LEADING CASES
ON
INTERNATIONAL LAW.

LEADING CASES

ON

INTERNATIONAL LAW

WITH

NOTES CONTAINING THE VIEWS OF THE TEXT-WRITERS ON THE TOPICS REFERRED TO, SUPPLEMENTARY CASES, TREATIES, AND STATUTES

VOL. I. PEACE.

BY

PITT COBBETT, M.A., D.C.L. (OXON.)

Formerly Emeritus Professor of Law in the University of Sydney, New South Wales

Fourth Edition

BY

HUGH H. L. BELLOT, M.A., D.C.L.

of Trinity College, Oxford, and of the Inner Temple, Barrister-at-Law; Associé de l'Institut de Droit International; External Examiner in International Law, and Acting Professor of Constitutional Law in the University of London; Hon. Secretary of the International Law Association, and of the Grotius Society.

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PREFACE TO FOURTH EDITION.

I FULLY share the regret expressed by Mr. Picciotto in his obituary notice of the late Professor Pitt Cobbett in the British Year Book of International Law, 1920–21, that the Professor did not live to give us yet another edition of his *Leading Cases*. As Mr. Picciotto reminds us, this work is far more than a mere collection of cases. "The commentaries," he says, "with which Professor Pitt Cobbett enriched the leading decisions were full of erudition and marked by qualities of clear and powerful thought and lucid expression."

It was in the Third Edition that Professor Pitt Cobbett departed from the original design of his work by the addition of systematic notes. His declared object was to "ensure a greater continuity of treatment and a fuller consideration of many recent changes both in the subject-matter and literature of international law." This object was successfully achieved, but only at the cost of making one volume into two. To have continued this line of treatment would have involved making two volumes into three.

In preparing this edition, I have left the text substantially unaltered, and have refrained as far as possible from adding to the bulk of the notes. In respect of the latter, my principal object has been to bring them up to date. I have eliminated obsolete matter and reduced redundant cross-references. Even had I differed from Professor Pitt Cobbett's views, I should

have hesitated to alter them. It is his book. Moreover, his opinions appear to me so sound that I have found little or no occasion to disagree.

The elaboration of the notes to meet the vast territorial changes, which have taken place since 1909, the date of the publication of the Third Edition, would, it seems to me, defeat the main purpose of this work. Moreover, much is in a transitional stage, much has still to be effected, and further change may be made even in the settlements already effected. I have, therefore, been content merely to indicate the principal alterations and to refer the student for details elsewhere. To have done more would have been to follow the evil example of the glossators of the *Corpus Juris*. The *Leading Cases* would have been buried under a mass of commentary.

H. H. L. B.

2 KING'S BENCH WALK,
INNER TEMPLE,
January, 1922.

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THE NATURE AND SOURCES OF INTERNATIONAL LAW.

THE "PAQUETE HABANA" AND THE "LOLA."

[1899; 175 U.S. 677.]

Case.] Soon after the outbreak of the Spanish-American War in 1898 two fishing-boats, the "Lola" and the "Paquete Habana," the one a schooner of about thirty-five tons with a crew of six men, and the other a sloop of about twenty-five tons with a crew of three men, sailing under the Spanish flag, were captured off the coast of Cuba by cruisers belonging to the United States force then engaged in the blockade of the north coast of Cuba, and were sent in for adjudication as prize. Both vessels were owned by a Spanish subject residing at Havana, and were manned by a Spanish crew; both had left Havana some time before on a fishing venture, which in the case of the "Paquete Habana" had been confined to the territorial waters, but in the case of the "Lola" had extended beyond these limits; neither vessel had any arms or ammunition on board, and neither had any knowledge either of the blockade or even of the war, until captured; neither vessel made any attempt to violate the blockade or any resistance to capture; nor was there any evidence to show that either vessel or crew would have been likely to afford assistance to the enemy in war. The question was whether, under these circumstances, the vessels were liable to condemnation as enemy property. In order to determine this question, it became

necessary, in default of any express provision of municipal law, to consider whether there was any rule of international law to the effect that fishing-boats were exempt from capture; and, incidentally, to determine under what conditions and on what evidence or authority such a rule would be regarded as part of the law of nations, and, in that character, as a part of the law of the United States. In the Court below both vessels were condemned; but on appeal to the Supreme Court it was held that both captures were unlawful, and a decree of restitution was made.

