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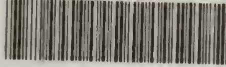
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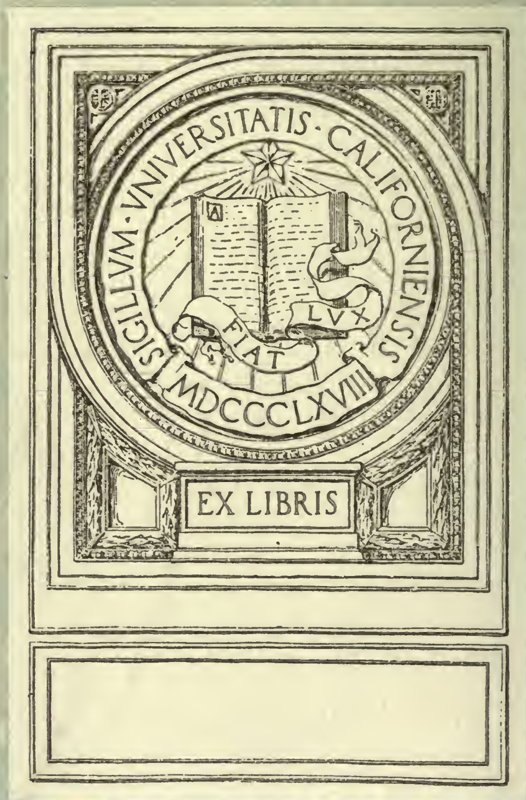
INTERNATIONAL LAW IN SOUTH AFRICA

T. BATY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UNIV. OF CALIFORNIA

INTERNATIONAL LAW

IN

SOUTH AFRICA.

BY

T. BATY,

CIVIL LAW FELLOW OF UNIVERSITY COLLEGE, AND BACHELOR OF CIVIL LAW
IN THE UNIVERSITY OF OXFORD;
BACHELOR OF ARTS, TRINITY COLLEGE, AND SENIOR WHEWELL SCHOLAR (1893) IN INTERNATIONAL LAW
IN THE UNIVERSITY OF CAMBRIDGE;
AND OF THE INNER TEMPLE, BARRISTER-AT-LAW.

Author of "First Elements of Procedure," "The Laws of Law," &c.

London:
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PREFACE.

The following studies were originally delivered as Lectures at Oxford.

It is still too early for the evidence to be sifted, and satisfactory conclusions arrived at, with regard to many of the matters of fact with which they deal. But it is not too early to establish the principles which must be applied to the facts when ascertained; and this small work is offered as a slight contribution to that desirable end.

T. BATY.

4, New Square,
Lincoln's Inn.
October, 1900.

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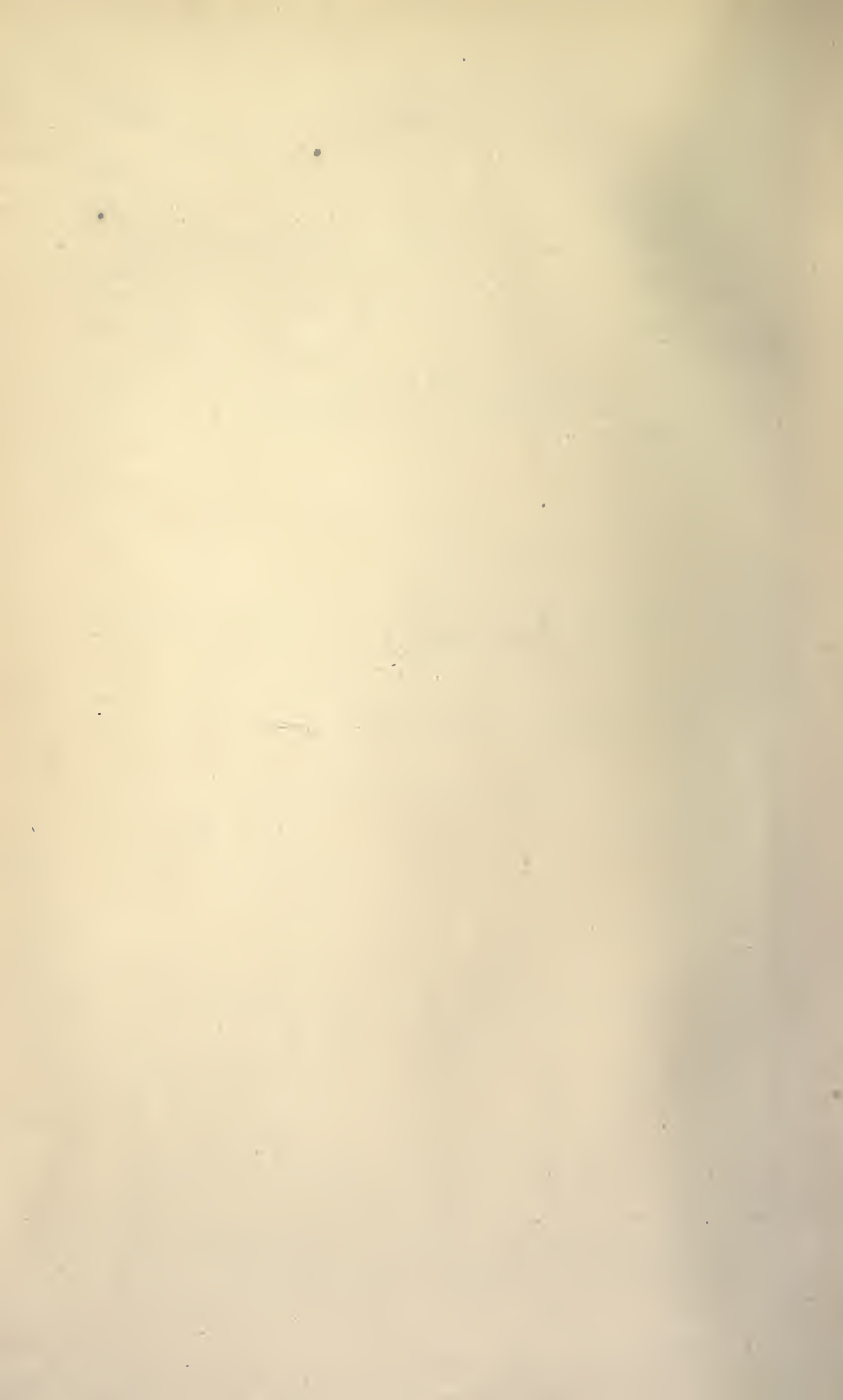

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ABBREVIATIONS.

C. Robins. .... C. Robinson's Admiralty Reports.
C. B. N. S.................... Common Bench Reports, New Series.
Ed. .... Edwards' Reports.
L. M. & R.................... Law Magazine and Review.
R. D. I. .... Revue de Droit International.

International Law in South Africa.

Chapter I.

CONTRABAND FOR NEUTRAL PORTS.

In commencing the consideration of the subject of contraband, it is not without advantage at the outset to guard against the risk of confusing its principles with those which apply to allied topics. One of such subjects is Blockade; another, the capture of enemy property: and these must be carefully distinguished from the immediate subject of our investigation. It seems almost absurd to insist upon the remembrance of so elementary a thing as the fact that breach of blockade is different from carriage of contraband; yet there are instances of eminent and careful jurists who have interpreted the law of contraband by citing cases of blockade without apparently recognising any necessity for mentioning the difference. Examples of this are very common in the literature of the subject which is more particularly important for our present purpose, namely, that of continuous voyages. Again, the capture of enemy goods is a totally different thing from the seizure of contraband. No less a person than Wheaton, however, treats cases of enemy property as cases of contraband goods. The cases of *The Nancy* (*a*) and *The Rosalie and Betty* (*b*), cited in Part IV. of Wheaton, § 506, as illustrating the law of contraband, are clearly seen (as

(*a*) (Knudsen) 3 C. Robins. 122. (*b*) 2 C. Robins. 343.

Dana remarks) to be mere instances of the seizure of enemy goods, under circumstances somewhat resembling those of the familiar type common in contraband cases. Indeed, the older cases in the Prize Courts require to be examined with the closest scrutiny before it can be seen exactly on what grounds the decision proceeded. And the error is therefore natural of those who have imagined cases to have been decided on the ground of contraband, which really turned on the fact of the goods in question having been enemies' property; or, rather, on the fact that satisfactory proof was not forthcoming of their being neutral property, in the face of suspicious circumstances arguing the contrary. One of the most suspicious of such circumstances which argue that the goods are the enemy's, is the fact that they are going to the enemy's country. It can easily be seen how liable such cases are to be confused with cases of contraband. Especially is this so when articles *ancipitis usus* are in question. Take the case of tar, adjudged seizable as enemy property. The grounds of this finding of fact may be simply that the tar was intended to reach the enemy ultimately, and that there is no satisfactory proof of neutral ownership to oppose to this suspicious fact. It is at once apparent how like a case of contraband this is. But it is not a case of contraband. The tar is condemned, not because it is tar, but because it belongs to the enemy. To argue from such cases to genuine cases of contraband, and to apply principles drawn from the former, to arrive at a decision on the latter, is a pure instance of mental confusion. The two things are quite distinct. The law of contraband is concerned with the supply of particular goods to a hostile market. Goods which are specifically consigned to hostile governments or persons are enemy goods; and, as such, do not need the application of the law of contraband (*c*), except for one very curious purpose.

(*c*) *The Atlas*, 3 C. Robins. 299; *The Anna Catharina*, 4 *ibid.* 107.

This is to enable enemy goods to be seized on a neutral ship. By the Declaration of Paris, the signatories are bound to respect enemy goods on a neutral ship " with the exception of contraband of war." Enemy goods, however, cannot properly be said to be contraband of war; so that, to give its obvious meaning to the passage, it must be read as though it were—" with the exception of goods which, if neutral, would be contraband of war." In such cases, the question of enemy property will be subsidiary to the question of contraband or not. And it would seem that an enemy's own munitions of war cannot, in accordance with this unfortunate phraseology of the declaration, be captured under neutral colours when in transit to a neutral, say for the purpose of being kept in safety, or of being worked up into engines of offence. For, as will immediately be seen, " contraband goods " means goods which are in direct transit to the enemy. And this brings us to the subject of immediate concern. Contraband, to be treated as such, must be captured in course of direct transit to the enemy. But when we come to inquire what direct transit is, we are met by a sharp conflict of opinion.

The conflict is all the sharper, because it is half-disguised. Both parties are outwardly at one, and the point at issue is not often put forward in clear relief. It seems to narrow down to this. One rule is, that the ship must be going to a hostile port; the other, that the goods must be going to the enemy. The supporters of the former rule do not in the least deny that a ship is none the less going to a hostile port, because she is pretending to go to a neutral port; or because she is going to call at a neutral port. But they say that this ought to be enough for a belligerent; and they do deny that it is safe to permit belligerents to pass beyond judging whether or not a ship is going to a neutral port, which is a matter of more or less easy ascertainment, and to allow them to judge whether its cargo is not going further, which is a matter of the greatest delicacy.

The one view is subjective and the other objective. The

one sees in the conveyance of warlike stores to the enemy, a noxious transaction, which the belligerent is entitled to strike at wherever possible, short of infringing the immunities of neutral territory and ships of war. The other regards it as a legitimate branch of neutral traffic, liberty to stop it being granted to the belligerent under certain well-defined conditions. The one is perhaps most neatly expressed in a phrase of Bancroft Davies, rendered by Calvo (*d*) as—" C'est simplement une question de preuves." That is, neutral destination for the time being is only one amongst various kinds of evidence of ultimate neutral destination; and not an objective barrier in the way of a captor, precluding all question as to what was ultimately to be done with the cargo. Those who hold this theory are careful to explain with some anxiety, that a belligerent destination must not be lightly presumed, but must be made out by strict proof. The fact that this caution is necessary points to the defectiveness of the rule which requires it. A rule, as to which it is requisite to point out that it must be fairly applied, is obviously a rule which may readily be made the instrument of injustice. In Prize Courts, moreover, suspicion is always a matter of great weight. Evidence is difficult to procure and to test. The parties reside in all quarters of the globe. Communication with the enemy is interdicted. A Prize Court, therefore, is restricted to dealing with gross and palpable cases; but it may act on slight evidence. To take a concrete instance. Goods destined for the food of the enemy can only (in general) be condemned on their way to a blockaded port—but a design to enter such a port can be inferred from very slight indications, such as the vessel being off her course in the neighbourhood of the place blockaded (*e*). This is the policy of the law of nations—to limit Prize Courts to simple cases, and to allow them a very free hand in dealing with them. The Prize Court is the substitute for the deck

(*d*) § 2763.

(*e*) Cf. *The Franklin, infra.*

of the admiral's ship (*f*). An attempt to impose on a Court, accustomed to be governed by such principles, the appreciation of delicate questions of intention—such as govern the decision of the ultimate destination of cargo—is sure to result in its applying its ordinary methods of condemnation on suspicion to the inquiry. Once let it be allowed, in theory, that contraband can be seized anywhere, on proof of its being intended for the enemy, and its seizure on that suspicion will be only a step.

"It is merely a matter of evidence," says Mr. Davies. Neutral destination is only a reason for thinking that the goods are not going to the enemy: it is only one circumstance amongst others which have to be considered, in deciding what is, on this theory, the really important point, namely, whether the goods are intended to be carried to a belligerent. If you can prove that the property is intended, some time or other, to reach the latter, you may disregard altogether the neutral destination, however genuine.

This position totally fails to command the assent of those who adhere to the doctrines which were established during the oceanic wars of the last century, and which stood the strain of those times. Such point to the fact that when a vessel is captured, even though it is eventually released, the neutral owners of ship and cargo seldom or never fail to sustain serious pecuniary loss. The recompense (if any) awarded by the Courts is, like costs in a civil trial, never adequate. Slight circumstances of suspicion are sufficient to bring about its refusal. This being so, it follows that the causes for which vessels can be captured should be such as are capable of little dispute, and of summary ascertainment. Such a cause is the vessel's incorporation into the enemy's service; another is the making for a particular port. It may be that, given

(*f*) Twiss, L. M. & R. 1877, p. 4.

the fact of making for a hostile port, it is open to the owners to prove ignorance of blockade, carriage of innocent goods, or a license to trade with the enemy. But there is always, first and foremost in such cases, the circumstance of perfectly easy ascertainment and of grave suspicion—viz., the making for a hostile harbour. The school of thought, then, which clings to the necessity of some patent and obvious fact like this, as the sole ground of capture, rejects the theory that the intent is the main thing to prove, and that neutral destination is a mere ingredient in ascertaining what that ultimate intent is.

"It is a mere matter of evidence." It would be strange if it were so. For the whole tendency of law is to substitute for an inquiry into subjective intentions an ascertainment of objective fact. The two views, however, are both widely held, and are fundamentally opposed. In fact, there is here one of the really keen conflicts of modern law. On grounds of principle and authority, however, there can be little doubt that the view which, for the moment, may be the less generally maintained is the right one. The universally necessary ground of condemnation, in cases of contraband, as in cases of blockade by ingress, ought to be the fact of making for an enemy's port. This incisive and clear principle relieves neutrals of half the cost and anxiety which the existence of war involves. If vessels bound for the enemy's ports are *primâ facie* liable to be intercepted, neutrals know, or can gauge, their risks. If vessels on any route can be seized, on miscellaneous suspicions, neutrals will never be easy. No neutral trade would ever be safe on such terms. It is easy to minimise the effect of such a rule by saying that the Court must make itself quite certain of the intention to send the goods on to the belligerent. As has been observed, Prize Courts do not proceed in that way: in a Prize Court suspicion is fatal.

All Courts of Prize are not presided over by a Portalis, or a Scott, or a Story. They are often rough and ready

tribunals, situate, possibly, in remote territories (*g*); and it is of no use to blink the fact that national prejudice and other motives do weigh with their Judges in some cases (*h*). Neutral merchants will not be satisfied with knowing that the Prize Courts of belligerents cannot in these delicate cases fairly condemn them on mere suspicion. They will suspect that suspicion will too often, in the eyes of the Prize Judge, wear the mask of proof. Nothing short of the absolute immunity of their ships, except in the simple cases already well recognized, will satisfy their legitimate demands.

If we turn from principle to authority, the rule has hitherto been clear, that nothing short of a voyage to a hostile port is sufficient to enable a vessel to be captured. This is, to go no further than English cases, expressly decided in the case of *The Imina*, and again in the case of *Hobbs* v. *Henning* (*i*). In the case of *The Imina* (*k*) there arose a curiously complicated question of blockade and contraband. The ship was cleared from her starting-point, laden with alleged contraband for a blockaded port. She was proceeding (as her papers showed) from Dantzic, in Prussia, to Amsterdam. But, hearing that Amsterdam was blockaded, she changed her course towards the neutral and unblockaded port of Emden, and was captured by a British cruiser. It was held by Sir W. Scott that in that case she was neither attempting to break the blockade, nor carrying contraband to the enemy. And the memorable words were used :—

"This is a claim for a ship taken at the time of sailing for Emden, a neutral port; a destination on which, if it is regarded as the real destination, no question of contraband could arise, inasmuch as goods going to a neutral port *cannot* come under the description of contraband, all goods

(*g*) Cf. *The Flad Oyen*, 1 C. Robins. 135.

(*h*) See Hall, Int. Law, p. 695.

(*i*) 17 C. B. N. S. 791.

(*k*) 3 C. Robins. 167.

going there being equally lawful. The rule respecting contraband, as I have always understood it, is that the articles must be taken *in delicto*, in the actual prosecution of a voyage to the enemy's port." Not a word was said as to the possibility of the goods being intended to reach Amsterdam by some other channel. Emden is about five miles from Holland, and communication is obviously easy enough. Yet it was not suggested that the *Imina* was doing any harm in conveying the spars, which formed her cargo, so near the Batavian frontier, nor that the inference could be drawn that the cargo was meant to reach the Dutch after all, nor that it would make the least difference if it could. It is not as if the Court was unaware of the position of Emden, and of its use as a *depôt* for the enemy. The Court knew very well what was going on at Emden. It was regularly condemning British goods intended for that port, on the ground of trading with the enemy, because it knew perfectly well where the goods were really going to. As an example, take the case of *The Jonge Pieter* (*l*), in which provisions sent by British merchants to Emden were confiscated because such a transport was a stage in an unlawful attempt to carry goods to the enemy. Yet the foreign *Imina* was declared by Sir W. Scott to have been within her right in taking contraband spars, which she had done her best to take to Amsterdam, to this very suspicious port. And it is in this most suggestive case that it was laid down that the destination of the *ship* must be hostile, without a word being said as to the destination of the goods; although it must have been apparent to everyone that they would before long be in Dutch hands.

Let us take a glance at Emden, and at its position with relation to the belligerent territory. In these days of pilgrimages, when the Roman Wall is traversed by the dutiful antiquarian, and the Catholic repairs to West-

(*l*) 4 C. Robins. 79.

minster and the Anglican to Pevensey, the international jurist might do worse than pay a respectful homage in this manner to Emden. For Emden was the Nassau of the Napoleonic time. It lies, a town of 12,000 inhabitants, now a mile and a half from the sea, at the point where the Ems forms the shallow and sandy estuary called the Dollart. This sheet of water was formed by an inundation and is not much more than five miles wide. The opposite bank is part of Holland. Emden itself, the guide-books tell us, is to all intents and purposes a Dutch town. Elisée Reclus, the French geographer, describes it as follows :—

"Cette ancienne ville est d'aspect tout à fait hollandaise; ses maisons de briques rouges tournant du côté de la rue leurs pignons à gradins, le beffroi de son hôtel de ville, les canaux qui la traversent dans tous les sens, les embarcations ventrues qui se meuvent sur l'eau jaunâtre, font ressembler la ville frisonne à ses voisines des bords de l'Yssel et du Zuiderzee."

And the irrecusable authority of Baedeker is in support —" a prosperous, Dutch-looking place."

In fact, it is no marvel that Emden should look Dutch —since 1595 Emden had been Dutch, having previously been Frisian, and was only ceded to Prussia in 1744 ; *i.e.*, 60 years before the date of *The Imina.* It was not long after the events which gave rise to that leading case before the city became Dutch again, though it was shortly afterwards incorporated, along with the Batavian Republic, into France, and at the peace of 1815 assigned to Hanover, along with which kingdom it has since gone the way of all German states which have tried to maintain in practice the theory of their independent existence of Prussia.

