of all the Russias, in order
" to respond to the desire which has been expressed to him by their
" Majesties the Queen of the United Kingdom of Great Britain and
" Ireland, and the Emperor of the French, declares that the Aland
" Islands shall not be fortified, and that no military or naval esta-
" blishment shall be maintained or created there.

" ART. II.—The present Convention, annexed to the General
" Treaty signed at Paris this day, shall be ratified, and the ratifica-
" tions shall be exchanged in the space of four weeks, or sooner, if
" possible.

" In witness whereof, the respective Plenipotentiaries have signed
" the same, and have affixed thereto the seal of their arms.

" Done at Paris, the thirtieth day of the month of March, in the
" year one thousand eight hundred and fifty-six."

(The Signatures follow.)

The firman referred to in the Ninth Article of the Treaty of Paris is as follows. See also *De Martens.*

" *Firman and Hatti-Sheriff by the Sultan, governing the Condition*
" *of non-Mussulman and Christian Subjects of the Porte.—*
" *February* 18, 1856.

" Let it be done as herein set forth. To you my Grand Vizier,
" Mehemed Emin Aali Pasha, decorated with my Imperial Order
" of the Medjidiyé of the first class, and with the Order of Personal
" Merit; may God grant to you greatness and increase your power.

" It has been my most earnest desire to ensure the happiness of
" all classes of the subjects whom Divine Providence has placed
" under my Imperial sceptre, and since my accession to the throne
" I have not ceased to direct all my efforts to the attainment of that
" end.

" Thanks to the Almighty, these unceasing efforts have already
" been productive of numerous useful results. From day to day
" the happiness of the nation and the wealth of my dominions go on
" augmenting.

" It being now my desire to renew and enlarge still more the
" new institutions ordained with the view of establishing a state of
" things conformable with the dignity of my Empire and the position
" which it occupies among civilized nations; and the rights of my
" Empire having, by the fidelity and praiseworthy efforts of all my
" subjects, and by the kind and friendly assistance of the Great
" Powers, my noble allies, received from abroad a confirmation
" which will be the commencement of a new era; it is my desire to
" augment its wellbeing and prosperity, to effect the happiness of
" all my subjects, who in my sight are all equal and equally dear to
" me, and who are united to each other by the cordial ties of pa-
" triotism, and to ensure the means of daily increasing the prosperity
" of my Empire.

" I have therefore resolved upon, and I order the execution of, the
" following measures. The guarantees promised on our part by the
" Hatt-i-Humaïon of Gul Hané, and in conformity with the Tanzi-
" mat, to all the subjects of my Empire, without distinction of classes
" or of religion, for the security of their persons and property, and
" the preservation of their honour, are to-day confirmed and consoli-
" dated, and efficacious measures shall be taken in order that they
" may have their full and entire effect. All the privileges and
" spiritual immunities granted by my ancestors, *ab antiquo*, and at
" subsequent dates, to all Christian communities or other non-Mus-
" sulman persuasions established in my Empire under my protection,
" shall be confirmed and maintained. Every Christian or other non-
" Mussulman community shall be bound, within a fixed period, and
" with the concurrence of a commission composed *ad hoc* of mem-
" bers of its own body, to proceed, with my high approbation and
" under the inspection of my Sublime Porte, to examine into its
" actual immunities and privileges, and to discuss and submit to my
" Sublime Porte the reforms required by the progress of civilization
" and of the age. The powers conceded to the Christian Patriarchs
" and Bishops by the Sultan Mahomet II. and his successors shall
" be made to harmonize with the new position which my generous
" and beneficent intentions ensure to these communities. The prin-
" ciple of nominating the Patriarchs for life, after the revision of the
" rules of election now in force, shall be executed comformably to
" the tenour of their firmans of investiture. The Patriarchs, the
" Metropolitans, Archbishops, Bishops, and Rabbins shall take an
" oath on their entrance into office according to a form agreed upon
" in common by my Sublime Porte and the spiritual heads of the
" different religious communities. The ecclesiastical dues, of what-
" ever sort or nature they be, shall be fixed, abolished, and replaced
" by fixed revenues for the Patriarchs and heads of communities,
" and by the allocation of allowances and salaries equitably propor-
" tioned to the importance of the rank and the dignity of the
" different members of the clergy. The property, real or personal,
" of the different Christian ecclesiastics shall remain intact; the