Judgment.] In the Supreme Court the judgment of the majority of the Court was delivered by Mr. Justice Gray (*a*). It was laid down that international law formed a part of the law of the United States; and must be ascertained and administered by courts of justice of appropriate jurisdiction, as often as any question of right depending on it duly presented itself for determination. For this purpose, where there was no treaty and no controlling executive act or judicial decision, resort must be had to the customs and usages of civilised nations (*b*).

With respect to the existence of a custom of exemption in the case of fishing-boats, it was stated that by an ancient usage among civilised nations, beginning centuries ago and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fish, had been recognised as exempt from capture as prize of war. But as this doctrine had been contested at the bar, the judgment proceeded to trace the history of this exemption. In doing this, reference was made to certain early treaties entered into between different European States; to various edicts and ordinances issued by European Governments; to a compilation on the "usage and customs of the sea"; and also to certain later treaties entered into by the United States, and the practice followed by the United States in previous wars; all of which went to show the existence of such a usage. There had, indeed, been an interruption of such usage as between Great Britain and France during the wars of the French Revolution; but that this interruption had been only temporary appeared from the fact that the exemption of fishing-boats had

(*a*) A dissenting judgment on behalf of himself and two other members of the Court was delivered by Fuller, C.J.

(*b*) At p. 700; this statement being a quotation from the judgment in *Hilton* v. *Guyot* (159 U. S. 113).

been renewed by Orders in Council of 1806 and 1810. Since then no instance was found in which the exemption from capture of private coast fishing vessels honestly pursuing their peaceful calling had been denied by Great Britain or by any other nation; whilst the Empire of Japan, the last State admitted into the ranks of civilised nations, had, at the beginning of the war with China in 1894, by ordinance exempted "all boats engaged in coast fisheries" (*c*).

Proceeding, next, to consider the question in the light of the authority of jurists and commentators, it was pointed out that such works were resorted to by judicial tribunals, not for the speculations of those authors concerning what the law ought to be, but for trustworthy evidence of what the law really was (*d*). Having regard to this class of evidence, it was held that an examination of the text-writers clearly showed that there had been and still was a custom of exempting fishing-boats. It seemed, indeed, that English text-writers did not fully admit that this exemption had become a settled rule of international law; nevertheless both Hall and Lawrence stated that there was no difference between the practice of Great Britain in this respect and that of other countries, and that Great Britain had always been willing to spare fishing-boats so long as they were harmless.

Looking, then, at the matter both in the light of precedent and authority, it appeared to the majority of the Court abundantly clear that, at the present day, according to the general consent of the civilised nations of the world, and independently of any express treaty or other public Act, it was an established rule of international law, founded on considerations both of humanity to a poor and industrious class of men, and of the natural convenience of belligerent States, that coast fishing vessels, with their implements, supplies, cargoes, and crews, unarmed and honestly pursuing their peaceful calling, should be exempt from capture as prize of war. But this would not extend to a case in which such vessels were in addition employed for any warlike purpose; or to the case of vessels fishing on the high seas, taking fish, such as whales or cod, which were not brought fresh to market; or to a case where seizure was required by military necessity.

(*c*) Pp. 686-700.

(*d*) P. 700; this also being a quotation from the judgment in *Hilton* v. *Guyot* (*supra*).

Finally, it was held that this rule, being a rule of international law, was one which Prize Courts administering the law of nations were bound to take judicial notice of and to give effect to, in the absence of any treaty or public Act of their own Government in relation to the matter (*e*).

Although the question of the exemption of fishing-boats in time of war is in itself not very important, yet this case is noteworthy as containing an authoritative statement on the subject of the nature and sources of international law. It embodies, in fact, a judicial recognition, on the part of one of the most august tribunals, of certain fundamental facts and principles in relation to the nature and sources of international law. These are: (1) that international law is a body of living rules, resting on the general assent of civilised nations; (2) that such assent finds its expression for the most part in usage, which when sufficiently general gives rise to rules of custom; and (3) that for proof of such usage regard must be had to the records of the actual practice of States, as well as to the works of accredited writers on international law in so far as these purport to show the approved usage of nations. Incidentally the decision also possesses a value as emphasising the principle that in so far as mitigations of the practice of war have received the sanction of time, they may be said to become a part of the law of nations, and not to depend merely on comity or voluntary observance.