This was the town, then, to which the *Imina* elected to go—a town Dutch by sympathy and tradition, and on the very edge of Holland, whose ports Great Britain was blockading. Imagine North and South England at war, Scotland an independent neutral kingdom, and a vessel

coming from Norway with goods for Liverpool slipping up the Solway into Annan! The conveyance of goods to Emden must have been regarded by Great Britain, when at war with the Batavian Republic, and blockading its coasts, as most irritating. To patrol, with such vigilance, the Dutch coast, and then to have goods quietly planted at Emden, ready to slip in across the shallows, or along the flat Frisian roads at the head of the estuary, must have been infinitely annoying. Yet the pertinacious Britain of those days did not object, but made the best of a good rule, which could not be expected to make everything smooth for the belligerent. And there must have been hundreds —one may indeed say thousands—of cases in which munitions of war were conveyed to ports in neutral countries in order to be the more safely and easily carried, either overland, or by a short sea journey, to the enemy. Yet not a single instance is forthcoming of such a voyage being impeached in its initial stage. During all the great period of the Napoleonic wars, when the rights of belligerents were being pushed up to, and far beyond, their legitimate extent; at a time when the Berlin decree was prohibiting traffic in British merchandise, and Orders in Council were establishing paper blockades of a continent, there is not one single case of goods being condemned simply on the ground of their being munitions of war, intended ultimately to reach the enemy, in course of transit to a neutral port. It cannot be supposed that arms were never carried to Spain, to be smuggled into France; nor stores to Prussia, to fit out the navies of Denmark. In no case was such a traffic objected to (*m*). We have to wait for the

(*m*) The case of *The Commercen* (1 Wheaton, 382) may be left out of account; for there the port of destination was not in reality neutral. The real port of destination was a belligerent fleet which was lying in a neutral harbour. Clearly the direct conveyance of stores to an enemy's fleet is inadmissible. Besides, *The Commercen* was trading under a special licence from the British Government, which

middle of the century before we see the new principle clearly enunciated in the case of *The Frau Anna Houwina.*

The Frau Anna Houwina was a case decided by the French Council of Prize during the Crimean war, and is reported—one regrets to say, with approval—by Calvo (§ 2767). The vessel, sailing under Hanoverian colours, was captured by a French cruiser, while carrying saltpetre from Lisbon to Hamburg. This was clearly a voyage to a neutral port. But the French Council did not stop, like Sir W. Scott, at that stage of their investigations. They did not believe, and could not say, that the ship was going on to a Russian port with her contraband saltpetre. But they did proceed to infer that the saltpetre was going on to Russia, and that it was confiscable accordingly—which is what the English Court pointedly abstained from doing in the much more suspicious case of *The Imina*, where the original destination was clearly hostile, and had only been

fact was of itself enough to render its cargo liable to condemnation in the United States Courts. The case proceeds on the ground that the vessel had entered into the position of a British transport, employed in the conveyance of stores for the military purposes of the British Government. There was not only a probability, but an avowed design—apparent on the face of the custom-house papers, admitted by the private letters of the shippers—to take the barley and oats in this Swedish vessel, from Limerick, for the sole use of the British forces in Spain. *The Commercen* was really, if not technically, a British hired transport. She was not going to Bilbao, but to the British fleet. Her papers showed it, and it was "a very lenient administration of justice to confine the penalty to a mere denial of freight." It is, moreover, noteworthy that the commanding intellect of John Marshall refused to concur in the decision, and that two associate judges (Livingston and Johnson) took the same view. The head-note is incorrect in stating the provisions to be neutral property. They are treated all through as being really British goods. (*Ibid.* pp. 390, 403; Wheaton, Elements, §§ 507, 508.) Nevertheless, the expressions of Story in this case have been much founded on by writers who wish to establish the destination of the goods as the determining criterion. It is submitted that to do so is a mistake. Of course, goods which are going straight to an enemy's fleet are contraband, and the terms of the judgment cannot fairly be pressed to cover more. They might do so, isolated from their context.

changed by an afterthought. The arguments the French Council relied on to support their view are instructive, if only to show the extreme danger of allowing such inferences to lead to condemnation. The mere facts, *first*, that since the war the imports of saltpetre and sulphur to Hamburg had gone suddenly up in amount; *second*, that, as a matter of fact, a brisk trade in saltpetre and sulphur was then being done by overland transit between Hamburg and Riga in Russia; *third*, that the cargo in question had been imported into Lisbon under a guarantee that it was for home consumption, and not for re-export, were the sole grounds of any substance adduced. To proceed on such grounds of suspicion is eminently characteristic of a Prize Court: and in a proper case, no objection could have been taken to the reasoning;—namely, if the question had been one of those simple ones with which a Prize Court may fairly deal. In a difficult matter like that of deciding the destination of *The F. A. Houwina's* cargo, such sweeping inferences are entirely out of place, and may lead to the grossest injustice; even though in the majority of cases such guesses may prove accurate.

It is not a mere coincidence that the new principle was applied for the first time in the Crimean war. The rule is a direct consequence of the new doctrine that enemy goods are safe from capture under the neutral flag, which was then first applied with undoubted authority. It is to get rid of the consequences of that doctrine that the temptation becomes so strong to extend the law of contraband. Goods which would, in the old days, have been condemned as enemy property can now only be seized if the law of contraband can be applied to them. Where it is possible to do so, Prize Courts will resort to that law. It might have been foreseen that they would take advantage of the loophole which the declarations of March, 1854, and of Paris left them (*n*).

(*n*) In the war between the Federated and Confederate American States, the principles of these declarations, though not binding,

Whether the United States Courts, seven years later, had ever heard of *The F. A. Houwina*, one does not know. But they laid hold of the same principle, and seized goods on board ships bound for neutral ports, on the inference that the goods were going on to ports of the hostile Confederate States of America: the chief neutral ports concerned being Metamoras and Nassau. It is important to distinguish exactly the differences between the various cases of *The Springbok*, *The Bermuda*, *The Stephen Hart*, and *The Peterhoff.* It is further important to remember that no one could have raised any objection to the action of the United States Courts, if they had condemned goods on the ground that the vessel carrying them was really going to a port of the Southern States, and not to Nassau at all. All that could have been done, then, would have been to complain that there were not sufficient grounds for such an inference. But in a case like that of *The Springbok*, which was a sailing barque, the Supreme Court could not (though the inferior Court could and did) find that the captured vessel was intended herself to run a blockade maintained by steamers. It was therefore necessary to invoke the rule of *The F. A. Houwina*, and to confiscate the goods on the plea of a conjectural enemy destination.

Let us regard each case separately. That of *The Springbok* (*o*) was the culminating one, in which the sole ground of seizure was the ultimate intent to break the blockade of the southern ports. There was, indeed, a certain small proportion of contraband goods on board; but both the contraband and non-contraband cargo were condemned as being intended to be carried through the

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were adhered to in this respect. See U. S. A. Dipl. Corr. 1861, pp. 28, 127, 175, 235 (not 44, 143, 191, 251, as in Dana), for the Federal; and State Papers, vol. 51, p. 257, for the Confederate view, which was embodied in a resolution of Congress, Aug. 13, 1861.

(*o*) Wallace, V. 1.

blockade, so that the question of continuous carriage of contraband did not arise in it. It was in the earlier cases that the alleged fact of contraband was relied upon. *The Bermuda* and *The Stephen Hart* (*p*) are cases which may be classed together for most purposes. They were decided expressly, but not exclusively, on the ground that contraband on board was meant eventually to reach the Southern States: the vessels being captured when on their proper courses for Nassau and Cardenas respectively. But, in both these cases the Court proceeded, to some extent, on the ground of the goods being enemy property, and on the probability that the vessels themselves meant to break the blockade (*q*); the *Bermuda*, at least, having done so successfully before: so that for a decision on continuous voyages of contraband, pure and simple, we must look to *The Peterhoff* (*r*). In that case, both the points of contraband and blockade were taken, but the charge of attempting to break the blockade was unsuccessful. The voyage was one to the mouth of the Rio Grande, where the vessel was to remain, as she drew sixteen feet of water, and there were only seven feet on the bar. The goods were to be taken in lighters to Metamoras, in Mexico, forty miles up the stream, and then to be ferried across to Confederate territory. The treatment of this state of affairs by the Court deserves praise. They went out of their way to distinguish in favour of neutrals a case of Sir W. Scott's (*The Maria*) (*s*), which seemed at first sight directly in point: and they applied the well-known case of *The Ocean* (*t*), to show that what had been done was not a breach of blockade. But, unfortunately, the mirage of continuous voyages again displayed its specious fascination; and it was held that it was contraband trading to

(*p*) Wallace, III. 515, 559.

(*q*) See *The Peterhoff*, *infra*, at p. 56 of the report.

(*r*) Wallace, V. 47.

(*s*) 6 C. Robins. 201.

(*t*) 3 C. Robins. 297.

supply these goods to Metamoras with the ultimate possible purpose of taking them across the river into Texas.

"The conveyance by neutrals to belligerents of contraband articles is always unlawful, and such articles can always be seized during transit by sea." So the Chief Justice (Chase) tersely sums up the principle; a principle which, whatever may be its merits, is not a principle which the British Court of Admiralty had ever enunciated.

We may take, then, *The Bermuda* and *The Stephen Hart* as more or less mixed cases, mainly decided on grounds of contraband; and *The Peterhoff* as a pure case of alleged contraband, as *The Springbok* was an almost pure case of blockade-running. The technical justification which has been alleged for these judgments is the analogy of continuous colonial voyages. In applying the rule of the war of 1756, which prohibited neutrals from engaging in a belligerent's coasting and colonial trade, it becomes necessary to inquire what is a colonial voyage. It was decided that, if a vessel was carrying goods to a hostile port, she was none the less carrying them from an enemy colony, because she had broken her journey at a neutral country, and performed the magical rites of transhipment and payment of duties there. This was far short of what would be necessary in order to justify the capture of contraband on its way to the enemy, whether the ship is going to an enemy port or not. "Read, 'contraband voyage' for 'colonial voyage,'" say the advocates of the rule under discussion; "the test of a colonial voyage is not at all the destination of the ship, but the unity of the transaction, and the destination of the goods. Therefore, that must be the test of that equally illegal thing, a contraband voyage." The failure of the analogy is obvious. One cannot find, in the first place, a single case where a voyage was ever considered a continuous colonial one, where the ships engaged in it were different. This is particularly well illustrated by the case of *The*

William (*u*). She sailed for Spain from Marblehead with sugar that had come from Havana, cocoa that she had brought from Venezuela, and salt fish from Marblehead itself. It was only the cocoa that was successfully attacked. It alone had performed a continuous voyage in one and the same ship from a Spanish colony to Spain.

True, there have been cases, and not infrequent ones, in which a vessel *in British waters* has been considered as engaged in a trade contrary to the terms of Navigation Acts, although her share in the transaction, if it stood by itself, would have been perfectly legal. But this licence was never extended to the case of war seizure. There does not appear one instance in which a voyage was considered as a continuous colonial one, so as to subject the ship and cargo to the violent process of seizure on the high seas, unless the same vessel was concerned throughout. In the application of a municipal statute to property within the jurisdiction a more stringent rule may conceivably be followed. Instances of such cases of voyages being held to violate municipal enactments are *The Eliza Ann* and *The Matchless* (*x*). In the former case the law was one against importation of goods into Jamaica, with an exception in favour of imports from Cuba in a British ship. Flour was imported into Jamaica in a British ship from Cuba. It was held that it might nevertheless be shown that the importation was an importation not really from Cuba at all, but that the flour had simply been sent to Cuba from the United States in a United States ship to be sent on to Jamaica. There is nothing in this to justify belligerent seizure on the high seas. It is a mere case of interpretation of a municipal statute. All that it, and cases like it, decided was, that the word "importation" means something different from the mere fact of immediate carriage. "This act of a hasty decanting into a British

(*u*) 5 C. Robins. 385.

(*x*) 1 Haggard, 97, 257.

ship at Cuba" was a step in the importation. In interpreting the statute it was held to be included in the term. Belligerent seizure on the ground of the voyage being a continuous colonial one was always limited to the case where the ship was the same throughout (*y*).

Though a remarkable case ought to be mentioned, in which the belligerent right of seizure on the high seas was exercised in an instance where the same ship was not concerned in the two stages of the voyage. This was not a colonial voyage, but a voyage between French and Spanish ports, which had been declared illegal by the Order in Council of January, 1807. The ship was a United States ship called the *Thomyris* (*z*), and was captured in the second stage of the voyage which a certain stock of barilla was making from Alicante to Cherbourg *viâ* Lisbon. The case is no exception to the rule which we shall see to be universal in the case of colonial voyages,—that the capture must be made in the second stage of the journey, when both parts of the voyage are palpable facts. But, unlike all the colonial cases, it condemned the goods even in face of the fact that they were now on board a different ship. One can only conjecture that the order under which the seizure was made was so confessedly illegal that it was interpreted more as a municipal ordinance than by the rules of International Law. That order was an attempt to impose upon the Continent the maritime will of Great Britain. It was naturally interpreted as a British statute would have been.

But a still more serious point, in which the analogy fails to support the novel doctrine of the French and United States Courts, is the destination of the ship. As Evarts (*a*)

(*y*) The *dicta* in *The Polly* (2 C. Robins. 361), as to the possibility of condemning chocolate which had reached the intermediate neutral port in a different ship, but for its trivial amount, are much weakened by *The William*, *supra*.

(*z*) Ed. 17.

(*a*) Brief, pp. 39, 47.

points out, the doctrine of continuous voyages was only employed when the ship had actually left the neutral port and was on her way to the hostile one. A ship was never captured on the mere ground that, although she was going to a neutral port, her cargo was going on to a hostile one. In the case of *The Essex* (*b*), which was the first of these instances of continuous colonial voyages, the ship, a United States vessel, had gone from Barcelona to Salem, the ulterior destination being Havana. Sir W. Scott, in *The Maria* (*c*), speaking of this case of *The Essex*, said that the owner "had the vessel in his own port, and was fully implicated in the engagement of sending her on, according to the projected voyage"; clearly implying that the capture was after the ship had been to Salem, *i.e.*, in the second stage. In *The Rowena* (*d*), "the whole cargo had come from the colony, and had lain in America just long enough to be re-shipped"; clearly this capture was also made in the second stage. In *The Eagle* (*e*), in which case the voyage was one from Spain to Havana *viâ* Philadelphia, "the cargo," to use the words of the judgment, "had come from Bilbao to Philadelphia, where it had been landed, and whence it was proceeding in the same vessel to Havana." In *The Freeport* (*f*), the voyage, which was one from Cadiz to the Spanish West Indies, was broken at Boston, and the judgment states that the vessel "had carried from Cadiz to Boston the cargo with which at the time of capture it was proceeding to one of the Spanish colonies. The cargo had been landed and remained some time on shore." In *The Mercury* (*g*), the voyage was from Havana to some Spanish port *viâ* Charleston: here, again, "by all the documents found on board, the cargo appeared to have been laden at Charleston." So that in this case also the capture was not made until the intermediate neutral

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(*b*) 5 C. Robins. 368.
(*c*) *Ibid.* 365.
(*d*) P. 370.
(*e*) P. 401.
(*f*) P. 402.
(*g*) P. 400.

port had been cleared. In *The Ebenezer* (*h*), the cargo had come from Bordeaux to Emden, and was being carried on to Antwerp without even having been unladen. The *Maria's* (*i*) voyage was from Havana *viâ* Providence to Amsterdam. She was a United States vessel, and "had come from Havana, May 31st, and proceeded July 20th with much the larger part of the same cargo on board." Plainly, the same observation applies here; the ship was not attacked during the first half of her voyage. And as a matter of fact, there being no letters proving an original intention to send the ship and cargo on to Amsterdam (as in *The Essex*); no charterparty to a similar effect (as in *The Enoch*); and no instructions disclosing a course of similar voyages (as in *The Rowena*), the vessel was released.

The Baltic (*j*) seems a case of condemnation on a voyage to a neutral port until it is carefully examined, when it is seen to turn, not on the hypothesis of an ultimate French destination, but on the ground of the goods being enemy property (or, at the very least, the produce of a prior contraband trading). It is one of those cases which have already been referred to as productive of so much confusion. Only the very narrowest examination reveals the fact that, though contraband had something to do with it, it was not decided on the ground of the confiscated cargo being contraband at all. Sir W. Harcourt curiously instances, as an authority against the view "that in cases of contraband the immediate destination alone is to be regarded, and that the eventual destination is to be put aside," the case of *The Richmond* (*k*). It cannot be meant that the ultimate destination of the ship, if clearly proved, was ever considered by anybody capable of being set aside; but whether Sir William is speaking of the eventual destination of the ship or goods, *The Richmond* is no

(*h*) 6 C. Robins. 250.
(*i*) 5 C. Robins. 368.
(*j*) Acton, 25.
(*k*) 5 C. Robins. 325.

authority for saying that the ultimate destination of either need be considered; for in that case it was clear from the papers that the hostile port was the *immediate* destination of the vessel and cargo. She had actually arrived at the intermediate port (St. Helena), *en route*, as her papers showed, for the Isle of France, with tar on board. There was no question here of a voyage ostensibly to St. Helena, with an ultimate idea of going on, or sending the tar on, to the Isle of France. The vessel had obviously, by her own showing, sailed from the United States for the Isle of France with tar. That was her immediate destination, and the mere fact of calling at St. Helena, as the case decided, made no difference. This does not prove that the ultimate destination of the vessel or goods is of any importance, where the ostensible voyage is in due course of performance without anything irregular in the course or papers of the vessel. The *Richmond's* voyage would have been just as illegal if St. Helena had been its original starting-point; and as it was, she could have been captured the moment she left the United States waters.

Another case mentioned, somewhat loosely, as a case "of this sort," that is, as one which shows the principles upon which the eventual destination is taken into account in cases of contraband, is *The Rosalie and Betty* (*l*). This case has been referred to above as being in truth a case of enemy property, and not one of contraband at all. The question of the legality of the trade did not arise; but, claim being made to the cargo, it was held that the claimants had not sufficiently shown their neutral interest. For that purpose the eventual destination of the goods was clearly material. But that does not say that it is material in a case of contraband. Take again *The Nancy* (*m*). The voyage in this instance was from the Dutch colony of Surinam, ostensibly to "Cowes or a port." The ship (a

(*l*) 2 C. Robins. 343.

(*m*) 3 C. Robins. 82.

United States one) was captured in the Channel, a long way past Cowes, and alleged that her terminus was Altona. The British view was, however, that this was a polite synonym for Amsterdam, and that the voyage was a colonial one. The sole question, it will be seen, had nothing to do with inferring an ultimate destination, but simply was whether the ship was making for Altona or Amsterdam. This, also, is "a case of this sort."

The cases of *The Franklin* (n) and of *The James Cook* (o) ought to be referred to that no misapprehension may be created by them. They were, like the last, simple cases of uncertain destination. The *Franklin* was a Prussian ship from Lübeck, and pretended to be going to Lisbon. It was held that she was really going to Bilbao. In the other case the destination of the ship, which had come from the United States, was asserted to be Tonningen; but the vessel, being found off the mouth of the Texel, the Court took the liberty of disbelieving the commander's statement to that effect. But there are three cases referred to by Sir W. Harcourt as having been decided by Sir W. Scott, which do look at first (but only at first) very like justifications of the United States doctrine, not because the ship was captured in the first stage of the voyage on her way to the neutral port, but because of the language used. They are all cases of blockade, broken by egress, and are reported 6 C. Robins. pp. 203, 204, and 394. The process was this: Bremen and Hamburg being blockaded, a charterparty would be made, under which the ship would proceed from one of those ports, light, to an unblockaded port, where she would await the goods, which would be smuggled in lighters to her through the blockade. Then they would be conveyed openly to Algeçiras or Malaga. It will be seen that what happened here was that the ship (empty) and the cargo simply passed through the blockade separately, instead of

(n) 3 C. Robins. 217. (o) Ed. 261.

the one being on board the other. The vessel sailed from the blockaded port under contract to take up the goods, which likewise sailed from it, at a neighbouring port, and to carry them to Spain. Clearly, this is not like the case of goods captured in transit to a neutral port; for here, in each case, the transaction was not attacked until the last stage, when the earlier part of the voyage was matter of history and capable of simple proof. Sir W. Harcourt does not see this vital difference between cases such as these, of breach by egress and cases of breach by ingress, and thinks that "precisely the same reasoning applies" in both cases. In the case of a continuous voyage resulting in breach by ingress, of course the immediate destination is a neutral port, and a hostile terminus has to be spelt out by conjecture. In the case of breach by egress the ship is captured in the second stage, and all that is further necessary is to find the clear fact of a prior breach of the blockade. Certainly, it was held in these cases that it was not necessary that the goods should have broken the blockade on board the actual vessel which carried them on in the sequel, and on board which they were at the time of capture. But then the unity of the transaction was admitted by the evidence of the ship's papers. No one denies that, in cases where a voyage is shown by the papers themselves to be one continuous one, the cargo may be subject to seizure as contraband if of a noxious character. In *The Maria*, the cargo "had been sent from Bremen in lighters to the Jade, for the purpose of being shipped for America, *under a charterparty* made at Bremen." The vessel had gone from the Weser to the Jade in ballast, and having taken on board the cargo, sailed from thence, and was captured in the North Sea. In *The Lisette*, the voyage was one from Tonningen to Malaga, but a voyage accompanied by this fact: that the ship had gone from Hamburg to Tonningen, *under a charterparty* formed at Hamburg for this ulterior voyage, and had there taken on board the cargo, which had been brought from Hamburg

in lighters. In *The Charlotte Sophia*, the voyage was from Tonningen to Algeçiras with goods shipped at Tonningen, but having been sent in lighters from Hamburg *under charterparty* with the ship (also proceeding in ballast from Hamburg), that they should be so shipped for Spain. In fact, these cases prove little more than that if the process of loading a vessel for a foreign voyage involves a breach of blockade, the voyage in question will itself be such a breach. The reason why they are here dwelt on in detail is that passages occur in Scott's judgments which, taken literally, tend a little to support the view that an alleged continuous voyage can be attacked in the first or any stage of its progress. It is sometimes broadly asserted, on the strength of them, that the two halves of such a voyage can be put together, and the entire transaction impeached. But, if these remarks are read with reference to the subject-matter, it will be plain that Sir W. Scott was only thinking of such cases as those which were at the moment before the Court, in which it was patent, from the ship's papers themselves, that the whole was one transaction, and that the ship sailed from Bremen or Hamburg with the goods, as really as if she had towed out the lighters and hoisted in the goods at sea.