" temporal administration of the Christian or other non-Mussulman
" communities, shall, however, be placed under the safeguard of an
" assembly to be chosen from among the members, both ecclesiastics
" and laymen, of the said communities. In the towns, small bo-
" roughs, and villages where the whole population is of the same
" religion, no obstacle shall be offered to the repair, according to
" their original plan, of buildings set apart for religious worship, for
" schools, for hospitals, and for cemeteries. The plans of these
" different buildings in case of their new erection must, after having
" been approved by the Patriarchs or heads of communities, be sub-
" mitted to my Sublime Porte, which will approve of them by my
" Imperial order, or make known its observations upon them, within
" a certain time. Each sect, in localities where there are no other
" religious denominations, shall be free from every species of restraint
" as regards the public exercise of its religion. In the towns, small
" boroughs, and villages where different sects are mingled together,
" each community inhabiting a distinct quarter shall, by conforming
" to the above-mentioned ordinances, have equal power to repair and
" improve its churches, its hospitals, its schools, and its cemeteries.
" When there is question of the erection of new buildings, the
" necessary authority must be asked for, through the medium of the
" Patriarchs and heads of communities, from my Sublime Porte,
" which will pronounce a sovereign decision according that autho-
" rity, except in the case of administrative obstacles. The inter-
" vention of the administrative authority in all measures of this
" nature will be entirely gratuitous. My Sublime Porte will take
" energetic measures to ensure to each sect, whatever be the number
" of its adherents, entire freedom in the exercise of its religion.
" Every distinction or designation tending to make any class what-
" ever of the subjects of my Empire inferior to another class on
" account of their religion, language, or race, shall be for ever effaced
" from the Administrative Protocol. The laws shall be put in force
" against the use of any injurious terms, either among private indi-
" viduals, or on the part of the authorities. As all forms of religion
" are and shall be freely professed in my dominions, no subject of my
" Empire shall be hindered in the exercise of the religion that he
" professes, nor shall be in any way annoyed on this account. No
" one shall be compelled to change their religion. The nomination
" and choice of all functionaries and other *employés* of my Empire
" being wholly dependent upon my sovereign will, all the subjects
" of my Empire, without distinction of nationality, shall be admissi-
" ble to public employments, and qualified to fill them according to
" their capacity and merit, and conformably with the rules to be
" generally applied. All the subjects of my Empire, without dis-
" tinction, shall be received into the Civil and Military Schools of
" the Government, if they otherwise satisfy the conditions as to age
" and examination, which are specified in the organic regulations
" of the said schools. Moreover, every community is authorized to

" establish public schools of science, art, and industry. Only the
" method of instruction and the choice of professors in schools in
" this class shall be under the control of a mixed Council of Public
" Instruction, the members of which shall be named by my sovereign
" command. All commercial, correctional, and criminal suits be-
" tween Mussulmans and Christian or other non-Mussulman subjects,
" or between Christians or other non-Mussulmans of different sects,
" shall be referred to mixed tribunals. The proceedings of these
" tribunals shall be public; the parties shall be confronted, and shall
" produce their witnesses, whose testimony shall be received, with-
" out distinction, upon an oath taken according to the religious law
" of each sect. Suits relating to civil affairs shall continue to be
" publicly tried, according to the laws and regulations, before the
" mixed provincial councils, in the presence of the governor and
" judge of the place. Special civil proceedings, such as those re-
" lating to successions or others of that kind, between subjects of
" the same Christian or other non-Mussulman faith, may, at the
" request of the parties, be sent before the councils of the Patriarchs
" or of the communities. Penal, correctional, and commercial
" laws, and rules of procedure for the mixed tribunals, shall be
" drawn up as soon as possible, and formed into a code. Trans-
" lations of them shall be published in all the languages current in
" the Empire. Proceedings shall be taken with as little delay as
" possible for the reform of the penitentiary system as applied to
" houses of detention, punishment, or correction, and other establish-
" ments of like nature, so as to reconcile the rights of humanity
" with those of justice. Corporal punishments shall not be ad-
" ministered, even in the prisons, except in conformity with the
" disciplinary regulations established by my Sublime Porte, and
" everything that resembles torture shall be entirely abolished.
" Infractions in the law in this particular shall be severely repressed,
" and shall besides entail, as of right, the punishment, in conformity
" with the Civil Code, of the authorities who may order and of the
" agents who may commit them. The organization of the police in
" the capital, in the provincial towns, and in the rural districts, shall
" be revised in such a manner as to give to all the peaceable sub-
" jects of my Empire the strongest guarantees for the safety both of
" their persons and property. The equality of taxes entailing the
" equality of burdens, as equality of duties entails that of rights,
" Christian subjects and those of other non-Mussulman sects, as
" it has been already decided, shall, as well as Mussulmans, be sub-
" ject to the obligations of the law of recruitment. The prin-
" ciple of obtaining substitutes, or of purchasing exemption, shall
" be admitted. A complete law shall be published, with as little
" delay as possible, respecting the admission into and service in
" the army of Christian and other non-Mussulman subjects. Pro-
" ceedings shall be taken for a reform in the constitution of the
" Provincial and Communal Councils, in order to ensure fairness in