GENERAL NOTES.—*The Nature and Sources of International Law.*—International law may be described as "the sum of the rules accepted by civilised States as determining their conduct towards each other, and towards each other's subjects" (*f*). This body of rules, which rests on the common assent of civilised communities (*g*), has its origin in the common needs of international life and intercourse. States, like individuals, cannot live side by side with each other without evolving rules of conduct by which, in their common interest, friction and conflict may be avoided. Such rules are at once essential to the intercourse of States and the tranquillity of the world. But whilst international law, as a body of rules, may be said to have its origin in the common needs and mutual convenience of the civilised part of mankind, its immediate sources, in the sense of the modes or agencies by which its rules are formulated (*h*) or brought into being, may be said to be (1) Usage, which when sufficiently general gives rise to

(*e*) *Cf.* also *Reg.* v. *Keyn* (L. R. 2 Ex. D. 63); *The West Rand Central G. M. Co.* v. *Rex* [1905] (2 K. B. 391); *Hilton* v. *Guyot* (159 U. S. 113); *The Scotia* (14 Wall. 170); and Scott, pp. 1-22.

(*f*) This definition, save for its concluding words, is virtually that put forward by Lord Russell of Killowen in 1896, which was judicially adopted in the *West Rand Central Gold Mining Co.* v. *Rex* (L. R. [1905] 2 K. B. 407); *cf.* also *Reg.* v. *Keyn* (L. R. 2 Ex. D. at 154).

(*g*) *The West Rand Central G. M. Co.* v. *Rex* (*supra*); *The Scotia* (14 Wall. 170).

(*h*) *Cf.* Holland, Jurisprudence, p. 56.

custom; and (2) Positive agreement; each being a manifestation of that general assent which must necessarily constitute the basis of any law applicable between States that have no common superior. So, in the *West Rand Central Gold Mining Co.* v. *Rex* (L. R. [1905] 2 K. B., at p. 407), it was said that in order to prove an alleged rule of international law it must be shown "either to have received the express sanction of international agreement," or "it must have grown to be a part of international law by the frequent practical recognition of States, in their dealings with each other" (*i*).

Usage and Custom.—Usage means no more than habitual practice. The growth of usage and its development into custom may be likened to the formation of a path across a common. At first each wayfarer pursues his own course; gradually, by reason either of its directness or on some other ground of apparent utility, some particular route is followed by the majority; this route next assumes the character of a track, discernible but not as yet well defined, from which deviation, however, now becomes more rare; whilst in its final stage the route assumes the shape of a well-defined path, habitually followed by all who pass that way. And yet it would be difficult to point out at what precise moment this route acquired the character of an acknowledged path. The growth of usage and formation of custom, both as between a community of individuals and the community of nations, proceeds much on the same lines. As between nations some particular practice or course of conduct arises, attributable in the first instance to some particular emergency or prompted by a common belief in its convenience or safety. But its observance is discretionary; and it exists side by side with other competing practices. Next, as between competing usages the fittest, having regard to the needs of the time, generally tends to prevail. It gathers strength by observance. It comes to be recorded, and is appealed to in cases of dispute, although not infrequently violated. Finally, it comes to command a general assent; and at this stage it may be said to take on the character of a custom, which involves not merely a habit of action, but a rule of conduct resting on general approval. The process by which usage thus crystallises into custom is well illustrated by the growth of the law affecting belligerent and neutral States, which has been so admirably sketched by Hall (*k*). But the conditions of international life are constantly changing; and new conditions ever tend to generate new usages; some of which in their turn develop into customs, that modify or supersede those hitherto observed (*l*). Within each political

(*i*) See also *Reg.* v. *Keyn* (2 Ex. D. 63).

(*k*) Hall, part iv. ch. ii.