The doctrine of the United States Courts receives no support, therefore, from the earlier British cases. *Hobbs* v. *Henning*, as has been seen, decided, with reference to the case of *The Peterhoff*, that the mere intention that the goods should eventually reach the Confederates was not enough to make the trading contraband, in so far as the voyage to Metamoras (*p*) was concerned. That case was brought by the owners of the cargo against the insurers, who defended themselves by alleging that the goods were shipped for the purpose of being sent to a Confederate port. They did not, of course, say that such an adventure was

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(*p*) *Ante*, p. 14.

so illegal as not to be capable of being insured; but that it was so dangerous that they ought to have been informed of the risk. It was demurred that the mere allegation that the goods were shipped "for the purpose" of being sent to a belligerent port was not enough of a defence. And the Court upheld this demurrer. It must be noted that nothing was decided as to what the effect would have been if the defendants, instead of pleading a mere indefinite purpose, had been able to plead a formal arrangement binding the shippers to take the goods on,—or any formal provision of means for the purpose of taking them on. That question was expressly left open by the judge who delivered the opinion of the Court of Common Pleas. But the case is valuable, not only for its clear repudiation of the theory that a trade may become contraband through a mere mental purpose that the goods shall reach the enemy, or because the shipper, knowing that it is very likely that the goods will be bought by the enemy, must be taken to have had the mental purpose that they should be so bought; but also for the emphatic re-statement of the plain and simple rules of Scott and Grant and the contemporary jurists of the great period. "The liability of these goods to lawful seizure, although their quality was such as might make them contraband of war, depended on their destination, and they were not liable unless it distinctly appeared that the voyage was to an enemy's port." This is not Chief Justice Chase's rule, which, it will be remembered, was:—"The conveyance by neutrals to belligerents of contraband is always unlawful, and such articles can *always* be seized during transit by sea."

Chase's justification of the rule laid down by the United States Court of Prize invokes the aid of the fact that United States shipments to Mexico had been, in 1847, subject to condemnation, on the ground of constituting a trading with the enemy, even when a neutral port had been interposed. But, as we have seen, the rules which a municipal court sees fit to impose upon its own vessels

throw no light on those which are required to be observed by the ships of independent nations. When the Court of Admiralty was condemning British goods bound for Emden, on the ground of trading with the enemy, it released *The Imina*, which was carrying warlike stores to the very same port. And therefore Chase's citation of the case of *Jecker* v. *Montgomery* (q) weakens the reasoning of the United States argument, by showing it to be based on a false analogy. And the cases of *The Indian Chief* (r) and of *The Jonge Pieter* (s), which were referred to in *Jecker* v. *Montgomery*, throw no further light on the matter. All that *The Indian Chief* decided was that the *prior* interposition of a neutral port, before the trading with the enemy took place, did not alter the character of that trading. The illegality consisted in a British subject's taking cargo away from the enemy's port. In *The Jonge Pieter* there was a genuine neutral port interposed. The goods were sent by a British merchant to Emden, for conveyance to Holland. Sir W. Scott held that, as between itself and its own subjects, a nation had a right that they should not trade with the enemy, in this or in any other direct or indirect way. In plain terms, it was laid down that *all* trade with the enemy by subjects is illegal; and the circumstance that the goods are to go first to a neutral port will not make it lawful. Is it conceivable, if contraband trading by the subjects of independent powers had come under the same rule, that Sir W. Scott would have found no opportunity of saying so? Since *Hobbs* v. *Henning*, case-law is silent on the subject.

Juristic opinion is at present inclined to make all traffic in munitions of war with a belligerent liable to the risk of interruption by the enemy, and not a few authorities wish to throw on neutral nations the onus of suppressing contraband traffic altogether. On the other hand, there is a

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(q) 18 Howard, 114. (r) 3 C. Robins. 28. (s) 5 C. Robins. 79.

nucleus of opinion gathering form in favour of abolishing the belligerent right to interfere with neutral commerce, even in cases of contraband (*t*).

So far as the specific question of continuous voyage goes, there is little modern authority. For those who would suppress neutral traffic in arms, and, on the other hand, for those who would suppress its suppression, the question does not exist. It is merged in a larger principle. Of the others, we can only claim as opponents of the subjective theory, which allows a Prize Court to guess at probabilities, Desjardins, Twiss, Hall and Field. In Field's "Outlines of a Code," § 858, we have:—"The destination of the ship is conclusive as to the destination of the goods on board. If the destination of the vessel be hostile, then the destination of the goods on board should be considered hostile also, though it may appear from the papers or otherwise that the goods themselves are not intended for the hostile port, but are intended either to be forwarded beyond it to an ulterior neutral destination, or to be deposited at an intermediate neutral port. On the other hand, if the destination of the vessel be neutral, then the destination of the goods on board should be considered neutral, though it may appear from the papers or otherwise that the goods themselves have an ulterior hostile destination, to be attained by transhipment, overland conveyance, or otherwise."

Hall's uncompromising condemnation of the subjective doctrine is too well known for quotation. The attitude of Twiss on the question is equally beyond dispute. Desjardins can only be claimed as a supporter of this principle in a qualified manner (*u*), maintaining that goods can be captured *en route* for a neutral port where that destination is proved to be a mere blind. Fiore (*v*) quotes with

(*t*) See v. Bar, quoted *infra*. Lorimer held this view also; and Klüber (§ 288) regarded the stoppage of contraband as based on convention.

(*u*) Annuaire de l'Institut de Droit International, 1896.

(*v*) P. 510.

approval *The Imina*, but does not specially deal with the point in question.

Of the writers who prefer the subjective position, some, with Bancroft Davis, would leave the whole question to be decided by the circumstances of each particular case. Others make it a *sine quâ non* that a formal arrangement should be proved, establishing a privity between the exporter and the belligerent consignee. A mere floating, or even a fixed, intention to send the goods on to the enemy would not, in this view, be sufficient: not even if it were communicated to the neutral intermediary. Thus Calvo observes—"Il faut qu'il y ait un lien commun entre le fournisseur neutre et le destiniaire belligérent, avec préméditation de nuire aux intérêts de l'autre belligérant; sans cette condition essentielle, le fait de contrebande n'existe pas." (§ 2754.)

Such a position might be unobjectionable, and would not vary very much from the old doctrine, if it meant that the arrangement in question had to be proved by the production of a charterparty or some such formal document, embodying it *totidem verbis.* But the danger is that the rule will be taken to mean that such a definite arrangement, theoretically necessary for condemnation, may be simply inferred. In fact, this seems to be Calvo's own meaning; or why should he approve *The Frau Anna Houwina ?* There, the requisite definite arrangement was virtually established from the development of the Hamburg trade in sulphur. It will not afford a shipper much satisfaction, to be told that the Court infers, from the suspicious circumstances of the case, that an arrangement for the transit existed between the exporter and someone in the belligerent territory. It would be quite enough to know that the Court inferred that the goods were meant to reach the belligerent in question. The additional protection is illusory. If an ultimate belligerent destination can be inferred, it will seldom happen that an arrangement to reach it cannot be inferred as a corollary.

Hautefeuille (*w*), who is entirely unfavourable to the traffic in contraband, and who thinks that it ought to be suppressed by neutral governments, does not go so far as to allow contraband to be seized on its way to a neutral port. The only case considered in the "Nations Neutres en Temps de Guerre" is that in which one and the same ship, destined for a hostile port, breaks the journey at a neutral one. There, it is held that the ship's papers are decisive. The question of a voyage to a neutral port, with a subsequent journey of the goods alone to an ulterior destination, is not even discussed. Hautefeuille may, therefore, fairly be ranked among the supporters of the old objective rule. And so may Halleck, who states (*x*), as the sole exception from the rule of *The Imina*, the case of carriage of contraband to a neutral port for the direct use of the enemy's army or navy, citing, and evidently solely contemplating, *The Commercen* :—there is no force in the word "direct," if the opinion is to have a wider bearing. Heffter does not seem to have been much troubled by the question; merely saying (*y*) that it is not enough to trade in prohibited articles, but that the neutral vessel must be carrying them towards the ports or the naval forces of the enemy. This does not exclude, while it does not recognize, the theory of continuous voyages; and Geffcken, in a note to this passage, supplies the approval which the author did not see fit to assert. The newer view appears definitely in the works of the modern German writers. Founding mainly on *The Commercen*, and, as it seems, allowing too little weight to its peculiar and very special circumstances, Gessner (*z*) permits the belligerent to prove an ulterior hostile destination for the goods, not only by the ship's papers, but by showing their falsity. In this opinion

(*w*) XIII. § 1.
(*x*) VIII. § 3.
(*y*) Trans. Bergson, § 161.
(*z*) P. 139.

Gessner is followed by Perels (*a*). So Phillimore (*b*) allows the belligerent to examine whether the alleged destination is not pretended. This is in accordance with the principle elsewhere expounded by this writer, that it does not matter where the neutral supplies the belligerent with the means of attack (*c*), and is approved by Owen and Westlake.

In their session at Wiesbaden, in 1881, the Institute of International Law instructed a strong committee to draw up a report on this subject. This committee reported unanimously against *The Springbok* decision. Part of their reasoning is directed against the impropriety of extending the law of blockade in this way—but the earlier portion of it is perfectly general, and applies to contraband as well (*d*).

A further committee was appointed eleven years later to draw up a code concerning contraband, which might form the basis of an international agreement on the subject. Mr. Kleen, a Swedish diplomatist, and Professor Brusa, of Turin, were the secretaries. In the project as drawn up by the former (*e*), the doctrine was broadly stated that contraband could be seized whenever it was going to the enemy, directly or indirectly. But Mr. Kleen's view is that contraband trade should be altogether unlawful, and that even on dry land a neutral government should be positively bound to put a stop to it. Events may or may not be tending in that direction—they certainly have not reached such a point. Kleen acknowledges that the laws of the code put forward are new. But the justification alleged is that law is in its nature progressive, and is not fossilised in tradition, however venerable and ancient. The natural reply is that it is an error to think that the law has progressed quite so far as this extremely revolutionary code would require. The

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(*a*) Trans. Arendt, p. 278. And see the draft code by this writer, R. D. I. xxvi, 325; and Annuaire, xiv, 58.

(*b*) III. § 235.

(*c*) § 238.

(*d*) R. D. I. 1882, p. 328.

(*e*) Annuaire, xiii, 103—106.

project was accepted by the committee, though the Netherlands delegate (*f*), as might have been expected, warmly dissented.

It is curious to notice, parenthetically, that the same theorists who would allow a belligerent to examine into the ultimate destination of goods, are excessively jealous of allowing any examination into the purpose for which they are ultimately to be used. They are the very people who most rigorously limit the definition of contraband to things which are "expressly made for war and immediately and particularly serviceable for war in their present state."

You may take an electric battery straight to the belligerent, and nobody can interfere with you. But you may not take a case of swords to China, for fear that France, at war with Brazil, may confiscate your cargo on the ground that it is going round the world to Rio! It is possible that the strictness of these authorities in the one respect may blind them to the consequences of their laxity in the other.

A committee of the Institute, in 1895, at Cambridge, drew up a short project which avoided dealing with the point (*g*), and was based on a draft by Perels. This Cambridge resolution was a very short and summary document, differing widely from Kleen's, which was a full and minute code. Kleen was not present at Cambridge, and tried with success to bring about a compromise, remodelling the resolution so as to be to some extent in harmony with the code which had previously been propounded. A paragraph of this compromise (*h*) states that enemy destination is presumed when the ship is going to a neutral port, if that port is by unmistakeable proofs (*d'après des preuves évidentes*), and beyond possibility of doubt (*et de fait incontestable*), seen to be only a stage in

(*f*) General den Beer Portugael. (*g*) Annuaire, 1895, p. 191.
(*h*) Annuaire, xv, 122.

the single commercial transaction of taking the goods to the enemy. Pausing to remark that the supply of contraband is not always a commercial transaction, whether single or duplex, attention must again be called to the danger of establishing rules, whose transgression is required to be proved by "unmistakeable proofs" and "beyond possibility of doubt." It is not probable that Chase would have failed to find that there was no reasonable doubt where the *Springbok's* or the *Peterhoff's* cargo was going, or that the French Council of Prize would have entertained any serious doubt as to the destination of the *F. A. Houwina's* saltpetre. To use such language is to open a door to most dangerous latitude. It may be meant to cover only those cases in which the ulterior destination is apparent from the ship's papers. On the other hand it is clearly wide enough to cover a great deal more than this. Any case of suspicion is capable of being considered as one beyond the possibility of doubt, or as one of unmistakeable proof. These are vague expressions which may well serve as guides to the legislator, but constitute extremely dangerous weapons to place in the armoury of the judge.

This third project, including the objectionable clause alluded to, was discussed at Venice (*i*). The paragraph in question was retained, on the proposition of Professor Westlake, who avowed the opinion that the doctrine of continuous voyages, though wrong when applied to blockade, might properly be applied to cases of contraband. As to what the rules actually at present binding are, we get no help from the Institute. The Règlement des Prises adopted in 1882 at Turin is susceptible of either interpretation (*k*). Professor von Bar, however, in an article (*l*) on Kleen's proposals, makes some observations, which certainly go beyond received usage in

(*i*) Annuaire, xv, 205.

(*k*) *Ibid.* 5 and 6, pp. 191, 216; 5 R. D. I. xiv, 601; xv, 607.

(*l*) R. D. I. xxvi, 407.

recommending the abolition of the doctrine of contraband altogether, yet are so full of good sense and so eminently display the insight of genius that no apology is here made for referring to them. In Von Bar's opinion, the prohibition of contraband trade places a premium on exaggerated military preparations, and unfairly deprives a nation of the advantages due to its cash and credit. There is no impropriety in neutrals furnishing a State with munitions of war, for cash, so that the issue may be finally and conclusively fought out once for all. If the defeated State is defeated merely because it was not allowed to use all its resources, the struggle will sooner or later be recommenced. "The fact," says Von Bar, "that two States are at war does not authorise either of them to require all the relations between its antagonist and a neutral State to be suspended, even though the antagonist may derive benefit from them. If two States fight, the whole world is not obliged on that account to put an end to its activity, in order to prevent the possibility of any pulsation of that activity doing good or harm to one or other of the combatants: the result of such a state of things would be to establish the principle that belligerents, as such, are to rule the rest of the world. What they *are* entitled to ask is simply that the relations of a neutral State with the enemy should remain the same as before. Thenceforward, the subjects of neutral States may continue to keep up the commercial relations they had kept up before—and if they were manufacturers of weapons and warlike stores, and had sold them to all comers, they may, even after war has been declared, go on selling them to all comers, the belligerents included. The belligerent State may indeed stop this trade which is to the benefit of its enemy—but only in the limits within which it is entitled to do so. For example, it may stop of its own mere motion the importation of weapons and goods of all kinds in the territories occupied by its military forces or effectively blockaded by its naval forces, blockade being a kind of temporary occu-

pation of territorial waters, or even of part of the high seas. The real direction of progress, then, would be, instead of limiting the law of contraband on the one hand, and furnishing it with a novel means of enforcement of a highly inconvenient and dangerous character on the other, to abolish entirely the right of belligerents as regards contraband, and to preserve only the right of blockade—which is a view that has already been sustained by Klüber as being in conformity with the principles of the natural law of nations, and especially by our deeply-regretted friend Lorimer.

"But in proclaiming the freedom of traffic in weapons and warlike stores in time of war, do we not prolong the evils of war? Should we not brand as almost criminal a trade which profits by those sanguinary struggles to which as speedy as possible an end should be put in the interests of humanity? It seems, at first sight, a specious argument. Lorimer, however, with the sagacity to which we are accustomed, puts the point in a clear light by remarking that the end and aim of war is not a temporary cessation of hostilities, but a lasting peace, and that it is an entire absurdity that a nation should be obliged to make peace without being really at the end of its strength, and without the question put at issue by the war being really solved, in this fashion. If the end of the war only comes about for the sole reason that one belligerent has been prevented from getting weapons and stores in return for its money, it is not really overcome, and so in a while the quarrel and the war will begin again. A qualification must, however, here be introduced; what Lorimer observes is true only of the wars, on a large scale, which are styled 'national,' the real cause of which is not some question or other of law which serves as a pretext, but the question of the supremacy of one nation over another, or the refusal to recognize another nation as equal in strength and dignity to the function of sharing in the work of shaping the destinies of the world, or at least of occupying

extensive territories. As to the wars of former times, which were often waged on frivolous grounds, slight losses sustained by either party were often sufficient to settle the matter in dispute, trivial in itself as it was, and of no consequence for the most part to anything but dynastic vanity and rapacity.

"But there are other reasons as well for condemning this ancient but not venerable institution of the repression of trade in weapons and munitions of war. Professor Westlake has well observed: 'I can see an obvious disadvantage which is of no common gravity. The plain tendency of every rule which throws hindrances in the way of belligerents obtaining supplies in the markets of the world is to assure victory to that one of the belligerents which at the outset is the best equipped, and accordingly to make it necessary for states to hold themselves in constant readiness for war.'

"As we know, there are differences of opinion with regard to the warlike preparations which, under the shelter of the maxim which declares that it is in the interests of peace alone that they are made, are frantically pursued, and overwhelm by their weight almost every race in Europe. Therefore, Professor Westlake's argument need not be insisted on, which asserts that the prohibition of trade makes war more likely, notwithstanding that the present writer shares his view. But the most flagrant injustice remains—the prohibition of trade gives rise to surprises, and lends support to the argument, dangerous for a government or a nation, if agreeable to an ambitious soldier—'war must come sooner or later; let us make it now, when our equipment is complete, whilst our adversaries' remains unfinished.'

"And further. Imagine, what in our age of inventions and engineering discoveries is not unlikely, that by chance a particular State had been able to obtain the benefit of some new discovery of capital importance to its military equipment.

"Is it fair to deprive its antagonist, whose own manu-

factories do not enable it immediately to alter its guns or to make the new explosive, of the chance of having its equipment perfected for so much cash by foreign contractors? Is it fair to establish the principle that a State may not derive any advantage in time of war from its cash and credit?

"By no means are we in sympathy with the militant philosophers and the philosophic and pious soldiers who for all time to come glorify war as the imposing instrument which divine Providence is always to employ for the advancement of human civilization. But if sometimes it happens that a great war is profitable and full of benefit for humanity, it is only because it awards victory to the nation which is strongest in the best sense of the word; strongest by its intellect, its moral and physical characteristics, and by a healthy and advanced civilization. What end do we serve in stopping the trade in arms and warlike stores, if not that of increasing the influence of mere chance and of the process of preparation for war—a process often uncandid and always insatiable?

"For these reasons it is with injustice that the sale of weapons and warlike stores by neutrals to belligerents has been branded as a gainful traffic which soils the hands and stains the honour of neutral countries. The allegation has no more weight than the taunt so often hurled at fire insurance companies, and employed to exalt State Socialism, 'that it is a despicable trade to grow rich on the misfortunes of others.'

". . . . . We must look for the rule which would be most in conformity with the general interests of humanity, and the search leads us to the absolute suppression of the superannuated law of contraband.

"Mr. Kleen (p. 397) understands this himself. He speaks of a future ideal which would look to nothing less than the complete suppression of the notion of contraband, so as to leave trade free in time of war, subject to no restrictions except those which result from blockades and the

investment of fortified places, and he shows that this general tendency exists among the most advanced States.

"But he does not venture to lay down this proposition, which he considers not yet warranted by the state of opinion. In order to make quite secure progress, he restrains the decaying idea of contraband within as narrow limits as possible, and then gives it a new foundation. In the present writer's opinion, that is to delay progress. The old edifice would have crumbled away of itself, but, supported by a general convention, adhered to by all civilized States, it will last a century still."

With these straightforward words of Von Bar, we may well close the discussion of this branch of the subject. It is, indeed, a matter of the greatest obscurity why so much warmth should be imported by so many writers into their remarks on the head of contraband trading and blockade-running. Cauchy (*m*), for instance, on the subject of contraband, declares in an almost lyrical outburst: "Je ne voudrais pas qu'on essayât d'abriter, sous le prestige de ces noms sacrés, des actes qui sentent la fraude et la guerre. Si mes sympathies avaient à choisir entre le belligérent qui fait usage des armes, et le neutre qui les vend, je n'hésiterais pas, je l'avoue, à préférer la guerre loyale et patente où le souverain joue son trône et le soldat sa vie, à ces neutralités déguisées, où des marchands fauteurs actifs mais latents de la guerre, n'exposent qu'un peu d'or, dans l'espoir d'en gagner beaucoup." Yet why is there any necessity to import moral considerations into the question? Is it not possible to be a virtuous blockade-runner, or a high-minded contraband dealer? There seems absolutely no reason whatever why neutral merchants, believing that a particular belligerent has a just cause, should not do their best to help that belligerent in the most effective way at their disposal. A safety valve

(*m*) *Droit Maritime International,* II. 209.

is necessary for the private opinions of individuals to work off steam. This is what the amiable theorists do not perceive, who would reduce to a cast-iron rigidity the doctrine, true in broad terms, which identifies subject individuals with their nation. It is not wise to force matters to logical extremes in this way. The next step will be that it will be asserted as a neutral nation's duty to suppress all independent opinion upon the merits of a foreign war on the part of its subjects.

If the investigator is not led away by prejudice of this kind, it is submitted that the conclusion is pretty clear that contraband, to be confiscable as such, must be seized on board a vessel which is going to an enemy port (*n*), according to the ancient practice. To seize it because it is supposed to be eventually intended for the enemy is a dangerous extension, and one which is moreover opposed to the current of progress; which has set strongly in the direction of doing away with restrictions on contraband trade altogether.

It is now possible for us to approach the question of the position of Delagoa Bay with regard to imports of weapons and warlike stores. As the conclusion has been arrived at, that on British and ancient principles, as opposed to French and American innovations, contraband can only be seized when on board a ship *en route* to a hostile port, it seems to follow that Great Britain has no right to place that fetter on the commerce of Portugal, which would be riveted on it if we could seize goods bound for Delagoa Bay. A little reflection will show how very seriously such a course would prejudice the right of Portugal to provide means for her own self-defence, and for the due performance of her neutral duties. As Twiss points out, contraband includes many things which can be used for quite innocent purposes. To seize such goods sends up

(*n*) Or when there is a through bill of lading to the enemy's country.

their price in the neutral market and inflicts serious loss on our friend. The harm done to the country of import, when goods destined for it are seized, has been generally overlooked, and is obscured by the patent harm done to the owner of the goods. But it is none the less real.