" the choice of the deputies of the Mussulman, Christian, and other
" communities, and freedom of voting in the Councils. The Sub-
" lime Porte will take into consideration the adoption of the most
" effectual means for ascertaining exactly and for controlling the
" result of the deliberations, and of the decisions arrived at. As the
" laws regulating the purchase, sale, and disposal of real property
" are common to all the subjects of my Empire, it shall be lawful
" for foreigners to possess landed property in my dominions, con-
" forming themselves to the laws and police regulations, and bearing
" the same charges as the native inhabitants, and after arrangements
" have been come to with foreign Powers. The taxes are to be
" levied under the same denomination from all the subjects of my
" Empire, without distinction of class or of religion. The most
" prompt and energetic means for remedying the abuses in collecting
" the taxes, and especially the tithes, shall be considered. The
" system of direct collection shall gradually, and as soon as possible,
" be substituted for the plan of farming, in all the branches of the
" revenues of the State. As long as the present system remains
" in force, all agents of the Government and all members of the
" Medjlis shall be forbidden, under the severest penalties, to become
" lessees of any farming contracts which are announced for public
" competition, or to have any beneficial interest in carrying them
" out. The local taxes shall, as far as possible, be so imposed as
" not to affect the sources of production, or to hinder the progress
" of internal commerce. Works of public utility shall receive a
" suitable endowment, part of which shall be raised from private
" and special taxes levied in the provinces, which shall have the
" benefit of the advantages arising from the establishment of ways
" of communication by land and sea. A special law having been
" already passed, which declares that the Budget of the revenue
" and expenditure of the State shall be drawn up and made known
" every year, the said law shall be most scrupulously observed.
" Proceedings shall be taken for revising the emoluments attached to
" each office. The heads of each community, and a delegate de-
" signated by my Sublime Porte, shall be summoned to take part
" in the deliberations of the Supreme Council of Justice on all
" occasions which might interest the generality of the subjects of
" my Empire. They shall be summoned specially for this purpose
" by my Grand Vizier. The delegates shall hold office for one
" year; they shall be sworn on entering upon their duties. All the
" members of the Council, at the ordinary and extraordinary meet-
" ings, shall freely give their opinions and their votes, and no one
" shall ever annoy them on this account. The laws against cor-
" ruption, extortion, or malversation shall apply, according to the
" legal forms, to all the subjects of my Empire, whatever may be
" their class and the nature of their duties. Steps shall be taken
" for the formation of banks and other similar institutions, so as to
" effect a reform in the monetary and financial system, as well as to

" create funds to be employed in augmenting the sources of the
" material wealth of my Empire. Steps shall also be taken for the
" formation of roads and canals to increase the facilities of com-
" munication, and increase the sources of the wealth of the country.
" Everything that can impede commerce or agriculture shall be
" abolished. To accomplish these objects means shall be sought to
" profit by the science, the arts, and the funds of Europe, and thus
" gradually to execute them. Such being my wishes and my com-
" mands, you, who are my Grand Vizier, will, according to custom,
" cause this Imperial firman to be published in my capital, and in
" all parts of my Empire; and you will watch attentively and take
" all the necessary measures that all the orders which it contains be
" henceforth carried out with the most rigorous punctuality."—*Ann. Reg.* 1856, pp. 337-41.