(*l*) As examples of customs now in course of formation, we may notice the custom of exempting private vessels in foreign harbours from local criminal jurisdiction except in cases affecting external order (Hall, 211); the custom of allowing enemy subjects to remain after the outbreak of war (Hall, 388); the custom by which a belligerent now waives his right to seize enemy merchant vessels in his ports or on their way to his ports on the outbreak of war (Hall, 477); and the custom prohibiting the construction and outfit in neutral territory of vessels of war intended for either belligerent (Hall, 653 *et seq.*). The two latter have now been embodied in conventions adopted by The Hague Conference of 1907: see Convention No. VI. Art. 1, and Convention No. XIII. Art. 8.

society and as between the individual members of the community the difficulty of ascertaining custom is met by the gradual establishment of some form of political authority which, through its various organs, assumes at once to declare what customs are binding and also to enforce them on its individual members. Out of this grows the national law. But as between nations there is, of course, no such common authority: although it is not improbable that in course of time some substitute for this will be found in international conference and joint international action; whilst in the Permanent Court of International Justice, which has now been established as one of the results of the Covenant of the League of Nations, we have already the genesis of an international tribunal. Meanwhile the two great difficulties with respect to custom are (1) the difficulty of proof, and (2) the difficulty of determining at what stage custom can be said to become authoritative.

Evidence of Custom.—It is somewhat difficult to classify logically the different sources of evidence as regards custom. But in substance we may say that custom may be proved either (1) by reference to instruments and records tending to show what the practice of States on particular subjects has been; or (2) by reference to the writings of the publicists, as tending to show what is the general opinion with respect to international conduct; or (3) by reference to the decisions of international tribunals, such as Boards of Arbitration, Courts of Prize, or even the higher Courts of a State when purporting to adjudicate on matters coming before them according to the principles of international law. The subject of international tribunals, however, will be considered hereafter, and for the present it will suffice to glance briefly at the two other sources of custom referred to.

Records of State Action.—It will be seen from the judgment in the case of the *Paquete Habana* that the Court, in endeavouring to ascertain whether there was a custom of exemption as regards fishing-boats, took into consideration both treaties made between different States—edicts and ordinances issued by particular States—and also compilations of maritime usage. But in fact anything that tends to show the fact of usage, and that such usage is general, will be available as evidence. So in *Reg.* v. *Keyn* it was said: "Whether a particular usage has or has not been agreed to must be a matter of evidence. Treaties and acts of State are but evidence, and do not, in this country at least, *per se*, bind the tribunals. Neither, certainly, does a consensus of jurists; but it is evidence of the agreement of nations" (*m*). The records of State practice usually referred to comprise (1) limited compacts or treaties between particular States; (2) decrees and ordinances issued by particular States; (3) instructions issued by States prescribing rules of conduct for their agents in matters of international concern; (4) written opinions of official jurists given, in relation to such matters, to their own Governments; (5) diplomatic correspondence between particular States; (6) the decisions of Prize Courts, and even of other municipal Courts in so far as they deal with matters of international concern; and (7) the history both of international transactions and of

(*m*) L. R. 2 Ex. D. 63, *per* Lord Coleridge, C.J., at p. 154; and *West Rand Central G. M. Co.* v. *Rex* (L. R. [1905] 2 K. B., at p. 407).

the executive action of particular States in relation to questions of international right. With respect to treaties, it will be noticed that these are here referred to only as evidence of usage. Many treaties, of course, have nothing to do with international law. Moreover, even when treaties entered into between particular States purport to define or modify the existing rules of international conduct in relation to those States, such agreements, although they may create a kind of particular international law, cannot strictly affect the obligations of the parties in relation to other States, or modify the general law. Nevertheless, even if we leave out of consideration for the moment the great law-making treaties referred to hereafter (*n*), treaties made between particular States may furnish evidence of custom in two ways: (1) In the first place, they may expressly purport to declare the general law, which the parties conceive to be binding not only on them but on all civilised States. So by a protocol signed at the Conference of London, 1871, the representatives of the six Great Powers, and also of Turkey, declared it to be an essential principle of the law of nations that "no Power can release itself from the engagement of treaties except with the consent of the contracting parties, amicably obtained" (*o*). (2) In the second place, it often happens that a treaty made between particular States, defining or modifying some rule of international conduct, is followed by similar treaties between other States; with the result that a new usage is gradually formed, which when sufficiently general will become binding irrespective of treaty (*p*). Treaties, in fact, which begin by excluding or modifying existing customs, may in time lay the foundation of new custom (*q*).