The cases of seizure of German ships destined for Portuguese ports, which attracted most attention in the winter of 1899—1900, were three in number. The *Bundesrath* left Aden for Lorenzo Marquez on December 5th, 1899, with twenty-seven alleged intending combatants among her passengers. It was suspected that ammunition was also on board. She was intercepted by the *Magicienne* (the suspicions having been telegraphed to the Cape and London) and was brought into Durban. No question seems to have been raised as to the carriage of enemy troops; and indeed, the vessel being a mail steamer, and carrying the suspicious persons as ordinary passengers, this could hardly have been possible: though an interesting question is suggested as to the liability of steamers to be seized and relieved of such part of their passengers' luggage as consists of ammunition and rifles, now that mail steamers are not in much danger of requiring to defend themselves against pirates. Partial search revealed no contraband by the end of the year; but it was not until January 18th that the ship and cargo were finally released. Incidentally this shows the extreme inconvenience which is occasioned to neutrals by capture. The case of the *Herzog* was very similar. She left Aden a fortnight later, on the 18th, conveying about forty Dutch and German medical and other officers and nurses. The fact was promptly telegraphed to the Admiralty. It instructed the admiral at the Cape that neither the *Herzog* nor any German mail steamer should be stopped on suspicion until it was seen what the *Bundesrath* turned out to be carrying. Nevertheless, the *Thetis* captured the *Herzog*, and brought her into Durban on January 6th. The senior naval officer there, satisfied with the capture, telegraphed at once to the

Admiralty that there was a "large ambulance party on board, most of whom had revolvers"; also that there were large quantities of provisions consigned to enemy's agents and otherwise reasonably suspected as intended for the enemy. However, a telegram next day directed the immediate release of the vessel unless guns or ammunition had been revealed by summary search. And in spite of an appeal from the admiral, "Should provisions be released which are consigned to enemy's agent and destined for enemy?" the Admiralty adhered to its instructions, and directed the vessel to be given up, unless the provisions were specially adapted for military use.

The case of the *General* was somewhat different. There, the naval officer at Aden on January 4th detained the vessel and organised a search which necessitated the displacement of 1,200 tons of cargo and six days' delay. No contraband was found, and orders were subsequently given for the discontinuance of such searches at Aden. It will be noted that in this affair the steps that were taken were carried out within the limits of British territorial jurisdiction.

On hearing of the seizure of the *Bundesrath*, Count Hatzfeldt addressed on January 4 a note to the British Foreign Secretary (*o*), asserting, among other things, that according to recognized principles of international law, there could not be contraband of war in trade between neutral ports, and quoting in support of that assertion the alleged view taken by the British Government of the case of the *Springbok*, and the Admiralty "Manual of Naval Prize Law." This volume contains a statement to the effect that "the destination of the vessel is conclusive as to the destination of the goods on board": Count Hatzfeldt accordingly claimed the release of the vessel, which was admittedly destined for a port in neutral territory.

(*o*) Parliamentary Paper (Africa, No. 1, 1900), p. 6.

And when the boarding and retention of the *General* at Aden became known, the previous note was followed, the next day, by a note requesting that the ship should be immediately released and her cargo replaced, and that no hindrance should be placed in the way of her completing her voyage. It was further requested that explicit instructions should be sent to commanders in African waters to respect the rules of international law, and to place no further impediments in the way of the trade between neutrals (*p*).

On the same day, the British Ambassador in Berlin obtained a statement of the views of the German Government (*q*). They maintained, with reference to the *Bundesrath*, that the carriage of contraband would not have justified interference with a neutral ship plying between two neutral ports. They again cited the *Springbok*, which Sir F. Lascelles took to be adduced as a proof that a British Court had affirmed this principle.

The Marquis of Salisbury's reply to these positions is contained in a note dated January 10 (*r*). In the first place, the writer denied that Great Britain had ever refused to accept the decision in the *Springbok*. On the contrary, she had expressly refused to protest against, or enter any objection to it. Earl Russell's disclaimer of the new doctrine (Hansard, 18 May, 1863) was not referred to, though officially made by the Earl as Secretary of State in the House of Lords. As to the Manual of Naval Prize Law, it was declared to be not authoritative, not exhaustive, and (as though an inland State were a novel phenomenon) (*s*) not applicable. Technically, the manual may be neither authoritative nor exhaustive; but neutral nations surely have a right to expect that a nation will not issue an official publication and then, on the plea of its

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(*p*) Parliamentary Paper (Africa, No. 1, 1900), p. 8.

(*q*) *Ibid.* p. 14.

(*r*) *Ibid.* p. 18.

(*s*) Cf. the *Magnus*, 2 C. Robins. 31.

summary character, adopt a view which renders its statements positively misleading. Further to weaken the authority of the manual, the Marquis invoked the aid of its editor (Professor Holland), who had addressed a letter to the "Times" newspaper in which a view said to be inconsistent with that of the German diplomatists was expressed. This seems to have been a letter dated January 3, 1900, in which the editor of the manual, after first dealing with another point, stated the rule of the *Imina*, but added that innovations were made in this rule during the American Civil War, which seemed to be demanded by the conditions of modern commerce, and might well be followed by a British Prize Court; and that the case of Lorenzo Marquez, 40 miles by rail from the Transvaal frontier, would seem to be well within the principles of the Civil War cases as to continuous voyages.

The new rule is thus distinctly affirmed to be an innovation. What are the conditions of modern commerce which require it is not quite obvious. Steam is the main factor of modern commerce; and its principal bearing on the subject seems to lie in this (a commonplace of the naval strategist), that it has made it easier for the hostile ports themselves to be reached, for blockades to be broken, and contraband carried in. It is, therefore, actually less necessary than it was before to guard against the misuse of neutral ports. The ease with which instructions can now be telegraphed to forward goods is another point of novelty; but anticipatory instructions could always be given in the old days, and were quite effective enough. The conditions of commerce in Scott's time enabled that judge to condemn British goods which were going to Emden, on the ground that their exporters were trading with the enemy, although Emden was a neutral port. The conditions of commerce even then were such as to require the eventual destination of the goods to be taken into account, if possible. Yet it was not taken into account, in ordinary cases of belligerent seizure. Considering that such innovations as those

which the armed neutralities endeavoured to enforce were never held to be binding by Great Britain, as against herself and other nations who did not accept them, it is not surprising if other countries refuse to accept as law our innovations, even when supported by jurists of their own—for the Marquis of Salisbury, with characteristic irony, reminds the German Government of the attitude of Bluntschli on this question.

Eventually Germany abstained from pressing the question of principle (*t*), the vessels being restored and liability to pay compensation (as no contraband had actually been found) being apparently acknowledged (*u*) by Great Britain. Count von Bülow, in the speech of Jan. 19, in which a very remarkable code of contraband was enunciated, expressly stated that the right to raise the question in future was reserved, but added that the principle (as though it were some new progressive nostrum) had not yet met with universal recognition in theory and practice. A rule which was never infringed in modern times until fifty years since does not need this apology.

It is said that Delagoa Bay is the "natural port" of the Transvaal, and that a special rule favourable to the other belligerent ought therefore to be applied. It is not easy to see why the Transvaal's isolation should be allowed to prejudice Portugal. If such an argument were admitted, no State bordering on a belligerent State would be free from vexatious interference. It could always be said that its ports were the "natural seaports" of its neighbour. The fact that the Transvaal has no seaports itself makes matters better for us, not worse. The fact that it has a neighbour with a good seaport is no more than what might happen in the case of any belligerent. Suakim and the neighbouring ports are, in the same way, the ports of Abyssinia. But we should not approve of Italian vessels

(*t*) Parliamentary Paper (Africa, No. 1, 1900), p. 19.

(*u*) *Ibid.* p. 25.

practically putting a stop to the importation of arms to such ports in case Italy had a war with Abyssinia on her hands (*x*); nor should we approve of vessels for Hong Kong being overhauled and taken as prizes by French cruisers in case the French were at war with China. Indeed, the neutral, like the lamb in the fable, cannot please the belligerent. The belligerent has you both ways, which is not even approximately fair. If you had little or no trade before the war, the inference is prompt that the trade that has sprung up since is a sham and a fraud and a blind for the enemy's trade. If, on the other hand, your port was the enemy's emporium before the war broke out, then the conclusion is equally immediate that yours is practically the enemy's port and must take the consequences.

One does not see where this theory of a neutral harbour being virtually the enemy's is to stop. Is it to apply only in cases where the enemy has no seaboard?—or no convenient seaboard?—or to all cases where a neutral port is a natural and accustomed outlet for its traffic? Suppose Russia at war with Persia. May she seize goods, bound for Herat *viâ* Bombay, in the English Channel? When once a few cargoes, on their way, in the various instances supposed, to Suakim, or Hong Kong, or Bombay, had been seized, on the pretext that they were intended for Abyssinian, or Chinese, or Persian use, the trade in arms of such ports would be paralyzed, and prices would rise enormously. If it were only arms that were in question it would not matter so much, though it would always entail immense expense and embarrassment on the neutral power. But there are an infinity of objects which an enemy might seize as being likely to be used for warlike purposes, and which might nevertheless be the entirely innocent commerce of the neutral port. Railway plant,

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(*x*) Actually, a Netherlands vessel for the French Red Sea port of Djibutil is said to have been stopped some years ago in the Mediterranean by an Italian cruiser: vide *Times*, Jan. 4, 1900.

machinery, food, electric batteries—it will never be difficult for a belligerent to imagine a destination to the enemy's military use, of things like these. If a neutral port, because of the unfortunate circumstance of being in proximity to the enemy's country, is to be subjected to interference with its trade of this nature, at the will of a belligerent, then one more discouragement is added to neutrality. Machiavelli used to say that a prince who remained neutral while his friends were fighting evinced his utter incapacity, and might expect his own speedy ruin. Lorimer of Edinburgh, from the ideal standpoint which was not entirely Machiavelli's, declares that it is the duty of states to make up their minds upon the merits of national quarrels and to side with the right. And it really looks as if the forward school of international lawyers were anxious to discourage neutrality, when they devote so much talent and eloquence to making the position of neutrals so extremely difficult. The bridge of Al-Sirat and the way of transgressors are safe and agreeable causeways in comparison. The lesson of the wars of a century ago ought to have been better learnt. Fifty years after the Milan decree,—the Declaration of Paris. Fifty years after the present-day attempts to render the Declaration of Paris nugatory, in the name of strict neutrality, it is not easy to say what the recoil may bring. Possibly, the prohibition of fighting on the world's highway; probably, the absolute security of the neutral flag at sea.

Chapter II.

THE SUZERAINTY.

In the controversy between the British Government and that of the South African Republic, an extreme position has been taken up by the supporters of both sides, as to the international status of the latter. From its own point of view, it was an independent sovereign State, which had nevertheless undertaken certain engagements towards Great Britain. On the other hand, it was freely asserted here, that its rights were a mere matter between ourselves and it, in which no other country had any concern; and that we could revoke them when we found them inconvenient, without accounting to anybody. This was to deprive the Republic of the character of a sovereign State altogether. The fate of such a State can never be indifferent to the family of nations. It would have enabled us to treat the Transvaal population as rebels; just as an Indian native prince would be treated, who should forcibly attack the British. Neither of the two views is satisfactory, and the opinion is here put forward, that the Republic was a *mi-souverain* State; a real international person, but an abnormal one, in that it did not possess certain most important sovereign powers. First, is this possible?

In accordance with the impossibility of any legal limitation being imposed on the "sovereign" as Austin defines it, and the further impossibility of regarding a community which obeys different authorities which are not legally limited to separate spheres of action, as a political society, the Austinian system does not admit the recognition of

what is known as a *mi-souverain* State. Either the sovereign of such a State habitually obeys another—in which case it is entirely subject to it: or it is only morally bound to it—in which case it is entirely sovereign and independent: or, what are seemingly two sovereigns—one superior, the other subject—are really components of one curiously composite sovereign. To the thoroughgoing disciple of Austin, nothing is impossible. So it is, perhaps, saying too much, to assert that semi-sovereignty is incapable of being recognized under Austin's system. But it is certainly extremely repugnant to it. In the case of continental writers, and others who do not accept the conclusions of Austin, their attachment to the principle of the perfect independence of nations renders them exceedingly reluctant to admit the notion that a sovereign can possibly be less than completely independent. Thus, Heffter, De Martens, Phillimore, and Twiss concur in mentioning the term "*mi-souverain*," and illustrating it; whilst at the same time stigmatizing it as a solecism. The truth is, the concept comes down to us from feudal times. These writers of the early part of the century found the name, but they did not find the thing—save in a very few trivial instances. The spirit of the time was impatient of it. The simplicity of full sovereignty was too attractive to make people tolerant of detractions from that. It was in a reaction from the complication of the mediæval hierarchy of empire, that the possibility of semi-sovereignty was slighted. Those authors who do treat semi-sovereignty as a possibility, sometimes define it as the position of a State which is bound in an unequal manner to another. It is not so much, however, the unequal nature of the union, as the non-contractual character of the relation which is set up between the two States, that is characteristic of half-sovereignty. Let us illustrate what is meant by an example. If Barataria *promises* Utopia to have no foreign relations except through the latter country, Barataria does not become *mi-souverain*. She still retains

the right of entering into relations with foreign countries, though Utopia may complain of her if she does. But if she not only contracts not to exercise that right, but actually renounces it altogether, then she becomes *mi-souverain*, for she has renounced and deprived herself of an essential portion of her sovereign powers; and any foreign relations she may assume to contract are simply null, as if Devonshire or the Wesleyan Conference had assumed to contract them. It is a question indeed, as will be seen hereafter, whether the promise to have no foreign relations does not operate *ipso facto* as a renunciation of the capacity to entertain them; but this accident does not affect the principle. The difference is that which exists between contract and conveyance—between the creation of a right *in personam* and a right *in rem*—between a continuous and a transitory convention. In the former case, the transaction leaves the sovereign subsisting as before, only bound to carry out a particular provision; in the other, it operates at once, and exhausts its effect in transmuting the sovereign into a *mi-souverain* State. This difference is to some extent expressed, though not clearly, in the word "unequally."

For the parties to a contract pure and simple are, in one sense, on an equal footing, however advantageous the contract may be to one of them. They begin to be on an unequal footing when one of them experiences a change of *status*. A contract to serve and work for an employer leaves the workman on an equal footing. A contract of apprenticeship puts the apprentice into a particular *status*. Different considerations from those derived from the contract at once arise when this is the case. The same distinction appears to be intended by authors who introduce the word "permanent" into the definition of semi-sovereignty. A semi-sovereign State, according to them, is one which is not bound unequally in a permanent manner to another. It is submitted that the permanence of the relation is not material. A State may enter into a

period of tutelage for a fixed and limited time. On the other hand, if it *is* bound unequally and permanently to another, the tie may be in so slight a point, that the State does not necessarily lose its full sovereignty.

It is very often uncommonly difficult, one need hardly say, to decide when a nation has promised not to do a thing, and when it has deprived itself of the legal power of doing it. The promise to sell, in English Law, may pass the property in the goods, and act as a conveyance. The pacts and stipulations of the Roman Law were effective to create the real right of servitude in provincial land. But the distinction between a contract and conveyance is plain, though the interpretation of a given state of facts may not be: and it is a distinction which is all-important. In each concrete case, the meaning of the treaty must be fairly inferred from its contents. Thus, an express provision that the protected State shall enjoy the rights of internal sovereignty, would generally imply that it gave the rights of external sovereignty up—according to the rule, *expressio unius*, &c.—and not merely that it agreed not to exercise them. This distinction between rights *in rem* and *in personam* is of especial importance with regard to the position of third parties. There is no rule of International Law preventing one State from taking a benefit from another, which that other has promised a third power not to confer. If France promises Holland not to cede Dunkirk to Germany, Germany does Holland no wrong in accepting the town. Holland can only complain of the conduct of France. But if France grants Holland a real right over Dunkirk (assuming that to be possible), Germany can no longer, without wrong, take the town over by cession from the French. Accordingly, a State which has promised not to send ambassadors may still send them; but a State which has disabled itself from sending them cannot. The same distinction occurs in connection with the grant of passage over neutral territory to belligerent forces. A promise to allow passage becomes one which

cannot lawfully be carried out in war-time. A grant of a servitude of passage (made without contemplation of war) remains unaffected.

The touchstone, in this case, is probably afforded by ascertaining whether or not the power claiming the passage could, in peace-time, effect it forcibly without giving cause of war to the servient owner. If so, it has a servitude. If it must look to the territorial power to keep open its passage for it, and may not use force on its own account, it has a promise merely. The same principles apply to such rights as are claimed by France in Newfoundland. They are real rights, and not abolished by the outbreak of war, along with the treaties which created them, if, and only if, their exercise can lawfully be maintained by force.

Mr. Despagnet, of Bordeaux, it should be said, refuses to admit that a protected State parts with any of its sovereignty. Despagnet regards the arrangement as essentially contractual. The State always retains the rights of a State undiminished. All it does is to contract not to exercise them within given limits. The "*jouissance*" of the rights remains, though their "*exercice*" is given up. It does not seem that this view allows for all possibilities. It is true that a nation could contract not to exercise essential rights; and probably it might be right to call it a protected State. But it is none the less true that a nation can actually deprive itself of its rights; and this without depriving itself of them all and so becoming an absolute dependency of another, as Despagnet would seem to infer.

In spite of the disfavour with which the idea of semi-sovereignty has met, at the hands of such opposite schools of thought as are represented by Austin and Phillimore, it seems to fill a very useful place in the scheme of international relations. Ruskin—whose views on political economy are generally worth more than those of orthodox economists, on artistic matters than those of art critics,

and on theology than those of divines—has some reflections on law and politics which are not to be despised when put in competition with the ordinary theories of professed statesmen and jurists. In them (*a*) the theory is developed of a hierarchy of powers rising from the parish to the empire, and to the sovereignty, above that, of the divinity. The higher ranks of this series of powers are clearly imagined as sovereign. The kings and dukes of provinces and kingdoms, are certainly not conceived of as mere subjects. Yet the existence of superiors over them implies that their sovereignty is not absolute. Law, therefore, must regulate their relations on the footing of their *mi-souveraintè.*

And the conception of *mi-souveraintè*, which was thus found necessary by the genius of the keen-sighted possessor of the "most analytic mind in Europe," has been discovered to be essential in practice. For we find that the institution has become revived in more recent years, especially for the purpose of developing half, or three-quarters, civilized States under the tutelage of a protector.

In point of fact, the powers of sovereignty *are* capable of being split up. And it will frequently be found convenient that they should be so distributed among various authorities. A powerful State, given the choice between relying on mere treaty with a weaker and annexation, may be driven to annex. But if it has the possible alternative of leaving its neighbour unannexed, and taking from it a transfer of particular attributes of sovereignty, that will often prove a course which follows the line of least resistance, and may actually, indeed, be for the benefit of the more powerful State itself.

It has now, therefore, become of the most pressing importance to decide exactly what results flow from the

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(*a*) *Fors Clavigera*, 71, p. 345.

establishment of such relations, variously described as suzerainty, protection, and protectorate. The main points which will, sooner or later, have to be determined are:—(1) Does such a relation leave the inferior State subsisting as a person known to International Law, so that the family of nations, though possibly cut off from all intercourse with it, yet feel that a wrong has been done to a State if it is maltreated? Or does it reduce it to the rank of a subject province, with peculiar privileges allowed it by its sovereign, which are capable of being revoked without giving rise to more international comment than bad faith in domestic legislation is usually found to give rise to? (2) Is there any, and if so, what, difference between the various kinds of *mi-souveraintè?* We must, for the purposes of this paper, assume that it is, at all events, possible that a subordinate State may be a real international person, and that there is now no substantial difference between the various types of protection.

The standard writer on the whole subject is J. J. Moser (1777). Indeed, the commencement of the "Jus Gentium" is so crowded with mention of *ganz-sovereign* and *halb-sovereign* (whole sovereigns and half-sovereigns), that in reading it one acquires by degrees the hazy impression that one has been taking a survey of the Mint. But the definition of half-sovereignty is better than that given by any of Moser's successors. *Mi-souveraintè* was a real thing, then; and no vague expressions about "equal terms" would serve. Moser goes straight to the heart of the matter, and the key of the definition is the use of the word *befahlen*, "command" (I. 26).

"They are not completely sovereign over whom exists a real and effective over-lord, who has in many matters authority to issue commands to them.

"But they are not mere subjects, as are equally exalted personages (so far as rank and dignity are concerned) in other kingdoms; on the contrary, they are in possession of many important privileges, which are usually sovereign

privileges, and only conceded to entirely independent rulers and States" (*b*).

This paragraph of Moser's really contains the pith of the matter, and is not improved by any of the publicists of later date. Klüber (*c*) gives a definition which is reproduced almost textually by Ortolan: "When one State is dependent on another in the exercise of one or more of the essential rights of sovereignty, but is otherwise free, it is called dependent, or *mi-souverain*." Ortolan (*d*) says "free to regulate its internal affairs," which does not appear to be an improvement. Indeed, Klüber expressly makes it clear that the question has not, of necessity, anything to do with the distinction between external and internal affairs. "It *generally* refers to the rights of external sovereignty, the exercise of which belongs in whole or part to another State." As to whether such a *mi-souverain* State retains any international personality at all, Klüber makes the power of negotiating the test. If a State cannot enter into diplomatic relations with other States, it does not exist, so far as they are concerned. Such a State is only a province, and its apparent national character is only a concession by its superior. The precise contrary of this is laid down by Phillimore, who makes the power of negotiating the test of *perfect* sovereignty. If a State has neither of these powers, it is then, according to Phillimore, that it is *mi-souverain*: what it is when it has one, and not the other, that jurist omits to inform us. "States which cannot negotiate, nor declare peace or war with other countries, without the consent of their protector

(*b*) "Clearly, therefore," Moser proceeds (I. 37), "the smallest whole-sovereign ruler or State is more highly privileged than the greatest half-sovereign one. For the whole-sovereign does in everything according only to its own free will, and answers to nobody for it; but a half-sovereign must govern its conduct according to the constitution and fundamental law of the States with which it is in relation."