APPENDIX XI. Page 481.

(*Extract from Œuvres de Fénelon*, t. xxii. p. 306, *à l'Examen de Conscience. Supplément. Sur la Nécessité de former des Alliances, tant offensives que défensives, contre une Puissance étrangère qui aspire manifestement à la Monarchie universelle.*)

" Les États voisins les uns des autres ne sont pas seulement obligés
" à se traiter mutuellement selon les règles de justice et de bonne
" foi; ils doivent encore, pour leur sûreté particulière, autant que
" pour l'intérêt commun, faire une espèce de société et de république
" générale.

" Il faut compter qu'à la longue la plus grande puissance pré-
" vaut toujours, et renverse les autres, si les autres ne se réunissent
" pour faire le contre-poids. Il n'est pas permis d'espérer parmi les
" hommes, qu'une puissance supérieure demeure dans les bornes
" d'une exacte modération, et qu'elle ne veuille dans sa force, que
" ce qu'elle pourroit obtenir dans la plus grande foiblesse. Quand
" même un prince seroit assez parfait pour faire un usage si mer-
" veilleux de sa prospérité, cette merveille finiroit avec son règne.
" L'ambition naturelle des souverains, les flatteries de leurs con-
" seillers, et la prévention des nations entières, ne permettent pas de
" croire qu'une nation qui peut subjuguer les autres, s'en abstienne
" pendant des siècles entiers. Un règne où éclateroit une justice si
" extraordinaire, seroit l'ornement de l'histoire, et un prodige qu'on
" ne peut plus revoir.

" Il faut donc compter sur ce qui est réel et journalier, qui est
" que chaque nation cherche à prévaloir sur toutes les autres qui
" l'environnent. Chaque nation est donc obligée à veiller sans cesse,
" pour prévenir l'excessif agrandissement de chaque voisin pour sa
" sûreté propre. Empêcher le voisin d'être trop puissant, ce n'est

" point faire un mal; c'est se garantir de la servitude et en garantir
" ses autres voisins; en un mot, c'est travailler à la liberté, à la
" tranquillité, au salut public; car l'agrandissement d'une nation au-
" delà d'une certaine borne, change le système général de toutes les
" nations qui ont rapport à celle-là. Par exemple, toutes les suc-
" cessions qui sont entrées dans la maison de Bourgogne, puis celles
" qui ont élevé la maison d'Autriche, ont changé la face de toute
" l'Europe. Toute l'Europe a dû craindre la monarchie universelle
" sous Charles-Quint, surtout après que François 1er eut été défait
" et pris à Pavie. Il est certain qu'une nation qui n'avoit rien à
" démêler directement avec l'Espagne, ne lassoit pas alors d'être en
" droit, pour la liberté publique, de prévenir cette puissance rapide
" qui sembloit prête à tout engloutir.

" Les particuliers ne sont pas en droit de s'opposer de même à
" l'accroissement des richesses de leurs voisins, parce qu'on doit
" supposer que cet accroissement d'autrui ne peut être leur ruine.
" Il y a des lois écrites et des magistrats pour réprimer les in-
" justices et les violences entre les familles inégales en biens; mais,
" pour les États, ils ne sont pas de même. Le trop grand accroisse-
" ment d'un seul peut être la ruine et la servitude de tous les autres
" qui sont ses voisins: il n'y a ni lois écrites, ni juges établis pour
" servir de barrière contre les invasions du plus puissant. On est
" toujours en droit de supposer que le plus puissant, à la longue, se
" prévaudra de sa force, quand il n'y aura plus d'autre force à peu
" près égale qui puisse l'arrêter. Ainsi, chaque prince est en droit
" et en obligation de prévenir dans son voisin cet accroissement de
" puissance, qui jetteroit son peuple, et tous les autres peuples voisins,
" dans un danger prochain de servitude sans ressource.