Text-writers of Authority.—It will be noticed that the Court, in the *Paquete Habana*, after examining the question of custom in the light of the evidence afforded by national practice, next proceeded to consider it in the light of the authority of the jurists and commentators. "No civilised nation," says Kent, "that does not arrogantly set all law and justice at defiance will venture to disregard the uniform sense of the established writers on international law" (*r*). Nevertheless, as was pointed out in the judgment, such works are resorted to not for the speculations of the authors as to what the law ought to be, but for trustworthy evidence of what the law really is (*s*). The authority of the text-writers, in fact, rests partly on the ground that they furnish evidence as to what is the approved usage of nations, and as to the prevalent opinion with respect to rules of international conduct; but even more on the ground that by recording such usages and stating the reasons on which they purport to be based, the text-writers lend them form and shape as rules, and thereby enable them to be appealed to in cases of international dispute. Thus even of Grotius' work it has been said: "It would be very misleading to believe that Grotius'

(*n*) *Infra*, p. 10.

(*o*) This may well serve as an example; although in relation to the immediate cause of dispute the declaration was little more than formal. As to its true meaning and value, see p. 331, *infra*.

(*p*) For examples of this see Hall, 214, 401, and 620.

(*q*) Hall, pp. 11 and 12; and as to the "evidences of custom in international law," Westlake, i. 16.

(*r*) Kent, Com. i. 12th ed. p. 19.

(*s*) *Supra*, p. 3.

doctrines were as a body once universally accepted. . . . What did take place was that when an international question of importance arose Grotius' book was consulted, and its authority was so overwhelming that in many cases its rules were considered right" (*t*). In the same category of authority we may perhaps class the work of the "Institute of International Law," which has done so much to define and ascertain the rules of international law, and which also has codified so many of its branches (*u*). The weight, however, that attaches to the writings of the publicists differs greatly in different countries. In some countries, especially in those which have inherited the system of Roman law, the tendency is to regard the opinions of approved writers not merely as persuasive, but as authoritative. But from the point of view of the English lawyer the tendency is to regard them only as evidence, and not always very weighty evidence, as to the usage of nations. This view finds its most definite expression in the judgment of Cockburn, C.J., in the case of *Reg.* v. *Keyn* (L. R. 2 Ex. D., at p. 202) (*v*). Nevertheless, as was pointed out in the same case by Lord Coleridge, the unanimous testimony of writers on international law, extending over a long period of time, may often serve to establish almost conclusively the existence of usage and common agreement amongst nations (*x*); and much the same view was adopted by the Supreme Court in the *Paquete Habana* (*y*). In *Macartney* v. *Garbutt* (L. R. 24 Q. B. D., at p. 369), it will be seen that Matthew, J., in giving judgment on the question of the exemption of a subject who had been received without reservation as a member of an embassy from a foreign Government, relied solely on the views put forward by accredited writers. Even more important, perhaps, is the influence which they exert in giving shape and form to legal rules, and in directing international opinion. Thus, as regards international law, it was admitted in *West Rand Central Gold Mining Co.* v. *Rex* (*z*), that "the views expressed by learned writers on international law have done in the past, and will do in the future, valuable service in helping to create the opinion by which the range of the consensus of civilised nations is enlarged." As regards that part of English law, moreover, which is commonly known as "private international law" (*a*), it has been justly said that Story's "Conflict of Laws," which appeared in 1834, had the effect of systematising or even creating a whole branch of English law; whilst Mr. Westlake's "Private International Law," which appeared in 1858, has influenced the whole line of cases decided by the English Courts during the last half-century.

When does Usage become Authoritative?—Some parts of international law rest on usage which is universally accepted amongst civilised States; such is the case with respect to the general immunity

(*t*) See Oppenheim, i. 63.

(*u*) Scott's Resolutions of the Institute of International Law; Encyclopædia of the Laws of England, vi. 512.

(*v*) *Infra*, p. 136. See also *West Rand Central G. M. Co.* v. *Rex* (L. R. [1905] 2 K. B., at p. 401).

(*x*) *Infra*, p. 138.

(*y*) *Supra*, p. 3.