(*c*) § 24.

(*d*) *Diplomatie de la Mer*, I. ii. 38.

are only mediately or in a subordinate degree considered as subjects of International Law. In war they share the fortunes of their protectors; but they are, for certain purposes and under certain limitations, dealt with as independent moral persons." So that we have this remarkable divergence of opinion: that Klüber would not call a State which had no power of negotiating a State at all; Phillimore, on the contrary, takes it as the leading instance of a *mi-souverain* State. Calvo agrees with Klüber, apparently, in regarding the power of negotiating as the distinguishing test of the existence of a State, as an international person—sovereign or *mi-souverain*. But the language employed by this author is unfortunately not characterised by extreme precision. "If a State . . . abandons its right of negotiating and treaty-making, *and* loses its essential attributes of independence, it can no longer be regarded as a sovereign State, or a member of the family of nations. Its legal *status* is not altered by a loss of relative power, but by a loss of the essential attributes of independence and sovereignty—*i.e.*, the right of exercising its will *and* the capacity of contracting obligations" (*e*).

The confusing habit of coupling ideas one of which includes the other makes it difficult here to say what Calvo really means. But, apparently, the mere loss of the right to negotiate is not of itself enough to deprive a State of its national character. On the other hand, it seems to be Calvo's opinion that the surrender of this right must always go hand in hand with a loss of independence which will entail that result. Halleck uses (almost in so many words) the same language: a fact which suggests that Calvo and Halleck both consulted some common authority. Wheaton seems at one time to have considered the phrase "semi-sovereign" as "an apparent solecism in terms." "As no State," Twiss quotes Wheaton as saying,

(*e*) *Droit Int.*, Vol. I. p. 171.

"can be considered at once sovereign and subject, so no State can with strict propriety be considered as half or imperfectly sovereign. But as some States are by special compact dependent upon other States with respect to the exercise of certain rights essential to perfect sovereignty, such States have been termed semi-sovereign States."

But Wheaton seems to have revised this opinion; for in the editions of the "Elements" which the present writer has had an opportunity of consulting, whilst the concluding passage remains in substance the same, it is preceded by an express statement that "the sovereignty of some States is limited and qualified in various degrees" . . ., that "treaties of unequal alliance, guarantee, mediation, and protection, may have the effect of limiting and qualifying the sovereignty, according to the stipulations of the treaties." In this Wheaton substantially follows Vattel. And the same view is taken by an eminent jurist of our own time and country. Professor Westlake, of Cambridge, says: "*Sovereignty is partible.*"

A very learned writer (Dr. Charles Stubbs), in the *Law Magazine and Review* (*f*), invites us to leave Moser and the rest, and to listen to the pronouncements of the earlier writers on feudal law. These come still nearer the time when the relation of suzerain and vassal was a common one, and their testimony is well worth taking into account. Loyseau on Seignories (1610) says:—

". . . Il est bien vrai, que la protection, le tribut, et la feudalité rabaissent et diminuent le lustre de l'estat souverain, qui sans doute n'est pas si pur, si souverain, et si majestatif (s'il faut ainsi dire) quand il est subject à ces charges: mais le Prince qui le possède ne laisse pourtant d'estre souverain en effet." Bodin had said (1593):— "Celuy est absolument souverain, qui ne tient rien, après Dieu, que de l'espée. S'il tient d'autruy, il n'est plus

(*f*) May, 1882, p. 279.

souverain"—on which Loyseau points out, that in that case there would hardly be a sovereign prince in the world, since they nearly all held of the Pope or the Emperor.

So Réal ("La Science de Gouvernement," 1765) concludes:—"La féodalité rabaisse l'état souverain et entraîne avec soi de la dépendance, dans certaines circonstances; mais le Prince vassal non lige peut exercer tous les actes de souveraintè, sans que le Prince à qui il doit l'hommage puisse y mettre obstacle ni par voie de ressort ni autrement; l'hommage que ces sortes de vassaux sont obligés de rendre, et la redevance qu'ils peuvent être tenus de payer aux termes de la première investiture, diminuent la splendeur de la souveraintè, sans mettre d'obstacle à l'exercice de ces droits dans toute leur plénitude" (IIII. 132). ". . . Les souverains, pour être vassaux d'autres souverains, ne cessent pas d'être souverains eux-mêmes. La féodalité . . . n'empêche point par elle-même, l'exercice des droits de la souveraintè" (p. 140). That is, the vassalage, apart from the incidents which accompany it, and the sentimental gratification which it gives the suzerain, does not interfere with the international position of the vassal.

The writer goes on to indicate as the characteristics of suzerainty the following incidents:—

1. *Military assistance*—always given by Naples to the Roman bishop, and in 1876 by Egypt to Turkey.

2. *No appeal in civil causes*—*e.g.*, none lay from Savoy and Piedmont to the Aulic Council, although the King of Sardinia held them of the Empire. None lay from the courts of Egypt—nor from those of North Africa—nor from those of the Balkans—nor of the Transvaal (Hansard, 260, p. 1534).

3. *No restriction on embassy*—thus Naples sent ambassadors to Rome; and see Vattel, IIII. 58.

But these terms apply only to "nominal" vassalage. The writer of the essay arrives at the conclusion that there existed two kinds of suzerainty—liege and nominal.

"Not one case can be quoted in which the suzerain has retained a single sovereign right, while admitting that the vassal is a [vassal] sovereign State . . ."; *è converso*, "No instance can be cited in which a State subject to vassalage has or has had the general right of war, neutrality and peace—of alienation of territory—of legation and embassy, without possessing them all and being, *ipso facto*, a sovereign State subject to no vassalage *other than nominal*."

That is, either the suzerainty meant a sentimental superiority, coupled with a right to military assistance, or it meant sovereignty pure and simple.

But this is entirely inconsistent with the position of the German States, which, though controlled by the Empire in their foreign relations before the Peace of Westphalia, and subject to the imperial tribunals of appeal afterwards, did enjoy the right of legation, and even the right of making peace and war. The jurisdiction of the imperial appeal court was not in the nature of a voluntary arrangement, as the author of the paper suggests, for none of the parties could set it aside.

Normandy, Brittany and Flanders, again, are said by the same authority to have possessed "none of the external rights of sovereignty, but all or only some of the internal rights. . . . They certainly were not privileged to exercise any international rights." But surely it is an international right, and a most important one, to be internationally recognised as sovereign in one's internal affairs. The exercise of internal sovereignty, if it is a mere matter of concession by an over-lord, is not an international right. But, if it is independent of the will and pleasure of the over-lord, then it becomes as much an international right as any of the rights which are called "external."

Kniphausen, according to the same writer, had "no international rights." How this could be, consistently with the fact that it had "the rights entailed by having a free commercial flag," it is hard to see.

We must conclude, in spite of such arguments, that there did exist a kind of superiority which was neither equivalent to sovereignty nor merely nominal. Otherwise, not only would the system developed by such writers as Moser be out of all harmony with facts, but there would have been no meaning in the creation of half-sovereign States in the present century on the analogy of such dependency. Despagnet (p. 46) attempts to draw a distinction between vassalage and protectorate, founded on the assumption that the former presupposes that the subordinate State has never been independent. This is too clearly in conflict with the facts of history to be admitted as a tenable explanation; and a more true account of the difference would probably be to say that vassalage, properly so called, is essentially a feudal relation, and can only be understood as a tessera in some feudal mosaic. Modern imitations of the relation, though they may use the word suzerainty, are really nothing but forms of protectorate, or (as in India) of subjection.

Moser's list of *mi-souveraintés* comprised—besides the spiritual and temporal electors and princes, the prelates and the earls, and the imperial free cities—Orange in the Netherlands; Modena, Monaco, Gonzago, Masserano in Italy; Courland in Poland; and Valachia and Moldavia in Turkey. The new organisation of the German Confederation at the beginning of the present century did away with most of these. They were either mediatized and deprived of all sovereignty, whole or half, or else they were recognized as sovereign partners in the Union. One curious little exception, which makes a great figure in the books, is that of Kniphausen. The next estuary to that of the Ems, (the Dollart), in North Germany, is that of the Weser—another gulf, which has the specific name of the Jade, and is to-day the scene of the summer evolutions of the German fleet. On the shores of this lies the principality of Kniphausen, which is the feudal possession of the counts Bentinck. Formerly held of the Empire, it was

not mediatized, and became independent, when the Empire, in 1806, was dissolved. But it was impossible that it should stand alone. Napoleon overran it, and by the Treaty of Tilsit ceded it, by right of conquest, to Russia, which transferred it to its next-door neighbour, Oldenburg. The counts Bentinck, after the overthrow of Napoleon, were not restored to their principality—whether because, as has been suggested, the small territory was forgotten at the Congress of Vienna, or whether, as is much more likely, the Czar of Russia, having adopted Napoleon's misdeeds in this particular, felt bound to confirm the title of the Duke of Oldenburg. Certainly it was in the year of Alexander's death, 1825, that the Bentincks were restored; but not to their momentary independence, Oldenburg being placed over them, as previously the Empire had been. This was by a treaty of Berlin, to which Russia, Oldenburg and Kniphausen were parties. It gave Oldenburg the control of the foreign relations of Kniphausen, but preserved to the latter a right of legislature and a commercial flag. At the present day, it seems to be an integral part of Oldenburg.

The new arrangements, however, under which so many of the ancient half-sovereignties disappeared, created one new one—the Free City of Cracow. Why Cracow was ever erected into an independent State, is doubtless discoverable in the records of history; but the wonder is that the arrangement lasted as long as it did. It is perhaps the first instance of a new State being created, and made half-sovereign. Its origin was in a simple treaty between Austria, Russia and Prussia. This treaty was, however, inserted in the final act of the Congress of Vienna, so that when the city of Cracow was annexed to Austria in 1846, the other parties to that final act considered that they had a right to protest—not only because a member of the family of nations had been destroyed, but because its continued existence formed part of the scheme which had been solemnly settled at Vienna. Cracow was, for the thirty

years it lasted, under the joint protection of the three powers. It was to be governed by a president and twelve senators, to have a civil militia, and to be free from the introduction of any foreign armed force. The three powers would protect it, and it was to afford no asylum to fugitives from justice or deserters. It was the last point that ruined Cracow. It became a focus of intrigue and a refuge for political offenders. Human nature could not give up to the protecting powers refugees with whom the town only too well sympathised; and in 1846 Austria had had enough of it. Previously, in 1830 and 1836, Russians and Austrians respectively had been quartered in the town for two months and four years respectively. It will be noticed that no provision prevented the sending of ambassadors by Cracow, nor the declaration of war and peace. Another half-sovereign State which it was attempted about this time to create was the republic of the Ionian Islands. In spite of all that has been said to the contrary, there does seem a good deal of truth in the opinion, universal on the Continent, that the Ionian Islands had no international personality at all. These islands, formerly Venetian, were ceded to republican France in 1797, but during the Napoleonic wars fell (all but Corfu) into British hands. Corfu was given up to the allies at the fall of the French Empire. The allied powers, not knowing what to do with the islands, and being embarrassed by promises, or half-promises, made by the Russian Emperor to the population, prevailed upon Great Britain to take them over. This was carried out, not by any convention with the Ionians, but by a declaration of the allied powers, of whom Great Britain was one. The declaration, as such documents usually are, was hardly consistent with itself. It began by declaring the Ionian Islands a single, free and independent State, under the immediate and exclusive protection of Great Britain. But they were to regulate their interior organisation, "with the approval of the protecting power," and their constitution was to be framed by a

legislative assembly, which was to be convoked, and of which the operations were to be directed, by the protector's commissioner. The United Kingdom had the right of occupying and garrisoning the State; its military forces were to be under British orders. The single, free and independent State of the Ionian Islands enjoyed, therefore, only a sort of clockwork freedom. It moved and spoke according as the high commissioner wound it up. This state of affairs was ended in 1863, by the cession of the islands to Greece.

These two cases of Cracow and the Ionian Islands are leading instances of the creation, or attempted creation, of a semi-sovereign State, by declaration. But it is more generally done by convention or treaty. This was the method in which the old feudal suzerainties arose. The treaty by which Genoa placed itself under the protection of France is interesting (*g*). It was made at the close of the 14th Century, and was one of a series of treaties by which Genoa, with charming impartiality, put itself under the protection of this and that Power in turn. Each party promised mutual help, and the Genoese took the French sovereign (Charles VI.) as their lord, put under his control all the town jurisdictions, and admitted French troops to all their fortresses. But that did not mean that the French were to do as they liked. There was to be a French governor, with the powers of the old doge, and a heavy salary; but the governor had no other powers than these, and was to be assisted and might be replaced by a council of twelve; the republic was not to be taxed nor (as it is quaint to read) obliged to obey one pope rather than another. So that the two most powerful motives of politics, money (*h*) and religion (*hh*), were withdrawn from the sphere of the protecting power. Otherwise the treaty operates as a tolerably complete submission: but the

(*g*) Cited by Engelhardt, *Revue de Droit Int.*, XXV. 232.

(*h*) Seeley.

(*hh*) Carlyle.

Genoese interpreted it as a treaty of alliance. It only lasted 14 years (1396—1410).

From what has been said, it will be seen that it is possible to divide protected States into three classes.

I. States whose protectorate dates back to feudal times; such are S. Marino, Andorra, Kniphausen (virtually), and Monaco (if the subjection of that State to Italy still exists, in face of the fact that the prince of Monaco ceded Rocabrunna and Mentone to France in 1861, without asking the consent of Sardinia, or evoking a protest from that power). Such were Ragosnizza and Poglizza until their absorption by Austria.

II. States established in imitation of these, *i.e.*, Cracow and the Ionian Islands.

III. States which have in recent times accepted a *mi-souverain* position, in virtue of their imperfect development or weakness, or in the course of the break-up of the Turkish empire. Instances of this third class are said to exist, or to have existed, in the old Balkan States; in Egypt, and the other North African dependencies of Turkey; in modern Bulgaria; in Zanzibar and Borneo and Sarawak; in the French protectorates of Annam, Tonquin, and Tahiti, and elsewhere. But it is certainly open to very grave doubt whether any of these (Bulgaria excepted) have at the present day any international *status* at all. A protected State, or a *mi-souverain* State, must have a real will of its own, exercisable within the limits of its limited sovereignty, without reference to the wishes of its protector; otherwise it ceases to be anything but a mask through which the protecting power can speak. This was the case with the kingdoms which Napoleon set up, and called the Confederation of the Rhine. They were considered by international law as provinces of France. For, as Phillimore remarks, "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."

This is certainly the case with Cuba at the present day. Constitutionally, the United States may repudiate the island as part of their territory, but internationally it is nothing more than a United States' province. So the preponderant weight of the British resident in the counsels of Zanzibar makes it hardly possible to accord the ruler of that sultanate an international *status*. Probably the same remark applies to Borneo and Sarawak. As to the French protectorates, Mr. Despagnet's book is instructive. The credit of inventing the protectorate as a means of developing uncivilised nations is ascribed by him to France, and the behaviour of France in dealing with such countries is exonerated from the semblance of blame upon all occasions. Britain is wrong in Egypt, and France is right in Tunis. France is right in Annam, and Britain wrong in Africa. English missionaries corrupted the simple natives of Tahiti, and forced the French to annex their vassal. Apparently, the French judge of the ways of missionaries by experience of their own. In the *Revue des deux Mondes* for April, 1900, occurs a warm eulogy of the way in which the Roman missionaries implant the *cultus* of France concurrently with that of the Evangel in the neighbourhood of New Caledonia. The panegyric is as frank as it is lavish. It is plainly regarded as the clear duty of the missionary to co-operate actively with the seaman in the pious labour of annexation. It may be British hypocrisy—but we do not seem to rely on our missionaries for this kind of pioneer work.

Through the joint exertions of mariner and missionary the designs of a British captain on New Caledonia were happily frustrated. The flag of France already waved there when the Briton arrived. "Le malheureux gardait en poche depuis plusieurs mois l'ordre d'occuper la Nouvelle Calédonie : en apprenant la fatale nouvelle, il tombe foudroyé. C'est ainsi que la France acquit la Nouvelle Calédonie par l'énergie et le patriotisme de ses marins et de ses missionaires. Les missionaires, en travaillant à

ouvrir au Christ l'accès de ces âmes primitives, avaient, du même coup, préparé les voies à la France ; les marins, qui avaient les premiers explorés ces parages dangereux, en avaient aussi, par leur audace prudente, assuré a notre patrie la possession. Ainsi, tous avaient collaboré à cette double action conquérante et civilisatrice qui a été et qui est l'honneur de notre race dans son expansion contre mer."

And Despagnet seems to be in error in calling Tahiti a protectorate: the *régime* inaugurated by Du Petit Thouars in 1842 was of a much more drastic nature. Besides the control of external affairs, the control of legislation, jurisdiction and police was in French hands. So in Annam, the sovereignty, since 1883, is under the control of the French resident. These protectorates of Oriental and savage States (*i*) are thus of little assistance in settling the point whether the South African Republic, as a member of this third class of vassal States, was an independent State, a semi-sovereign State, or a subject State (*i.e.*, a mere province to which has been conceded the apparent character of a State).

Starting with the position that there can be a semi-sovereign State, that, in Westlake's words, sovereignty is partible, let us, in the light of this, examine the Conventions of 1881 and 1884. They differ from the Convention of 1854 with the Free State of Orange, in granting "self-government" instead of "independence." So the instrument acknowledging the North American States' independence used that express term; so did the Declaration constituting the Ionian republic; so did the Convention establishing the republic of Cracow.

It will be observed that the Convention of 1881 used the word "suzerainty." It is frequently assumed that this word was employed because nobody knew what it meant. A small circumstance indicates that this is hardly

(*i*) Cambodia and Tonquin are now admittedly colonies.

an accurate, though a wide-spread, impression. The name given to the country in that Convention was "the Transvaal State." Now the native States of India are, in Anglo-Indian official language, generally referred to in exactly the same phrase: as the "Patiala State," the "Sirmoor State," the "Jodhpûr State." Every stamp collector knows this. These native States are constantly referred to as being under British suzerainty; the inference seems tolerably clear that, to the mind of the British negotiators, at least, the "Transvaal State" was to be in the position of an Indian native State; that is, that its vassalage was to be "liege," not "nominal," and that it was to have no international *status* at all. With such an interpretation the terms of the treaty are consistent. But it was generally held at the time that the suzerainty was merely nominal, and did not resemble the suzerainty of Indian feudatories, but rather that with which Turkey had just been invested over Bulgaria by the Treaty of Berlin. The Marquis of Salisbury took occasion to observe in the House of Lords, on March 31st, 1881: "The suzerainty contains no atom of sovereignty whatsoever." Then came the Convention of 1884, altering the name of the State to the "South African Republic," and substituting a fresh set of articles, in which all reference to suzerainty was left out.

The 1881 Convention had granted "complete self-government . . . subject to . . . suzerainty . . . upon the following terms and conditions, and subject to the following reservations and limitations";—these terms, conditions, reservations, and limitations are very numerous and long, and are numbered from I. to XXXIII. It was not the grant of self-government, but these terms and conditions, &c., which were replaced by fresh matter in 1884. This substitution of a fresh set of terms and conditions on which self-government was granted, evidently left subsisting the original grant itself—which was not, as it is so often called, a preamble, but a

substantive concession. The grant of autonomy subject to suzerainty, therefore, apparently remained; and the only question appears to be whether the change in the terms of the treaty did not reduce the suzerainty to what has been above referred to as nominal suzerainty, *i.e.*, a merely sentimental and honorary suzerainty—or, at all events, to something less than complete sovereignty, if it had previously amounted to that. According to the *Law Magazine* writer, the South African Republic having thenceforward an external sovereign right (that of intercourse with foreign powers) was completely sovereign. Phillimore would say the same. According to Klüber and most other jurists, the South African Republic was thenceforward (if not before) a *mi-souverain* State, having an absolute sovereignty in most points, but affected with this very serious incapacity, that it could not make treaties as to which Great Britain could assert that they were prejudicial to her. It does seem impossible, on the one hand, that after conceding to the South African Republic the power of negotiating with foreign countries on its own account, Great Britain could treat it as a province on which it was entitled to enforce its will, and in whose fate foreign countries could not be admitted to have any legitimate interest or concern. It seems equally impossible to hold that Great Britain intended to relinquish all rights with respect to the Transvaal, except as contractual claims. The disability of the South African Republic to make treaties which met with the disapproval of Great Britain was surely a real disability, and not a mere promise not to make them.

The conclusion will then be, that in 1884 the South African Republic became, or remained, a semi-sovereign State. In endeavouring to ascertain the true state of the case, it is plain that there are three alternatives for consideration. In the first view, the Republic was, before and after 1884, a simple colony, not to be appropriately so called because of the peculiar privileges which it had,

but exactly assimilated to a colony in this, that it was entirely incorporated into the possessions of the kingdom, so that any privileges and independence which it enjoyed, it enjoyed at the absolute pleasure of the sovereign authority, which could revoke them or withdraw them as it liked; just as it can withdraw the rights which it confers on a colony or a county. Of course it is not meant here to speak of high politics. It may be a very flagrant breach of faith for a central government to take back the powers with which it has invested a locality; but in such a case the question becomes one of constitutional propriety, and ceases to be one of international law.