" Par exemple, Philippe II, roi d'Espagne, après avoir conquis
" le Portugal, veut se rendre le maître de l'Angleterre. Je sais bien
" que son droit étoit mal fondé, car il n'en avoit que par la reine
" Marie sa femme, morte sans enfans. Élizabeth, illégitime, ne
" devoit point régner. La couronne appartenoit à Marie Stuart et
" à son fils. Mais enfin, supposé que le droit de Philippe II eût
" été incontestable, l'Europe entière auroit eu raison néanmoins de
" s'opposer à son établissement en Angleterre; car ce royaume si
" puissant ajouté à ses États d'Espagne, d'Italie, de Flandre, des
" Indes orientales et occidentales, le mettoit en état de faire la loi,
" surtout par ses forces maritimes, à toutes les autres puissances de
" la chrétienté. Alors, *summum jus, summa injuria*. Un droit
" particulier de succession ou de donation devoit céder à la loi
" naturelle de la sûreté de tant de nations. En un mot, tout ce
" qui renverse l'équilibre, et qui donne le coup décisif pour la
" monarchie universelle, ne peut être juste, quand même il seroit
" fondée sur des lois écrites dans un pays particulier. La raison en
" est que ces lois écrites chez un peuple ne peuvent prévaloir sur
" la loi naturelle de la liberté et de la sûreté commune, gravée
" dans les cœurs de tous les autres peuples du monde. Quand une

" puissance monte à un point, que toutes les autres puissances
" voisines ensemble ne peuvent plus lui résister, toutes ces autres
" sont en droit de se liguer pour prévenir cet accroissement, après
" lequel il ne seroit plus temps de défendre la liberté commune.
" Mais, pour faire légitimement ces sortes de ligues, qui tendent à
" prévenir un trop grand accroissement d'un État, il faut que le cas
" soit véritable et pressant; il faut se contenter d'une ligue dé-
" fensive, ou du moins ne la faire offensive, qu'autant que la juste
" et nécessaire défense se trouvera renfermée dans les desseins d'une
" agression; encore même faut-il toujours, dans les traités de ligues
" offensives, poser des bornes précises, pour ne détruire jamais une
" puissance sous prétexte de la modérer.

" Cette attention à maintenir une espèce d'égalité et d'équilibre
" entre les nations voisines, est ce qui en assure le repos commun.
" A cet égard toutes les nations voisines et liées par le commerce
" font un grand corps et une espèce de communauté. Par exemple,
" la chrétienté fait une espèce de république générale, qui a ses
" intérêts, ses craintes, ses précautions à observer; tous les membres
" qui composent ce grand corps se doivent les uns aux autres pour
" le bien commun, et se doivent encore à eux-mêmes, pour la sûreté
" de la patrie, de prévenir tout progrès de quelqu'un des membres
" qui renverseroit l'équilibre, et qui se tourneroit à la ruine inévi-
" table de tous les autres membres du même corps. Tout ce qui
" change ou altère ce système général de l'Europe est trop dan-
" gereux, et traîne après soi des maux infinis.

" Toutes les nations voisines sont tellement liées par leurs intérêts
" les unes aux autres, et au gros de l'Europe, que les moindres
" progrès particuliers peuvent altérer ce système général qui fait
" l'équilibre, et qui peut seul faire la sûreté publique. Ôtez une
" pierre d'une voûte, tout l'édifice tombe, parce que toutes les
" pierres se soutiennent en se contre-poussant.

" L'humanité met donc un devoir mutuel de défense du salut
" commun, entre les nations voisines, contre un État voisin qui de-
" vient trop puissant; comme il y a des devoirs mutuels entre les
" concitoyens pour la liberté de la patrie. Si le citoyen doit beaucoup
" à sa patrie, dont il est membre, chaque nation doit à plus forte
" raison bien davantage au repos et au salut de la république uni-
" verselle dont elle est membre, et dans laquelle sont renfermées
" toutes les patries des particuliers.

" Les ligues défensives sont donc justes et nécessaires, quand il
" s'agit véritablement de prévenir une trop grande puissance qui
" seroit en état de tout envahir. Cette puissance supérieure n'est
" donc pas en droit de rompre la paix avec les autres États in-
" férieurs, précisément à cause de leur ligue défensive; car ils sont
" en droit et en obligation de la faire.

" Pour une ligue offensive, elle dépend des circonstances; il faut
" qu'elle soit fondée sur des infractions de paix, ou sur la détention
" de quelques pays des alliés, ou sur la certitude de quelque autre

" fondement semblable. Encore même faut-il toujours, comme je
" l'ai déjà dit, borner de tels traités à des conditions qui empêchent
" ce qu'on voit souvent; c'est qu'une nation se sert de la nécessité
" d'en rabattre une autre qui aspire à la tyrannie universelle, pour
" y aspirer elle-même à son tour. L'habileté, aussi bien que la
" justice et la bonne foi, en faisant des traités d'alliance, est de les
" faire très-précis, très-éloignés de toutes équivoques, et exactement
" bornés à un certain bien que vous en voulez tirer prochainement.
" Si vous n'y prenez garde, les engagements que vous prenez se
" tourneront contre vous, en abattant trop vos ennemis, et en élevant
" trop votre allié ; il vous faudra, ou souffrir ce qui vous détruit, ou
" manquer à votre parole ; choses presque également funestes. Con-
" tinuons à raisonner sur ces principes, en prenant l'exemple par-
" ticulier de la chrétienté, qui est la plus sensible pour nous.

" Il n'y a que quatre sortes de systèmes. Le premier est d'être
" absolument supérieur à toutes les autres puissances, même réunies :
" c'est l'état des Romains et celui de Charlemagne. Le second
" est d'être dans la chrétienté la puissance supérieure aux autres,
" qui font néanmoins à peu près le contre-poids en se réunissant.
" Le troisième est d'être une puissance inférieure à une autre,
" mais qui se soutient, par son union avec tous ses voisins, contre
" cette puissance prédominante. Enfin, le quatrième est d'une
" puissance à peu près égale à une autre, qui tient tout en paix par
" cette espèce d'équilibre qu'elle garde sans ambition et de bonne foi.

" L'état des Romains et de Charlemagne n'est point un état qu'il
" vous soit permis de désirer : 1° Parce que, pour y arriver, il faut
" commettre toutes sortes d'injustices et de violences ; il faut pren-
" dre ce qui n'est point à vous, et le faire par des guerres abomi-
" nables dans leur durée et dans leur étendue. 2° Ce dessein est
" très-dangereux ; souvent les États périssent par ces folles ambi-
" tions. 3° Ces empires immenses, qui ont fait tant de maux en
" se formant, en font, bientôt après, d'autres encore plus effroy-
" ables, en tombant par terre. La première minorité, ou le pre-
" mier règne foible, ébranle les trop grandes masses, et sépare des
" peuples qui ne sont encore accoutumés ni au joug ni à l'union
" mutuelle. Alors, quelles divisions, quelles confusions, quelles
" anarchies irrémédiables ! On n'a qu'à se souvenir des maux
" qu'ont fait en Occident la chute si prompte de l'empire de
" Charlemagne, et en Orient le renversement de celui d'Alexandre,
" dont les capitaines firent encore plus de maux pour partager ses
" dépouilles, qu'il n'en avoit fait lui-même en ravageant l'Asie.
" Voilà donc le système le plus éblouissant, le plus funeste pour
" ceux mêmes qui viennent à bout de l'exécuter.

" Le second système est d'une puissance supérieure à toutes les
" autres, qui font contre elle à peu près l'équilibre. Cette puis-
" sance supérieure a l'avantage, contre les autres, d'être toute
" réunie, toute simple, toute absolue dans ses ordres, toute
" certaine dans ses mesures. Mais, à la longue, si elle ne cesse de

" réunir contre elle les autres en excitant la jalousie, il faut qu'elle
" succombe. Elle s'épuise : elle est exposée à beaucoup d'accidens
" internes et imprévus, ou les attaques du dehors peuvent la ren-
" verser soudainement. De plus, elle s'use pour rien, et fait des
" efforts ruineux pour une supériorité qui ne lui donne rien d'effec-
" tif, et qui l'expose à toutes sortes de déshonneurs et de dangers.
" De tous les États, c'est certainement le plus mauvais ; d'autant plus
" qu'il ne peut jamais aboutir, dans sa plus étonnante prospérité,
" qu'à passer dans le premier système, que nous avons déjà reconnu
" injuste et pernicieux.