This first view can hardly seriously be maintained; nor is that a more probable one, which sees in the possession of the right to negotiate an infallible index of absolute sovereignty, bound only by contractual promises. The only satisfactory way of looking at the matter seems to be to treat the sovereignty as split up between the governments of the Republic and the United Kingdom. The difficulties of such a position are patent, but they are not insuperable; and if facts are in their nature difficult, it will not render things easier, in the end, to treat them as if they were simple and capable of adjustment by a simple rule.

It does not follow, however, that, because the South African Republic was a State, it could declare war on, or be in a state of war with, its suzerain.

Mr. Engelhardt (*Histoire des Protectorats*, p. 209) refuses to a protected State the capacity, under any circumstances, of making war on its protector. Despagnet maintains (p. 362) that it may do so if the object of the war is to repudiate the protectorate, in consequence of some infringement of its terms. This, Engelhardt says, would be to allow the protected State to throw off its allegiance whenever it might suit it to do so. But such a conclusion is not warranted. It rests on a confusion entailed by the fact that a State is necessarily the judge of its own rights. By parity of reasoning, one might say

that when two States have promised perpetual friendship by treaty, they can never go to war afterwards; for to allow them to do so would be to say that the treaty was only binding on either party so long as it suited it. Engelhardt's theory would go far to reduce the protected State to the mere rank of a province, and the examples adduced in its favour are scanty and unconvincing.

In 1876, according to Engelhardt, the Servians were not treated by Austria as belligerents against Turkey during the Herzegovina difficulty. But then, by the protocol signed at London on March 31, 1877, the six powers expressly took note of "the conclusion of *peace* with Servia" (*State Papers*, 1877, p. 823), whilst Turkey consistently preferred to speak of the "*status quo ante*" (*State Papers*, 1877, p. 810).

Again, in 1895 the Malagasy were not treated as belligerents against France, by Britain, which "authorized British ships to assist" the French in the transport of war material. This is an error. Sir E. Grey stated expressly in the Commons (4th Hansard, XXX. p. 957) that there could be no question of direct permission being given by the Government to such trade. It was merely in accordance with the general principle, that a neutral government is not bound to prevent the carriage of contraband by its subjects, that they did not think it necessary to take active steps to stop the traffic. And the Under-Secretary expressly declared the opinion of the Government that a state of hostilities did exist between France and Madagascar (p. 1266).

The reported declarations of the Italian Foreign Minister (25 July, 1895) that nobody could come between Menelek and Italy, and the irritation with which the British press received the Emperor of Germany's celebrated telegram to the Transvaal, are quite beside the mark in this connection. They touch the much larger question of whether the vassal State has any international existence at all. And they do

not repudiate, even tacitly, the possibility of war between suzerain and vassal.

Consequently, it seems safest to recognize the possibility of a war between a suzerain and its vassal—at all events where it is waged for the safeguarding of the vassal's rights. In such a case the people of that State cannot be treated as rebels, and the only question remaining is whether the relation of protectorate is put an end to. Those who, like Despagnet, consider this relation as a matter of contract merely, naturally assert that it is destroyed, like the obligation of all other treaty promises, by the outbreak of a state of war. On the other hand, if we regard the relation as created indeed by contract, but existing thenceforward as a "real" obligation, it by no means follows that infringement of its terms dissolves it, nor that war does away with its existence. Far from asserting that these results may not follow, we may freely agree that they generally do. But this is not, as on the other hypothesis, an essentially necessary consequence of the position.

Chapter III.

PASSAGE OF TROOPS OVER NEUTRAL TERRITORY.

The question of whether a neutral State is at liberty, during the progress of a war, to allow a passage over its territory to a belligerent's forces is one not altogether easy to answer. Certainly it appears at first sight entirely at variance with the modern theory of neutral obligation, according to which the neutral is bound to afford not the slightest facility to the warlike measures of either side. And the curious paradox seems to be true, that it is on account of its very flagrancy that it still remains invested with a shadow of legality. For this startling character secured it specific discussion, at a time when opinion was altogether against requiring a strict standard of conduct on the part of neutrals. As soon as neutrality became a possibility, and had superseded the principle that underlay the wars of the Reformation period—that religious agreement must determine the attitude of third parties towards the combatants—it became necessary to lay down the rule that the neutral must not help either side unfairly. Then the further question inevitably arose—were not some modes of succour so palpably a participation in the conflict as to be inconsistent with neutral duty, even though granted to both sides alike? The gratuitous supply of weapons, for instance, even though the assistance is afforded equally to both sides, was recognized as unlawful. But the free grant of a passage for troops might be made (Vattel, III. 7, §§ 119—135) without objection, so

long as the same privilege was accorded to the other belligerent.

This is the view of Vattel, and it shows the way in which the point was lucky enough to receive a favourable solution. It was startling enough to be formally raised at a time when it was just capable of being decided by authoritative writers in the affirmative. How nearly it missed receiving a negative decision is seen by the fact that the free supply of weapons was too plain an interference to be tolerated even then.

But in both cases—in that of the supply of weapons and in that of the permission of passage—the jurists of Vattel's age (Cent. XVIII.) recognized that the assistance was not gratuitous, and could accordingly be fairly afforded to a belligerent, if it had been promised by treaty before the war, and not in contemplation of it.

It is said by most authors that a change has taken place in the law: that the passage of troops is absolutely interdicted where not secured by treaty; and—more doubtfully—that where it is so secured, the provision securing it is generally invalid and of none effect. The authority of precedents is remarkably scanty. The extreme measures which were taken by Belgium and Switzerland in the Franco-German war of 1870, and in the Austro-Italian war of 1866, admittedly went far beyond the legal duties of those States, and no deduction can be made from them what those legal duties were. Belgium refused a passage to German wounded; and Switzerland refused a passage from France to Germany, and *vice versâ*, to every belligerent capable of bearing arms (*a*). These precautions were obviously dictated by the delicate and dangerous position of these neutralized buffer States, the maintenance of whose absolutely neutral position is the breath of their existence. No general conclusion can be drawn from their conduct.

(*a*) *Walker*, Science of International Law, p. 449.

Writers vary in their treatment of the question. But the modern authorities are all one way. Phillimore is one of the latest who allows the neutral to admit belligerent troops to passage (III. § clix.). Previously that rule had been generally upheld. Wheaton says: "[Passage] may be granted or withheld at the discretion of the neutral State; but its being granted is no ground of complaint on the part of the other belligerent power, provided the same privilege is granted to the latter, unless there be sufficient reasons for withholding it" (§ 427). So De Martens (§ 310, *Précis*): "It is not a violation of neutrality to give the two parties, or that one of them which asks for it, permission to traverse its territories with a body of troops, armed or otherwise, and to let it enjoy the rights which such a passage necessarily involves. . . . . Further, even inequality practised in such a matter, by allowing a passage to one of the belligerents whilst refusing it to the other, would not always entail a violation of neutrality, if that inequality were based (*inter alia*) on treaties of general application concluded before the outbreak of hostilities." De Martens goes on to say that a power does infringe the obligations of neutrality which, without any previously existing engagement to do so, permits a passage to one of the belligerents, and adds—what one cannot in the least understand—that it is useless for it to screen itself under the pretext that it is ready to do as much for the opposite party. As De Martens has already asserted the admissibility of allowing passage, not only to both sides, but to that party which may have asked for it, this further observation is unintelligible. Manning (1839) makes sense of the passage by entirely reversing the meaning of the concluding part. Instead of reading it as saying that it is useless to pretend an equal readiness to oblige the other side, we find the paragraph paraphrased as though it ran—"*unless* one shows an equal readiness to oblige the other side." The conclusion which the last-named writer comes to is, "that the passage of troops

cannot be . . . granted where there is no antecedent treaty, unless an equality of privilege be allowed to both belligerents" (p. 249). Klüber (1819) recognized that a neutral might be bound and entitled to permit the passage of hostile troops, but only in virtue of treaty. Kent (to whom we have Sir W. Harcourt's testimony that he is "never wrong") observes (p. 305, Abdy) that the right of a refusal of a passage over neutral territory to the troops of a belligerent power depends more upon the inconveniences falling on the neutral State, than on any injustice committed to the third party who is to be affected by the permission or refusal. It is no ground of complaint against the intermediate neutral State if it grants a passage to belligerent troops, though inconvenience may thereby ensue to the adverse belligerent. It is a matter resting in the sound discretion of the neutral power, who may grant or withhold the permission without any breach of neutrality. This is a quotation from the judgment of Sir W. Scott in the "*Twee Gebroeders*"; and it is also adopted by Twiss, who says (§ 218) that a neutral nation has the same absolute right of sovereignty within its own territory in respect of belligerent nations as it has in respect of nations which are at peace with one another. It may accordingly grant a free passage through its territory to the armed troops of a belligerent power without compromising its neutrality, if it is prepared to grant a free passage similarly to the armed troops of the other belligerent.

And Ortolan (II. 284) says:—"When it is a question of the passage of an army or smaller body of troops . . . the State to which the territory belongs has, in virtue of its exclusive right of property, the right of opposing it, even by force; and if it allows it to one of the opposed parties, it cannot in similar circumstances refuse it to the other, without partiality and a departure from strict neutrality."

So far, we have the jurists of the first half of the century

—with the possible exception of Klüber—unanimous in following Grotius and Vattel, and allowing neutrals to permit belligerents passage, so long as they did it impartially.

But, since the middle of the century, a total and violent change in the opinions of authors has operated. Passage is now a benefit which every modern author holds must be refused absolutely, and not offered impartially.

Hautefeuille first enunciated (in 1848) the modern view: that a nation is absolutely bound to refuse a passage to troops, and that it makes no difference if it is impartial in allowing the privilege to both sides. Apparently, a treaty by which a State engaged to grant a passage in war time would be regarded by Hautefeuille as no excuse; though the case might be different if the treaty did not specifically contemplate a state of war (I. 424, 369). Fiore and Pinheiro Ferreira adopt the same view.

Halleck is undecided, and, one may remark, treats Manning as altogether against grants of passage; whereas Manning is really, as we have seen, only against *unequal* grants of passage.

It is common for English authors to blame Hautefeuille, Ortolan, and others for stating their personal views of what the law should be, as accepted law. But it is questionable whether Heffter, for whom English writers have a great respect, is not as bad as anyone in this matter. On this question of passage, Heffter says the old writers fell into a serious mistake, in thinking the grant of passage lawful. But when they wrote their books the fact was so, however improper that may seem.

Calvo observes: "During war neutrals may oppose, even by force, all attempts that a belligerent may make to use their territory, and may, in particular, refuse one of the belligerents a passage for its armies to attack the enemy; so much the more so, inasmuch as the neutral who should allow the passage of the troops of one belligerent would be false to its character, and would give the other just cause of war.

"However, it may be that a servitude of public order, or a treaty made antecedently to the war, imposes on a neutral State the obligation of allowing the passage of the troops of one belligerent. In such a case, the fulfilment of this legal obligation cannot be regarded as an assistance afforded to that belligerent and a violation of the duties of neutrality."

Calvo therefore appears to approve of the granting of passage where that has been secured by previous treaty. The point seems to lie in the nature of the previous treaty. If it granted a real right of way of the nature of a right *in rem*, there is no reason why the way should be stopped against troops, any more than why a purchaser of territory should be debarred from using it as a base of military operations. If the treaty only created a right *in personam*, the case is different. There, the power which claims the way depends entirely on the promise of the territorial power, for the exercise of that advantage. In such a case, it may well be that the performance of its promise by the territorial power becomes unlawful, on the outbreak of war between the promisee and a third party.

A test is undoubtedly wanted, by which we may be able to separate real servitudes from personal engagements. At Rome, the want of such a test brought it about that personal stipulations created real servitudes, in the later history of the law.

It is submitted that, for international purposes, the true test is: "Could the power claiming the right of way, or other servitude, enforce its claims during peace time by force, without infringing the sovereignty of the territorial power?" And it will follow that if it could, and the servitude is consequently a real right, it will still have the right to use its road in time of war, and that the owner of the territory will be bound to permit the use, without giving cause of offence to the enemy who is prejudiced by the existence of the servitude. To stop the use of such a road, would be analogous to the seizure of a belligerent

warship, to prevent its being used against the enemy. But if the right of way is merely contractual, then the fulfilment of the promise to permit it must be taken to have become illegal on the outbreak of war, and the treaty cannot be invoked to justify the grant of passage. This case would be analogous to the sale of a warship to the belligerent. Internationally, though that belligerent might have a right *in rem* to the ship so far as the civil law was concerned, it would only have a quasi-contractual right *in personam* against the State in whose waters it lay, to allow it to be handed over. And the performance of that duty to hand over the vessel would have become illegal when hostilities broke out.

What, then, is the nature of the right of way which Great Britain is enjoying across Portuguese territory in South-East Africa? It is not a new right—it was created by a treaty of June 11, 1891. Is it real or personal? Is it a right of way, or is it a license to pass?

The terms of the treaty in this regard are as follows:—

Art. 11. . . . It is understood that there shall be freedom for the passage of subjects and goods of both powers across the Zambesi, and through the districts adjoining the left bank of the river situated above the confluence of the Shiré, and those adjoining the right bank of the Zambesi situated above the confluence of the river Luenha (Ruenga), without hindrance of any description and without payment of transit dues.

Art. 12. . . . The Portuguese Government engages to permit and to facilitate transit for all persons and goods of every description over the waterways of the Zambesi, the Shiré, the Pungwe, the Busi, the Limpopo, the Sabi, and their tributaries; and also over the landways which supply means of communication where these rivers are not navigable.

Art. 14. . . . In the interests of both powers, Portugal agrees to grant absolute freedom of passage between the

British sphere of influence and Pangwé Bay (*b*), for all merchandise of every description, and to give the necessary facilities for the improvement of the means of communication.

It is not clear that General Carrington and his troops would like to be described as "merchandise": Art. 14 is therefore scarcely applicable. Art. 11 obviously applies to the territory far to the north, and concerns the question of access to British Central Africa. Art. 12, on the face of it, only relates to certain waterways and the land routes ancillary to them. The treaty has therefore to be pressed very far, to cover the grant of an overland passage for troops from Beira inland—and, assuming that it does, it must be by virtue of Art. 11. Let us assume that Art. 11 did grant such a passage for troops—the question arises, Was it such a grant as could be valid in war time?

Does Art. 11 mean that Great Britain acquired thenceforward a right to force her way along these routes, as a real easement, and to overcome local opposition (if any should arise), without going to war with Portugal, by force of arms—as France might claim to do in Newfoundland? Or does it, on the contrary, mean that she acquired a right to be allowed to use the routes in question, and a faculty, if they were stopped, to exact damages from Portugal, or to go to war with that power? On the answer to that question, it is apprehended, will depend the solution of the difficulty as to whether the road across Portuguese East Africa could properly be used after the outbreak of war in the same way as previously thereto. But this is always subject to the consideration, that the terms of the treaty do not seem to contemplate the use of the road as a military road at all. There can be such a thing as a military road across neutral territory. The German Empire has such a road across the canton of

(*b*) Where Beira is situated.

Schaffhausen, and there used to be one between Saxony and Poland. But it seems very questionable whether the roads indicated by the treaty of 1891 were not simply commercial, and not for purposes of war at all. Taking this view, a writer in the *Revue des deux Mondes* remarks that "thirty years ago it was said 'Europe no longer exists'—now it may be said, 'International law no longer exists.'" Without going so far as that, one may regret that the British Government should have found it necessary to place a somewhat strained interpretation on a treaty which, even then, did not give them, in anything like clear terms, an absolute servitude of the kind contended for. It cannot be denied that the feeling is very prevalent, however unjustly so, that Great Britain is an adept in misreading International Law to serve her own interests—a feeling which is fostered by the outspoken declarations of so many English organs of opinion in favour of England doing as she pleases, without regard to law, or anything but the expediency of the moment. The frequent recurrence of denials on the part of English statesmen and journalists (trained in Austinian theories) that there is any such thing as International Law, fortifies this distrustful sentiment. We are looked upon as a lawless nation. It is with surprised pleasure that one finds a leading newspaper, which has for some years treated the Law of Nations with the most lofty indifference, awaken to the necessity of teaching the obligations of that law. True, it is the Chinese who are to be taught; but the admission that there is a law of nations which has to be observed is something to be grateful for, however extorted. To give any occasion for justifying a bitter feeling of English lawlessness, as exhibited in contempt for universally accepted rules, except when backed by the mailed hand, is neither Imperial nor dignified.

Chapter IV.

CONDUCT OF WARFARE.

The breaches of the laws of war which have been most frequently alleged during the present hostilities in South Africa are the use of improper projectiles, firing on or under cover of flags of truce or ambulance flags, the bombardment of hospitals, and pillage. These complaints are such as are continually made by either side in all modern wars.

More particularly in the Franco-German war was this the case (*a*). Mutual accusations were made of the employment of explosive bullets (*b*). The Germans charged the French with bombardment of undefended towns, wholesale neglect of the Geneva Convention, and the employment of uncivilized Zouaves. The French laid to the account of the Germans the seizure of ambulances and doctors, the use of the red cross to cover the transport of ammunition, and the bombardment of hospitals (*c*). Colonel Hamley wrote: "If we must consider as in conformity with the laws of war the system pursued by the Germans, let us no longer call Tilly, the Duke of Alva, and Attila, scourges of humanity, or we are likely to offend eminent contemporaries." However violent the censure so pronounced by neutral observers, they would probably (says Rolin-Jacquemyns) not have been too severe, if all the stories printed again and again by the daily press from the beginning of the war were true.

(*a*) Rolin-Jacquemyns (*Revue de Droit Int.*, II. 658, &c.)

(*b*) *Ibid.* III. 297.

(*c*) *Ibid.* III. 304.

But the author just mentioned reminds us of the myriad false reports which are manufactured by the newspapers. Paris relieved, Bismarck shut up in Versailles, Trochu at Nantes, Vinoy at Rouen; and for corroborative detail, Prince Frederick Charles' head shot off, and the German Emperor dead or mad, along with his ministers and generals. The conclusion is, that there is every ground, in this audacious and universal departure from the truth—and newspapers are no less enterprising now than thirty years since—for justifying scepticism as to the greater portion of the atrocities reported as having been committed. Rolin-Jacquemyns adds, what may, perhaps, be commended to the consideration of our own people: "How can one believe all the harm the French say of the Germans, when one can hardly believe what they say against each other?"

In the Russo-Turkish war the same complaints were made with aggravated violence, and perhaps with more reason.

The indiscriminate charges which one hostile army brings against the other are therefore a well-known phenomenon. In dealing with them, it must first be remarked that the South African Republic is not a party to the Géneva Convention, nor to that of The Hague; and therefore that the conduct of the parties to the present hostilities must be estimated independently of those treaties and tried by the standard of ordinary belligerent propriety. This standard, of course, falls somewhat short of the provisions of the Conventions, otherwise no Conventions would have been needed; though it is probably true to say that since the date of the earlier of those agreements, and to a certain extent in consequence of it, the general law has been sensibly mitigated.

With regard to the matter of firing under cover of a flag of truce, there appears to exist a very singular misapprehension. It seems to be the view of some people that if a white flag is displayed among any body of troops—

it may be a pocket-handkerchief tied to a rifle—all firing must cease in the neighbourhood, and the detachment must be held to have surrendered. This is to treat the party as a kind of ship which can signal by its colours, and is an entire perversion of the idea of a flag of truce. The object of a flag of truce is to open communication with the enemy. There are well-known rules governing its reception and the mode of its tender. It must be carried by a definite party and advanced towards the lines of the enemy, who may either admit its bearers or warn them off. If the white flag could also be used as a symbol of surrender, the confusion which would result would be productive of the most dangerous consequences. The usual token of surrender is for all the men individually to throw down their arms, or to hold them horizontally in the air. After surrender they cannot, according to modern usage, be fired on. But it is perfectly lawful and proper to fire during action on a flag of truce; otherwise an enemy might readily paralyze its opponent's tactic at a critical period, by the simple expedient of hoisting a white flag. Naval auxiliaries are apparently received with gratitude by military commanders. But it will not do to import naval ideas as to flag signalling into the usages of armies in the field, to the confusion of the rules of warfare; nor to treat bodies of soldiers as though they were vessels which could be surrendered *en bloc* by the use of a flag. No complaint of this kind, as to firing after exhibiting a white flag, was ever made in the Franco-Prussian war. No case anything like it occurs in the lengthy catalogue of complaints which the French detailed. The device of a simulated surrender, made in order that the surrendered troops, or their comrades, may entrap the enemy, is an old one. It is, of course, absolutely wrong for soldiers who have shown a well-established signal of surrender to fire afterwards. But it does not follow that the exhibition of an unknown and unauthorized signal, like a white flag, should involve the surrender of all the forces present. The

introduction of the white flag may be due to the difficulty of seeing the individuals who compose the enemy's forces at the long ranges which the use of modern weapons necessitates. But surrender at long range cannot be common, and might be carried out, if necessary, by the despatch to the enemy of a flag of truce in the ordinary way. The custom of signalling surrender by the mere display of a white flag is in every way to be deprecated, as being inefficient and confusing. It is confusing, because it is liable to be mistaken for a flag of truce. It is inefficient, because it does not show, with any approach to precision, who has surrendered. That troops should continue firing after someone has taken it upon himself to display a white flag in their vicinity, is not surprising.

At long range it is not surprising, either, that ambulances and hospitals should occasionally be struck. The mutual recriminations which have been made by both sides in respect of these matters wear a less serious aspect than they would otherwise do, when this is remembered. In the heat of action it is inevitable that acts will be imputed to deliberate intention, which are really the results of pure chance. It is not necessary to ascribe to the combatants a wholesale disregard for the rules of civilized warfare. If such were the case, the acts complained of would be infinitely more frequent than they are alleged to have been.

As to the accusation of pillage, which has been freely levelled against both sides, it is impossible, without further evidence than is at our command, to decide whether there has been, on the one side or the other, anything more than those sporadic acts of pilfering which can hardly be prevented except by such drastic means as are only admissible when the evil is very widespread and serious. It is only too probable that there have been isolated cases of pillage. Whether theft has been so systematic, or so encouraged by authority, as to constitute a just cause of complaint, it is impossible to decide. It is very difficult to separate, in practice, pillage from forage. The soldier who takes from

an enemy's farm the food and supplies which he wants, and the carts and wood which the general wants, will find it hard to refrain from helping himself to other articles as well—particularly if the premises are abandoned. Pillage, moreover, though interdicted by The Hague Convention, has hardly passed out of the category of acts which are technically justified by the laws of war. The appropriation of the property of enemies is in broad terms lawful. The exemption of the property of private individuals on land is so recent as to be hardly settled.

The wanton destruction of private property, which has also taken place in particular instances, stands on the same footing. Probably it is unlawful; certainly it is difficult to prevent; possibly it should be judged leniently in consequence.

As Calvo points out (§ 2223), "The reprobation of pillage has reached the point at which, without being absolutely erected into a principle of International Law, it may now be considered as morally incumbent on all civilized nations. We have proofs of this in the deserved stamp of reproach which historians, as well as universal opinion, attach to the horrors which succeeded particular sieges in the Spanish War of Independence, and to the sanguinary excesses which marked the struggle of Poland against Russia, and the War of Secession in the United States. To these distressing occurrences, which it might with justice have been hoped would not have happened in such an age as our own, must be added the destruction of the Chinese Emperor's palace, which was fired by the troops after two days' successive pillage: a precedent so much the more serious and regrettable in that the discredit of it falls on the two maritime powers generally regarded as the vanguard of civilization (*a*). The example has the greater force in coming

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(*a*) The main body of the army of civilization does not appear to have been backward in imitating their example; as Pekin is again able to testify, although the palace seems to have been, on this occasion, respected.

from such a level. France experienced its evil consequences in 1870. According to the Home Secretary's report to the President, in thirty-four of the Departments invaded by the German forces, the amount of the claims sent in came to five and a-half million pounds for damage by fire and otherwise, and to ten million pounds for furniture and other things 'seized without being duly requisitioned.'"

And Sir S. Baker, in a note to Halleck (Ch. XXI. § 19), says that during the occupation of Versailles by the Germans in 1870, the French mayor made frequent complaints to the Prussian commandant-general that many acts of violence were committed by the German soldiers, such as breaking into private houses and plundering, or destroying the furniture, especially the clocks. In the populous part of the town, order was tolerably well maintained, but not in the outskirts. These complaints, Sir Sherston continues, do not appear to have had any favourable results.

And, as The Hague Conference found it necessary formally to declare the abolition of pillage, it must perhaps be considered as occupying a kind of ambiguous position on the border of illegality, though on the whole within that term.

Halleck's opinion is (§ 18) that the commanding officer who permits indiscriminate pillage, and allows the taking of private property without a strict accountability fails in his duty to his Government and violates the usages of civilized warfare. It is, Halleck says, a common excuse for such conduct, that the general is unable to restrain his troops; but he who cannot preserve order in his army has no right to command it: in collecting military contributions, trustworthy troops should always be sent with the foragers to prevent them from engaging in irregular and unauthorized pillage, and the party should always be accompanied by officers of the staff and administration corps, to see to the proper execution of the orders, and to report any irregularities on the part of the troops. This

plan reminds one of Napier's system for minimising the horrors of capture by storm, which was that the storming party should be followed by a select body, charged with the duty of promptly shooting any of them who indulged in excesses. Whether a general would like to employ his best troops in policing his storming party, and whether the knowledge that a pistol was at their heads would stimulate the ardour of the latter, is a question for military experts. General Halleck's plan, however, of sending the military police with foragers inevitably suggests the inquiry, "*at quis custodiet ipsos custodes?*" In case any corps should engage in unauthorized pillage, Halleck recommends that restitution should be made to the inhabitants, and the expenses of such restitution deducted from the pay and allowances of the corps by which such excess is committed. A few examples of such summary justice soon restores discipline to the army and pacifies the inhabitants of the country or territory so occupied. *Cuique in sua arte credendum*, and Halleck's view, as that of a general officer, deserves respect. But one would not otherwise have thought these measures sufficient, and Wellington did not seem to find them so. And the severe measures which were taken against marauders in the Peninsular Wars can only be resorted to, without offence, when the evil is widespread or aggravated.

The refusal of quarter is a worse offence against the rules of modern warfare than is pillage. Unlike the latter, its position is unequivocally manifest from the writings of all authorities. They are unanimous in declaring the killing or wounding of a combatant who is no longer capable of resistance to be an act which nothing can in general excuse. It does not matter that the enemy may, up to the very moment of surrender, have been engaged in firing. That is the duty of a soldier. It is what is to be expected. One is not to be shot down because one fired one's rifle with effect immediately before giving in. It was therefore as irrational as it may have been natural, for an officer to boast that one of the enemy

who had killed his comrade, and then thrown down his arms, was shot in revenge. Take also the following extract from a London newspaper :—"A Boer rifleman, who appeared to share the belief common among his countrymen that a flag of truce and a cry of surrender cover flight and ensure safety when they have fired the last shot and are in imminent danger of death, emptied his magazine at a range of ten yards, and then calmly observed to his chosen victim, 'I surrender.' He will have no further opportunity of putting into practice these peculiar views as to the liabilities of a combatant." It is the newspaper correspondent's views which are peculiar.

On this subject it is scarcely necessary to quote authorities; but the following may be taken as examples of the tenor of their statements :—

Heffter (§ 125): "The slaughter of persons who do not and cannot oppose any resistance is the subject of universal reprobation."

So Phillimore, (III. § 95): "Soldiers are not of the unoffending and unarmed class referred to in the last paragraph—to wound and to kill, to be wounded and to be killed, is a large part of their terrible though necessary vocation in this imperfect and unquiet world. But when, by surrender or capture, they are manifestly without the will or power to resist, their injury or destruction is brutal, sinful and indefensible."

Even Vattel (Bk. III. § 140) says: "Dès qu'un ennemi se soumet et rend les armes, on ne peut lui ôter la vie."

The excuse of reprisals cannot justify pillage, devastation, the use of improper weapons, or other similar breaches of the laws of war, except under very special circumstances. It is not enough to justify one army in resorting to these measures that instances of the enemy's troops having done so on particular occasions, are alleged to have occurred. If it were so, and if individual soldiers, or subordinate commanders, were permitted to imitate, on their own authority, the real or imaginary license which the enemy

permit themselves, the elaboration of laws of war would be so much waste of time. The first day's campaigning would put an end to them. Every apparent or isolated violation of them by the one side would be seized on as an excuse for the perpetration of worse atrocities by the other. The gratification of revenge would hasten to quote a recital of the misdeeds of the enemy, as a shelter for its own enormities. The enemy would be exasperated by such acts in turn, and so the crescendo would go on until the worst excesses of barbarism had been equalled, or excelled. Accordingly, the infringement of the laws of war, by way of reprisals, must be a step to be taken only in the last resort, after all other means have failed; to be taken only in the case of such serious and continued breaches by the enemy as make it absolutely necessary to put a stop to them or to prevent their repetition; and to be taken only on the considered judgment of the officer in supreme command in the locality. And there are some infringements which can never be met with reprisals in kind. *Noblesse oblige*, and a self-respecting commander will not follow the example of an antagonist, should that example unfortunately be set, in reducing a civilized army to the rank of a band of massacring savages.

The Transvaal troops appear to be of the nature of a *levée en masse:* they do not seem to wear any distinctive uniform; therefore, although they carry arms openly and are organized under responsible leaders, they do not appear to come within the definition of irregular troops, but must be regarded as an armed population. It may be questioned whether a *levée en masse* are within the exemption from ordinary requirements as to uniform, &c., when they defend their own country by invading the enemy's; but it would seem pedantic to refuse them this countenance, and to treat them as brigands. The terms of The Hague Convention, which formally expresses protection of a *levée en masse*, only mention, nevertheless, a levy in case of actual invasion; and the present circumstances suggest

that there is here a lacuna, which ought to be filled up, in that written code of warlike usages.

A word should be said about the measures which can lawfully be taken in an occupied country. It has been said that upon occupation supervenes the establishment of martial law, which is again defined as the will of the Commander-in-Chief. This is quite true, but it only answers the question from the point of view of municipal law. The really important question is, to what lengths may the Commander-in-Chief go? Municipal law may leave him a free hand: how far is this restricted by the law of nations? The general principle, that the measures to be taken must be such as are dictated by military necessity, is further qualified by the rule that the non-combatant population must be protected, and must not be forced to assist the progress of the campaign against their own country. It was considered an improper violation of this principle when the Germans requisitioned the personal services of 500 workmen to repair a railway-bridge, and when an order was issued enjoining heads of villages to give information of the neighbourhood of sharpshooters. On the other hand, the material belongings of the population can be requisitioned to provide for the carrying on of the war against their nation; and it was on this ground that the Germans justified their action in the former case.

In all these matters, the practice of the armies when in occupation of hostile territory seems to have been lenient on the whole. The persons of the non-combatant enemies —if not always their property—have been respected. Military necessity has not been invoked with undue freedom, to justify such acts as the setting of houses on fire, which apparently has only been done, in general, when the building in question has been used as an improvised fort, or *place d'armes*.

The observation that the non-combatant population has been left undisturbed, is subject to an exception, if the relatives of combatants were, as is said to have been the

case, deported from Pretoria to the Transvaal lines. If such a deportation were indiscriminate, and merely calculated to embarrass the enemy by increasing his incumbrances, it would have to be condemned as entirely illegitimate, and counter to the spirit of modern warfare. And one cannot regard with much satisfaction the threats which were issued of wasting property, in the neighbourhood of which telegraph lines or railway tracks should be broken. Such vicarious measures are always most strongly to be deprecated. They are, in fact, an indirect way of doing what is never permissible—to force the quiescent population to take active steps in the furtherance of the campaign. Their object is to force the people of the district to protect their conquerors' communications. Accordingly, the note addressed on behalf of the South African Republic to the Marquis of Salisbury on August 18, 1900, takes objection in formal terms to two military proclamations, said to have been issued on the 16th of June, threatening devastation of the immediate neighbourhood, and monetary penalties on the whole district, in case of damage to rails and telegraphs, and further initiating the objectionable practice of taking inhabitants on the trains for the security of the latter. To justify such acts by a reference to German practice is to set back the clock thirty years. Even in 1870, they were strongly condemned by impartial judges.

One reflection which inevitably results from the consideration of these subjects, from the violation of private property to the slaughter of unarmed opponents, is the notable dissonance between theory and practice. It cannot be denied that both sides, in the present war, have to a certain extent pillaged, refused quarter, killed prisoners, and destroyed property; and that one side at least has occasionally fired after what they must have known would be taken as a surrender. The lurid stories which appear in the public journals must be ninety per cent. untrue. One particularly disgraceful one, as to Dutch prisoners

being forced to dig the holes destined for their dead bodies, is told in precisely the same terms of the Germans in France—though in that case it was not the Germans who boasted of it. Such tales, whether told in boasting or accusation, one disbelieves for the most part. But then, the ten per cent. which are possibly true? It may perhaps be suggested that the efforts of military reformers might be better directed to devising means for securing the observance of the existing law, than to pushing the nominal rules of warfare to a point beyond the level of attainment of armies actually in the field. The presence of numerous foreign attachés was a method recommended by the Institute of International Law at Zurich, with this object in view. More might be done by this to raise the standard of military behaviour, than has been accomplished by the declarations which more ambitious workers for humanity have brought about. In the Turkish war of 1876, it is asserted that the Geneva Convention was not even translated into Turkish. What chance could there be of its unknown provisions being regarded by those in command—not to speak of the mass of the army?

The great danger of proceeding too fast in measures of reform with regard to what is permissible in warfare is this: if we lay down rules which are very much in advance of the ideas of military personages, the result will be that they will simply be disregarded. And thereupon, when the subordinate officer and the rank-and-file see this constant infringement of what are styled laws of war, they will infer that *all* laws of war—even the old well-established ones—are made to be broken, and war will tend to become lawless. Unless we are careful to introduce reforms gradually, and as the state of opinion in the army is able to bear them, we run the risk of obtaining a beautiful moral code of war to which nobody pays the least attention, except in official documents: practice would be thrown back to the unregulated savagery of the time of Grotius.

Chapter V.

ANNEXATION.

Considerable amusement was felt at the report—now shown to have been a *canard*—that the Orange State had annexed part of the British dominions. More or less gratified surprise was also manifested at the British Commander-in-Chief's references, at the Orange State capital, to the "ex-President" and the "late Republic."

It is true that a State may cease to exist. Phillimore observes that this happens (§ 124) "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 these contingencies, or such others as the destruction or wholesale emigration of all the State members, a State, Phillimore says, becomes, instead of a distinct and substantive body, the subordinate portion of another society. Phillimore gives as instances the formation of the United Kingdom, and of Italy; and also of "Prussia, which has by force of arms possessed herself of her weaker neighbours' territories"—always an attractive career.

The general principles of conquest, or, as it is popularly called, "annexation," proceeded formerly on the ground that military occupation carried with it a substitution of sovereignty. The invader, by the very fact of possession, became sovereign of the territory invaded. In more recent times this theory was mitigated by the admission of the principle that the new sovereign's temporary sovereignty is restricted at all points until it ripens into

conquest; and a development of this is the still more modern view that there is no substitution of sovereignty at all.

In any case, modern practice recognizes two distinct stages—military occupation, entitling the invader to take all steps necessary for the security of the invading army, but nothing further; and complete conquest, entitling invaders to treat the invaded territory as they please.

Halleck declares conquest to be complete when the invader exhibits ability to maintain the territory and also intention to keep it. The latter intention must be manifested by some unequivocal act, as annexation or incorporation, made by the sovereign authority of the conquering State.

Without such an authoritative signification of intention, the occupation does not ripen into conquest.

Dana asserts that the conqueror may exact from the population an oath to remain quiet (*a*), but not an oath of allegiance.

And Hall says (p. 588) that intention to appropriate and ability to keep must be combined. Intention to appropriate is invariably, and perhaps necessarily, shown by a formal declaration or proclamation of annexation. Ability to keep must be proved either by the conclusion of peace or by the establishment of an equivalent state of things. A treaty, says Hall, is the best evidence; but possession which is *de facto* undisputed, and the lapse of a certain time, are also proof when combined. On the analogy of the recognition of a revolted province as independent, it would seem that the invader cannot annex territory as

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(*a*) Such an oath has apparently been imposed in occupied districts of the African Republics. It is strenuously objected to by the Note of Aug. 18th, 1900, above referred to; and, indeed, one cannot see that it is of any service. The inhabitants are bound to remain quiet, without the necessity of any oath. No penalty can lawfully be exacted from them for refusing to take it.

conquered so long as the enemy is making serious efforts to continue the war, even though the great probability is that they will be unsuccessful.

On this point the leading authority is the recognition as independent of the Spanish American republics. Although the Argentine revolted in 1810, and was never assailed by Spain at all, it was not recognized by Great Britain until 1825.

Although Chili was free from Spanish attack after 1818, its recognition was deferred until the same year. The bases which Spain possessed in other parts of the continent were considered sufficient to prevent these States from being regarded as independent, although the ultimate issue of the war was not really doubtful.

It was not until Spanish strength was reduced to "a single castle in Mexico, an island on the coast of Chili, and a small army in Upper Peru," that Great Britain in 1825 recognized Buenos Ayres, Colombia and Mexico. Even the United States were only three years earlier.

If this analogy were to be followed, the small probability that the Orange forces would ever regain their territory must be balanced against the fact that they still have a more or less powerful army in the field, and a base from which to operate in the country of their allies.

And, on principle, the South African Republic—which has not, up to this autumn, been purported to be "annexed"—cannot lawfully be so, so long as it possesses an armed force. The furthest stretch of belligerent authority would be to incorporate into the British dominions those parts of its territory which it is beyond all dispute it can never regain. So long as a Transvaal army exists as a fighting force, and is making active efforts for the prosecution of the war, not even this can be done. But even if the South African Republic discontinued those efforts, and practically gave up all attempt to regain the territory in British occupation, still it must be said that this would give us no right to treat

them as rebels. In virtue of the parcel of territory, however small, which their army effectively occupied, they would still be entitled to the privileges of belligerents. We need not quarrel with the principle: we do not wish for vindictive vengeance. If this doctrine were not firmly held, there would be no security for the subjects of a State which had had a considerable part of its territory invaded. Paris would have been rebel in 1870. Suppose a continental combination to invade and overrun England, and the British army to concentrate in the Scottish highlands. In every glen and on every hillside where the British troops were, no enemy, however overwhelmingly strong, could lawfully treat the inhabitants as in rebellion.

Chapter VI.

LIMITED COMPANIES IN THE WAR.

When war breaks out between two countries, it is not without effect on the private relationships of the members of those States. The most conspicuous instance of this is in the sphere of contract. It is in general terms impossible to make a contract with an alien enemy. It is, further, impossible for an alien enemy to enforce in British Courts a contract made previously to the outbreak of hostilities. And, in the particular case of the contract of partnership, the contract is entirely put an end to.

In ordinary cases, of course, the rule is that it is merely the remedy on a contract which is suspended during the war: that is, the enemy cannot sue, having no *persona standi in indicio*. But the *execution* of the contract does not appear to be suspended, unless its fulfilment would be illegal, during the war. Accordingly, when a plaintiff became once more capable of suing, by the conclusion of peace, such a plaintiff could properly allege that acts done during the war were done under the contract by that plaintiff, or in breach of its terms by the defendant.

Thus it would be possible for an agent, or a partner (who is an implied agent), to claim after the war, for services rendered to the principal or the partner, being an enemy, during its progress. But, as regards partners, the rule is not so. The outbreak of war dissolves the contract. Whether this rule ought properly to be put upon the ground that it would be impossible, after the war, to pick up the threads of the business at the point where they

were when the war began; or on the ground that the rule against having any communication with the enemy makes the continuance of the partnership relation impracticable, may be a question.

But the rule itself is well established, though *Griswold* v. *Waddington* (16 Johnston, 488) does not, as is commonly imagined, decide it. Kent, C., expressed a decided opinion in its favour in that case, but only *obiter*.

There are passages in the Chancellor's reasoning which may be open to objection. But the really decisive passage is that in which it is declared that the power of mutual control which enables one partner to check another's dealings is gone in war time, and that it would be unjust to hold a partner any longer liable on such terms. This reasoning would, of course, apply to cases of agency as well; also to a great number of other contracts. This principle, of not permitting any intercourse between subjects of a State at war with another and those of its enemy, is thoroughly rooted in the practice of nations. It is treated by Scott in England, and Kent in New York, as a fundamental measure absolutely necessary for the safety of States, and only to be departed from in particular instances by express decision of the sovereign authority. Its operation renders it impossible to carry on the partnership business in concert; and the partnership is accordingly, if for no other reason, *ipso facto* dissolved.

If, therefore, a company is on all fours with a partnership, the alien enemy can no longer be a joint shareholder with the Briton. The awkward question would immediately follow, which party, if either, should be entitled to remain in the company, and which should have to retire.

The reason of the thing seems exactly parallel with the reasoning in a case of partnership. It would be unjust to hold a person to be still a member of a company when that person is debarred, through being an alien enemy, from taking any active share in its management.

But a company, being a corporation, goes on as before;

and it does not seem easy to see how the alien's share of capital can be protected in the case of a limited company, nor how creditors can be prevented from relying on the alien's credit in the case of an unlimited one, or one whose shares are not fully paid up. How is a creditor to know that the shareholders, or half, or all of them, are domiciled alien enemies?

Yet, on principle, this would seem to be a logical consequence of the position. The net assets of the company attributable to the shares of outgoing shareholders, if not confiscated by the Crown, would have to be set aside for their benefit; and those shareholders could not subsequently be made liable for obligations attaching to their shares; and any loss occasioned by future trading would have to be made good—probably by the company and the directors personally.

An alien enemy who ceased to be a partner naturally remained subject to the partnership liabilities already incurred, and was entitled to a proper share of the surplus assets—though this might not be transmitted to the alien, and might be confiscated by the Crown. How the balance is struck in practice, seeing that the alien cannot be a party to winding-up proceedings, is not clear, and makes the position of the friendly partners rather a difficult one.

Applying this practice to the case of companies, one is met by the difficulty that, unlike a partnership, a company does not come to an end when one partner withdraws. In the case of a partnership, the friendly partners, if they continue the business, start entirely fresh. There is no question of the enemy ex-partner being bound or entitled by their acts, any more than if such a partner were dead.

Lord Lindley thinks that *Ex parte Boussmaker* (13 Ves. 71) suggests that an alien enemy does not cease to be a member of a company deriving its existence from the law of England. But that was a case of the foreign creditors of a bankrupt, in which it was held that their right to prove in the bankruptcy must be reserved to them in case

they should be in a position to avail themselves of it. This is very different from continuing persons in a position which may involve liabilities, such as that of being a shareholder in a company.

Of course, the fact that they are shareholders in a company, incorporated by British law, and carrying on business here, does not make enemies friends in respect of their shares.