" Le troisième système est d'une puissance inférieure à une autre,
" mais en sorte que l'inférieure, unie au reste de l'Europe, fait
" l'équilibre contre la supérieure, et la sûreté de tous les autres
" moindres États. Ce système a ses incommodités et ses incon-
" véniens ; mais il risque moins que le précédent, parce qu'on est
" sur la défensive, qu'on s'épuise moins, qu'on a des alliés, et qu'on
" n'est point d'ordinaire, en cet état d'infériorité, dans l'aveuglement
" et dans la présomption insensée qui menace de ruine ceux qui
" prévalent. On voit presque toujours, qu'avec un peu de temps,
" ceux qui avoient prévalu s'usent et commencent à déchoir. Pourvu
" que cet État inférieur soit sage, modéré, ferme dans ses alliances,
" précautionné pour ne leur donner aucun ombrage, et pour ne rien
" faire que par leur avis pour l'intérêt commun, il occupe cette
" puissance supérieure jusqu'à ce qu'elle baisse.

" Le quatrième système est d'une puissance à peu près égale à
" une autre, avec laquelle elle fait l'équilibre pour la sûreté pu-
" blique. Être dans cet état, et n'en vouloir point sortir par ambi-
" tion, c'est l'état le plus sage et le plus heureux. Vous êtes
" l'arbitre commun ; tous vos voisins sont vos amis ; du moins,
" ceux qui ne le sont pas se rendent par là suspects à tous les
" autres. Vous ne faites rien qui ne paroisse fait pour vos voisins
" aussi bien que pour vos peuples. Vous vous fortifiez tous les
" jours ; et si vous parvenez, comme cela est presque infaillible à
" la longue, par un sage gouvernement, à voir plus de forces
" intérieures et plus d'alliances au dehors, que la puissance jalouse
" de la vôtre, alors il faut s'affermir de plus en plus dans cette sage
" modération qui vous borne à entretenir l'équilibre et la sûreté
" commune. Il faut toujours se souvenir des maux que coûtent
" au dedans et au dehors de son État les grandes conquêtes ; qu'elles
" sont sans fruit ; et du risque qu'il y a à les entreprendre ; enfin,
" de la vanité, de l'inutilité, du peu de durée des grands empires,
" et des ravages qu'ils causent en tombant.

" Mais, comme il n'est pas permis d'espérer qu'une puissance
" supérieure à toutes les autres demeure longtemps sans abuser de
" cette supériorité, un prince bien sage et bien juste ne doit jamais
" souhaiter de laisser à ses successeurs, qui seront, selon toutes les
" apparences, moins modérés que lui, cette continuelle et violente
" tentation d'une supériorité trop déclarée. Pour le bien même de

" ses successeurs et de ses peuples, il doit se borner à une espèce
" d'égalité. Il est vrai qu'il y a deux sortes de supériorités; l'une
" extérieure, qui consiste en étendue de terres, en places fortifiées,
" en passages pour entrer dans les terres de ses voisins, etc.
" Celle-là ne fait que causer des tentations aussi funestes à soi-
" même qu'à ses voisins, qu'exciter la haine, la jalousie et les ligues.
" L'autre est intérieure et solide: elle consiste dans un peuple plus
" nombreux, mieux discipliné, plus appliqué à la culture des terres
" et aux arts nécessaires. Cette supériorité, d'ordinaire, est facile
" à acquérir, sûre, à l'abri de l'envie et des ligues, plus propre
" même, que les conquêtes et que les places, à rendre un peuple
" invincible. On ne sauroit donc trop chercher cette seconde
" supériorité, ni trop éviter la première qui n'a qu'un faux éclat."