Accordingly, it seems plain that British and Transvaal shareholders cannot remain members of the same company; provided that its regulations give the shareholders a voice in the management of the business, or, indeed, any rights which may require for their exercise a communication between enemies. But this does not carry us very far. Which party is to leave the company? The constitution and status of the company is entirely a matter to be regulated by the laws of the State which gives to it legal existence: at least this seems to be Dr. Westlake's opinion (*b*). That country is the only forum in which the company can be wound up, and as enemies would have no *locus standi* in a winding-up, it is plain that the rule which would allow the people who *could* obtain judicial assistance in winding-up to remain members of the company, and to retain its empty shell, is the convenient and right one. Therefore, domiciled British members of a company incorporated under the law of the South African Republic must probably be held in England to have ceased to be shareholders, to be free from future liability, and to have an inchoate claim for their share of assets as at the date of hostilities. On the other hand, if the company is incorporated under British law, our Courts ought, on these principles, to hold that citizens of the South African Republic have ceased to be members—that they cannot be affected by liabilities incurred, nor benefited by profits

(*b*) Private International Law, p. 144.

made, since the war; and that they will have—subject to the Crown's right of confiscation—a claim to a share of the surplus assets of the company, calculated as at the outbreak of war.

Another point is the *locus standi* of companies during the war, which are incorporated by the law of the South African Republic, or which carry on their business there.

The object of excluding alien enemies from the Courts during war, is to prevent them from taking the proceeds of their action to the enemy country. This is the only ground on which the extension of the rule, to persons who have an enemy domicile, can be justified. Now, if a company sues, it is plain that whatever its real domicile may be, in the sense of the place whose law governs its capacity, and is the criterion of its personal statute, all we need consider for this purpose is its trade domicile, or the place where it carries on its business. If that is the enemy's country, the proceeds of the action will go there in the first instance. Therefore, the company should not be permitted to sue, even though the ultimate result might be that British shareholders would, in the natural course of things, be benefited to the extent of the whole of these assets. For they will be put in the first instance in the power of the enemy. Nor should it be permitted to sue simply because it has been incorporated here, and here only. On the other hand, if it is only incorporated abroad, but carries on its business here, and consists solely of British subjects, it ought to be admitted to have a *persona standi*. Such a rule would be as closely analogous as possible to that which obtains in the case of individuals.

Twiss says (p. 303): "An individual cannot be permanently resident in two countries; and wherever he is permanently resident, there he is contributing by his industry and general wealth to the strength of the country, and to its capacity to wage war. There can be therefore no injustice in regarding the property of such a person

as forming part of the common stock of the enemy nation."

Domicile, that is, in the ordinary sense of the word, without reference to commerce, is the test of enemy character. But this is subject to the qualification that material property, employed in a trade which is carried on in the enemy's country, is affected with enemy character, let the owner's domicile be what it may. "Such a trade," says Twiss, "so carried on, has a direct and immediate effect in aiding the resources and revenue of the enemy, and warding off the pressure of the war. It subserves his manufactures and industry, and its whole profits accumulate and circulate in his dominions and become regular objects of taxation in the same manner as if the trade were pursued by native subjects. There is no reason, therefore, why he who thus enjoys the protection and benefits of the enemy's country should not, in reference to such a trade, share its dangers and its losses."

There seems to be no case in which this rule has been extended beyond the mere declaration of tangible goods to be enemy property, because they are in course of export from a house of trade in the enemy country, or for some analogous reason. A personal claim by a neutral has never been met by a plea, that the claim is in respect of a trade carried on in a hostile country. And mercantile affairs are now so complicated that it would often be extremely embarrassing to allow such a plea. It would be too readily assumed that claims were made in connection with a particular trade, which were not really so. The case is like that of allowing a belligerent to infer an ulterior enemy destination for contraband. Such questions are too delicate to be left open. In the case of a company, however, the neutral shareholders, wherever domiciled, must evidently, so far as the company's claims are concerned, be interested in the capacity of persons who carry on business in the locality of the company's operations. So that there would seem to be fair ground for excluding

from the Courts, all companies carrying on a house of trade (whatever that may mean) in the hostile territory, in so far as the cause of action relates to the transactions of that "house of trade"; whatever the domicile of their shareholders personally.

Then a further point will be, whether the domicile of the company's members in the enemy's country will matter. A company does not spend its profits: it distributes them to its members. Consequently, it cannot be said to have a domicile. For private law purposes, the law which constitutes it, or recognises it, will regulate its status. But will the hostile domicile of its members disentitle it to sue; assuming that its house of trade, in respect of which the cause of action arose, was in a neutral country? Hostile domicile is of course inconsistent with the possession of a house of trade here—the doctrine of trade domicile has never been carried so far as to allow a domiciled enemy the privileges of a subject in regard to a particular trade carried on here. But, if the shareholders are hostile, and the house of trade neutral, may the company sue here? And what if the shareholders are partly neutral, and partly hostile? In the former case, the answer, on principle, should be in the negative. The latter presents more difficulty. It would rather seem that we could not deny justice to our friends, simply because our enemies might obtain an incidental benefit.

The question as to what country incorporated the company is not really of any importance here. The really crucial question is the *locale* of the company's business. As a secondary consideration comes the domicile of the shareholders.

The theory here put forward is consistent with the cases of the *English R. C. Colleges in France* and the *Irish ditto* (Knapp II. 51). It was there held that corporations which carried on their operations in France, and derived their corporate existence (if any) from its laws, could not claim as British institutions, although they were composed

of British subjects. These decisions were quite in accordance with the principles already suggested—for the English and Irish priests who composed the corporations were domiciled in France, and were only English and Irish by nationality. Moreover, the colleges were not trading corporations, and the income was not distributed as profit, but was applied for charitable purposes in France.

COMPARATIVE SUMMARY OF

Convention of 1881.

Her Majesty's Commissioners for the settlement of the Transvaal Territory, duly appointed as such by a commission . . . bearing date the 5th April, 1881, do hereby UNDERTAKE and GUARANTEE, on behalf of Her Majesty, that from and after the 8th August, 1881, complete self-government, subject to the suzerainty of Her Majesty, her heirs and successors, will be accorded to the inhabitants of the Transvaal Territory, upon the following terms and conditions, and subject to the following reservations and limitations:—

I. The said territory, to be hereinafter called the Transvaal State, will embrace the land lying between the following boundaries, *i.e.* [*naming them*].

II. Her Majesty reserves to herself, her heirs and successors, (a) the right from time to time to appoint a British Resident in

THE TRANSVAAL CONVENTIONS.

Convention of 1884.

Whereas the Government of the Transvaal State, through its delegates, consisting of S. J. P. Krüger, President of the said State; S. J. Du Toit, Superintendent of Education; and N. J. Smit, a member of the Volksraad, have represented that the Convention signed at Pretoria on the 3rd August, 1881, and ratified by the Volksraad of the said State on the 25th October, 1881, contains certain provisions which are inconvenient and imposes burdens and obligations from which the said State is desirous to be relieved, and that the south-west boundaries fixed by the said Convention should be amended . . . and whereas Her Majesty . . . has been pleased to take the said representation into consideration: Now therefore Her Majesty is pleased to direct, and it is hereby declared, that the following articles of a new Convention, signed on behalf of Her Majesty by Her Majesty's High Commissioner in South Africa, the Right Hon. Sir H. G. R. Robinson, K.C.M.G., Governor of the Colony of the Cape of Good Hope, and on behalf of the Transvaal State (which shall hereinafter be called the South African Republic) by the above-named delegates, . . . shall, when ratified by the Volksraad of the South African Republic, be substituted for the articles embodied in the Convention of 3rd August, 1881, which latter, pending such ratification, shall continue in full force and effect.

I. The territory of the South African Republic will embrace the land lying between the following boundaries:—[*naming them as altered*].

IV. The South African Republic will conclude no treaty or engagement with any State or nation other than the Orange

Convention of 1881.

and for the said State, with such duties and functions as are hereinafter defined; (b) the right to move troops through the said State in time of war, or in case of the apprehension of immediate war between the suzerain power and any foreign State or native tribe in South Africa; and (c) the control of the external relations of the said State, including the conclusion of treaties and the conduct of diplomatic intercourse with foreign powers, such intercourse to be carried on through Her Majesty's Diplomatic and Consular officers abroad.

III. Until altered by the Volksraad or other competent authority, all laws, whether passed before or after the annexation of the Transvaal Territory to Her Majesty's dominions, shall, except in so far as they are inconsistent with . . . the provisions of this Convention, be and remain in force in the said State, in so far as they shall be applicable thereto: Provided that no future enactment specially affecting the interests of natives shall have any force or effect in the said State without the consent of Her Majesty first had and obtained, and signified to the Government of the said State through the British Resident: Provided further, that in no case will the repeal or amendment of any laws which have been enacted since the annexation have a retrospective effect so as to invalidate any acts done or liabilities incurred by virtue of such laws.

IIII. On the 8th August, 1881, the Government of the said State, together with all rights and obligations thereto appertaining, and all State property taken over at the time of annexation, except munitions of war, will be handed over to MM. S. J. P. Krüger, M. W. Pretorius, and P. J. Joubert, or the survivor or survivors of them, who will forthwith cause a Volksraad to be elected and convened; and the Volksraad thus elected and convened will decide on the further administration of the Government of the said State.

Convention of 1884.

Free State, nor with any native tribe to the east or west of the Republic, until the same has been approved by Her Majesty. Such approval shall be considered to have been granted if Her Majesty's Government shall not, within six months after receiving a copy of such treaty (which shall be delivered to them immediately upon its completion), have notified that the conclusion of such treaty is in conflict with the interests of Great Britain or of any of Her Majesty's possessions in South Africa.

[Cancelled.]

[Performed.]

Convention of 1881.

[V., VI., VII., VIII. and IX. provide for the compensation by a commission, of persons who had sustained damage.]

X. The Transvaal State will be liable for the balance of the debts for which the [*old*] South African Republic was liable at the date of annexation, ... which debts will be a first charge on the revenues of the State. The Transvaal State will, moreover, be liable for the lawful expenditure lawfully incurred for the necessary expenses of the province since annexation, which debt . . . . will be a second charge upon the revenues of the State.

[XI. provides for mode of payment of these sums.]

XII. All persons holding property in the said State on the 8th August, 1881, will continue to enjoy the rights of property which they have enjoyed since the annexation. No person who has remained loyal to Her Majesty during the recent hostilities shall suffer any molestation by reason of his loyalty, or be liable to any criminal prosecution or civil action for any part taken in connection with such hostilities; and all such persons will have full liberty to reside in the country, with enjoyment of all civil rights.

XIII. Natives will be allowed to acquire land, but the grant or transfer of such land will in every case be made to and registered in the name of the Native Location Commission hereinafter mentioned, in trust for such natives.

XIV. Natives will be allowed to move as freely within the country as may be consistent with the requirements of public order, and to leave it for the purpose of seeking employment elsewhere or for other lawful purposes: subject always to the

Convention of 1884.

V. The South African Republic will be liable for any balance which may still remain due of the debts for which it was liable at the date of annexation, ... which will be a first charge on the revenues of the Republic. The South African Republic will also be liable to Her Majesty's Government for £250,000, which will be a second charge on the revenues of the Republic.

[VI. provides for payment of interest.]

VII. All persons who held property in the Transvaal on the 8th August, 1881 (*b*), and still hold the same, will continue to enjoy the rights of property which they have enjoyed since the 12th April, 1877 (*b*). No person who has remained loyal to Her Majesty during the late hostilities shall suffer any molestation by reason of his loyalty, or be liable to any criminal prosecution, or civil action for any part taken in connection with such hostilities; and all such persons will have full liberty to reside in the country, with enjoyment of all civil rights, and protection for their persons and property.

[Cancelled. See XIX.]

[Cancelled. See XIX.]

(*b*) *Sic.*

Convention of 1881.

pass laws of the said State, as amended by the legislature of the province, or as may hereafter be enacted, under the provisions of Art. III.

XV. The provisions of Art. IV. of the Sand River Convention are hereby reaffirmed, and no slavery, or apprenticeship partaking of slavery, will be tolerated by the Government of the said State.

XVI. There will continue to be complete freedom of religion, and protection from molestation for all denominations, provided the same be not inconsistent with morality and good order: and no disability shall attach to any person in regard to rights of property by reason of the religious opinions which he holds.

XVII. The British Resident will receive from the Government of the Transvaal State such assistance and support as can by law be given him for the due discharge of his functions. . . .

XVIII. The following will be the duties of the British Resident:—

1. He will perform duties and functions analogous to those discharged by a Chargé d'Affaires and Consul-General.
2. In regard to natives within the Transvaal State, he will— (a) report to the High Commissioner, as representative of the Suzerain, as to the working and observance of the provisions of this Convention; (b) report to the Transvaal authorities any cases of ill-treatment of natives, or attempts to incite natives to rebellion, that may come to his knowledge; (c) use his influence with the natives in favour of law and order; and (d) generally perform such other duties as are by this Convention entrusted to

Convention of 1884.

VIII. The South African Republic renews the declaration made in the Sand River Convention, and in the Convention of Pretoria, that no slavery, or apprenticeship partaking of slavery, will be tolerated by the Government of the said Republic.

IX. There will continue to be complete freedom of religion, and protection from molestation for all denominations, provided the same be not inconsistent with morality and good order: and no disability shall attach to any person in regard to rights of property by reason of the religious opinions which he holds.

III. If a British officer is appointed to reside at Pretoria, or elsewhere within the South African Republic, to discharge functions analogous to those of a consular officer, he will receive the protection and assistance of the Republic.

[See III. above.]

[Cancelled.]

Convention of 1881.

him, and take such steps for the protection of the persons and property of natives as are consistent with the laws of the land.

3. In regard to natives not residing in the territory—(a) he will report to the High Commissioner and to the Transvaal Government any encroachments reported to have been made by Transvaal residents upon the land of such natives, and in case of disagreement between the Transvaal Government and the British Resident as to whether an encroachment has been made, the decision of the Suzerain shall be final; (b) the British Resident will be the medium of communication with the native chiefs outside the Transvaal, and, subject to the approval of the High Commissioner as representing the Suzerain, he will control the conclusion of treaties with them; and (c) he will arbitrate upon every dispute between Transvaal residents and natives outside the Transvaal (as to acts committed beyond the boundaries of the Transvaal) which may be referred to him by the parties interested.
4. In regard to communications with foreign Powers, the said Government will correspond with Her Majesty's Government through the British resident and the High Commissioner.

XIX. The Government of the Transvaal State will strictly adhere to the boundaries defined in Art. I., and will do its utmost to prevent any of its inhabitants (*c*) from making any encroachments upon lands beyond the said State.

(*c*) *Sic.*

Convention of 1884.

[Cancelled.]

[Cancelled.]

II. The Government of the South African Republic will strictly adhere to the boundaries defined in Art. I. of this Convention, and will do its utmost to prevent any of its inhabitants (*d*) from making any encroachment upon lands beyond the said boundaries. The Government of the South African Republic will appoint Commissioners upon the East and West borders, whose duty it will be strictly to guard against irregularities and all trespassing over the boundaries.

(*d*) *Sic.*

Convention of 1881.

XX. All grants or titles issued at any time by the Transvaal Government in respect of land outside the boundaries of the Transvaal State . . . . shall be considered invalid and of no effect, ... and all persons holding any such grant so considered invalid . . . . will receive from the Government of the Transvaal State such compensation, either in land or in money, as the Volksraad shall determine. In all cases in which any native chiefs or other authorities outside the said boundaries have received any adequate consideration from the Government of the former South African Republic for land excluded from the Transvaal by Art. I. of this Convention, or when permanent improvements have been made on the land, the British Resident will use his influence to recover from the native authorities fair compensation for the loss of the land thus excluded, or of the permanent improvements thereon.

[XXI. constitutes a Native Location Commission composed of the President, the Resident, and a third.]

XXII. The Native Locations Commission will reserve to the native tribes of the State such locations as they may fairly and equitably be entitled to. . . .

[XXIII. Sekukuni and followers to be released.]

XXIV. The independence of the Swazis within the boundary line of Swaziland . . . . will be fully recognized.

XXV. No other or higher duties will be imposed on the importation into the Transvaal State of any article the produce or manufacture of the dominions or possessions of Her Majesty, from whatever place arriving, than are or may be payable on the like article the produce or manufacture of any other country, nor will any prohibition be maintained or imposed on the im-

Convention of 1884.

[XI. and XII. repeat in substance the same provisions, adapted to the new boundaries, as XX. and XXIV. of 1881.]

[Cancelled; but cf. XIX., *infra*.]

[Cancelled.]

[Performed.]

XII. [See XI., *supra*.]

XIII. Except in pursuance of any treaty or engagement made as provided in Art. IV., no other or higher duties shall be imposed on the importation into the South African Republic of any article coming from any part of Her Majesty's dominions which shall not equally extend to the like article coming from any other place or country: AND in like manner, the same

Convention of 1881.

portation of any article the produce or manufacture of the dominions and possessions of Her Majesty, which shall not equally extend to the importation of the like articles being the produce or manufacture of any other country.

XXVI. All persons other than natives conforming themselves to the laws of the Transvaal State—

(a) Will have free liberty, with their families, to enter, travel (*e*), or reside in, any part of the Transvaal State;

(b) They will be entitled to hire or possess houses, manufactories, warehouses, shops and premises;

(c) They may carry on their commerce either in person or by any agents whom they may think fit to employ;

(d) They will not be subject, in respect of their persons or property, or in respect of their commerce and industry, to any taxes, whether general or local, other than those . . . . imposed upon Transvaal citizens.

XXVII. All inhabitants of the Transvaal shall have free access to the courts of justice for the preservation and defence of their rights.

XXVIII. All persons, other than natives, who established their domicile in the Transvaal between the 12th April, 1877, and the date when this Convention comes into effect (*f*), and who shall within twelve months after such last-mentioned date have their names registered by the British Resident, shall be exempt from all compulsory military service whatever. The Resident shall notify such registration to the Government of the Transvaal State.

(*e*) *Sic.*
(*f*) *I.e.*, the period of British occupation.

Convention of 1884.

treatment shall be given to any article coming to Great Britain from the South African Republic as to the like article coming from any other country. . . . .

[XIV. repeats the same provisions as XXVI. of 1881.]

[Cancelled.]

[XV. continues this exemption.]

Convention of 1881.

[XXIX. provides that extradition shall be the subject of future agreement.]

[XXX. makes debts payable in the currency in which they were contracted, and provides for the recognition of certain stamps and licenses.]

[XXXI. provides for the recognition of grants of land made during the period of annexation.]

XXXII. This Convention will be ratified by a newly-elected Volksraad within three months after its date, and in default . . . . shall be null and void.

XXXIII. Forthwith after the ratification of this Convention, as in the last preceding article mentioned, all British troops in Transvaal Territory will leave the same, and the mutual delivery of munitions of war will be carried out.

[See III., XIII., XIIII., XV., XVIII. (2), (3), XXI., XXII.]

We the undersigned [*names*] as representatives of the Transvaal burghers do hereby agree to all the above conditions, reservations, and limitations, under which self-government has been restored to the inhabitants of the Transvaal Territory, subject to the suzerainty of Her Majesty, her heirs and successors, and we agree to accept the Government of the said Territory, with all rights and obligations thereto appertaining, on the 8th August, 1881, and we promise and undertake that this Convention shall be ratified by a newly-elected Volksraad of the Transvaal State, within three months from this date.

[Date (3rd August, 1881) and signatures.]

Convention of 1884.

[XVI. continues this provision.]

[XVII. deals with similar matters.]

[XVIII. continues this provision.]

XX. This Convention will be ratified by a Volksraad of the South African Republic within the period of six months after its execution, and in default of such ratification this Convention shall be null and void.

[Performed.]

XIX. The Government of the South African Republic will engage faithfully to fulfil the assurances given, in accordance with the laws of the South African Republic, to the natives, as to [*certain provisions for their benefit*].

With these falls to be compared the document recognizing the independence of the Orange Free State. This was a Convention signed in 1854 by Sir George Russel Clark and twenty-four inhabitants of the district.

By the 1st Article, "Her Majesty's Special Commissioner . . . . guarantees on the part of Her Majesty's Government, the future independence of that country and its Government; and that after the necessary preliminary arrangements for taking over the same shall have been completed, the inhabitants of the country shall then be free (*g*). And that this independence shall, without undue delay, be confirmed and ratified by an instrument promulgated in such form and substance as Her Majesty may approve, finally freeing them from their allegiance to the British Crown, and declaring them to all intents and purposes a free and independent people, and their Government to be treated and considered thenceforth a free and independent Government."

By the 4th, the Orange Government engaged not to proceed against British subjects for acts done under British authority, and to allow them to leave the country.

By the 5th and 6th, reciprocal rights of extradition, and open Courts, were conceded. By the 7th, the Orange State engaged, as previously, to permit no slavery; the 8th gave them liberty to buy ammunition in British territory; and the 9th provided—it is not clear in whose interest—that a British Consul or Agent would be stationed in the State.

(*g*) *Sic.*

This Convention was affirmed by a proclamation of the Queen:—

"WHEREAS we have thought fit . . . . to abandon and renounce for ourselves, our heirs and successors, all dominion and sovereignty of the Crown of the United Kingdom over the territories designated in our letters patent of the 22nd March, 1851, by the name of the Orange River Territory, and have revoked and determined the said letters patent accordingly: We do for that end publish this our royal proclamation, and do hereby declare and make known the abandonment and renunciation of our dominion and sovereignty over the said Territory and the inhabitants thereof."

This proclamation was approved by an Order in Council, which declared that when promulgated (April 19th, 1854), all dominion and sovereignty of Her Majesty over the said Territory and the inhabitants thereof should absolutely cease and determine.

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