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"*nature of them, I hold them wise, just and moderate laws: they give to God,*
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"*they are as mixt as our language, compounded of British, Saxon, Danish,*
"*Norman customs. And surely as our language is thereby so much the richer,*
"*so our laws are likewise by that mixture the more complete.*"—LORD BACON.

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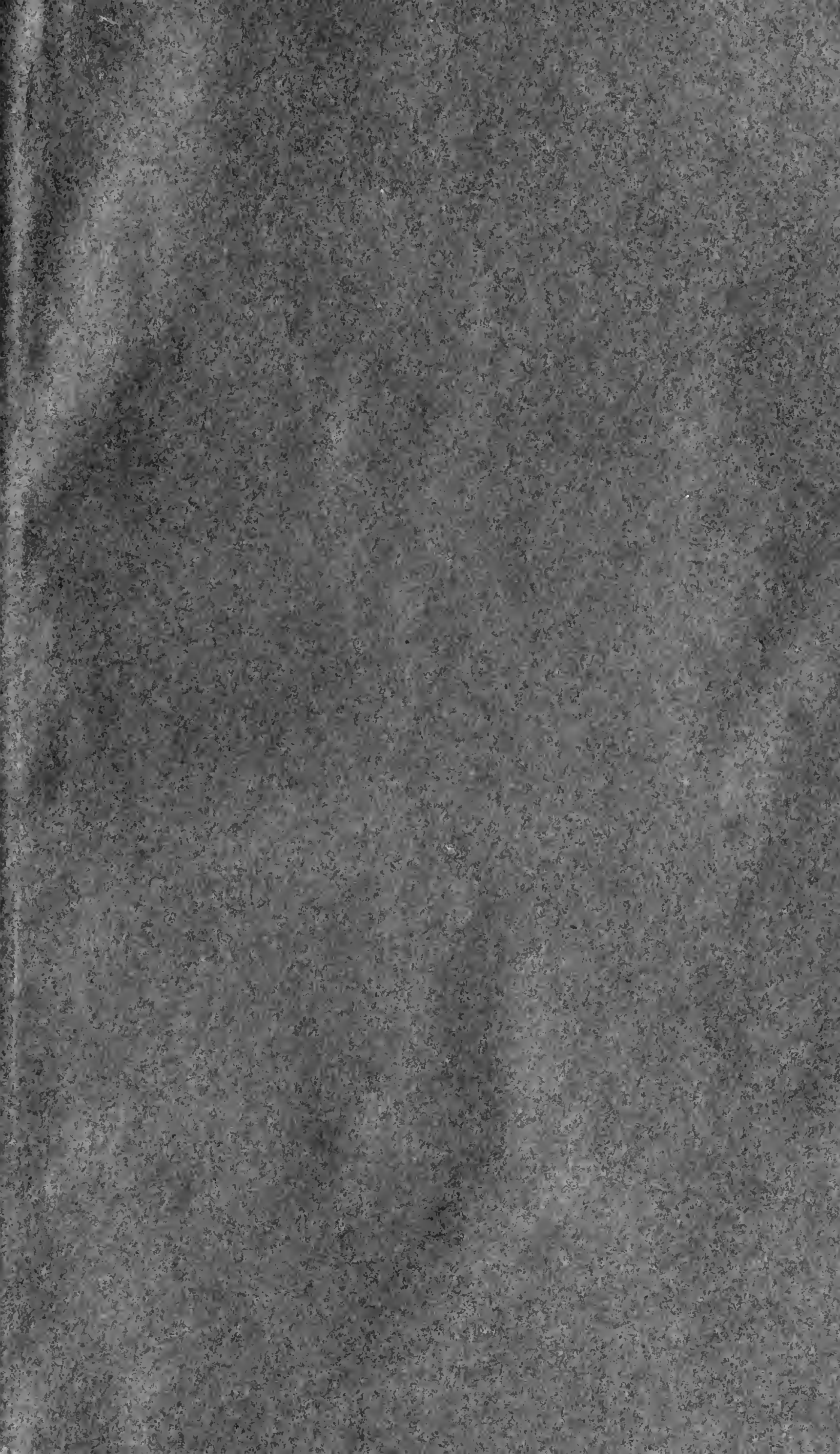

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