(*z*) [1905] 2 K. B., *per* Lord Alverstone, C.J., at p. 402.

(*a*) As to how far this body of rules can be said to have an international character, see p. 238, *infra*.

of ambassadors. But the changing conditions of international life are ever generating new usage, and it is as to these inchoate customs that the difficulty arises of determining at what stage usage or common practice can be said to have developed into custom or common law. Although international law as a coherent body of rules is rightly said to rest on the common assent of civilised nations, it can scarcely be said that every new usage must, before it can be recognised as part of the customary law of nations, have been definitely accepted by every member of the "family of nations." The test usually adopted in order to ascertain whether usage has developed into obligatory custom is, that it must be approved by the *common consent* of civilised nations (*b*) or the general consensus of opinion within the limits of European civilisation (*c*). The difficulty, of course, lies in the application of this test. Something will turn on the question of the long continuance of the usage, but even more will turn on the number of States adopting it; in fact, "unanimous opinion of recent growth will constitute a better foundation than the long practice of particular States" (*d*). If, then, the usage in question has become the predominant usage, and if, in fact, it prevails amongst the great majority of States, it is conceived that it may fairly be regarded as part of international law, even though an exceptional practice may still be followed by a few States, especially if these be of minor importance. Thus, since the virtual acceptance by the United States and Spain, in 1898, of the principles of the Declaration of Paris of 1856, it is very doubtful whether the great maritime Powers would tolerate any reversion to the practice of privateering, or the capture of goods not being contraband found on neutral vessels, even by non-adhering Powers, such as Mexico and Venezuela. It should be noticed, however, that special authority attaches to the usages of particular States in certain departments; so that no new maritime usage could well be regarded as generally binding, independently of agreement, unless it had been followed by such Powers as Great Britain and the United States (*e*).

Intrinsic Reasonableness and Conformity to Principle.—Finally, just as considerations of justice and humanity, of public convenience, and "the reason of the thing" enter into both the making and interpretation of the unwritten law of England, so it may be said that considerations of morality, of conformity to existing principles, and of intrinsic reasonableness, will not only be taken count of in the interpretation and application of admitted rules of international law, but will also in cases of doubt constitute an important factor in determining the obligatory character of international custom (*f*). So, also, in determining the nature and scope of an alleged custom some regard may fairly be had to considerations of comity, and reciprocal

(*b*) See *The Scotia* (14 Wall. 170).
(*c*) Westlake, i. 16.
(*d*) Hall, p. 12 *et seq.*
(*e*) By way of illustration see Hall, p. 790, as to the authority of the alleged right of convoy.
(*f*) As to "the reason of the thing" see *The Charkieh* (4 A. & E. at p. 77); *Bentzon* v. *Boyle* (9 Cranch, 191); Phillimore, i. 30, iii. 105; and Westlake, i. 15, 17.

convenience as between States; although this can only be regarded as a secondary factor (*g*).

International Agreement.—Apart from custom, moreover, in modern times a new source of direction, both as regards the framing of the general rules of conduct, and as regards the settlement of territorial and other matters tending to affect the peace of nations, has been found in international agreement. Such international agreements may fairly be grouped under three heads: (1) Law-making treaties (*h*); (2) Territorial settlements and kindred arrangements; and (3) Agreements providing for mutual co-operation in furtherance of intercourse and in other matters of common concern. It is strictly only the first of the groups that affects the question of the making or alteration of rules of conduct; but the others bear so closely on the organisation of international society that they claim some mention.

(1) *International Law-making.*—International agreement, as a factor in the making of new rules of conduct, may take the form of either treaty or convention, or joint international declaration. With respect to treaties, these even where they do purport to introduce new rules of international conduct, will, if made only between particular States, strictly only be binding on the signatory Powers; and they will not affect the general law, except in so far as they may afford evidence of the formation of new custom. But this is a slow process; and in view of the fast-changing conditions of international life, the inadequacy and indefiniteness of existing rules, and the inconvenience and danger of international friction or conflict involved in having to wait until new rules have been generated by custom, it has been attempted in modern times to settle the rules of international conduct by the concerted action and declaration of a group of leading States, or, more recently, of the great body of civilised States. This device of attempting to define law by joint international declaration no doubt grew out of previous attempts to settle disputed questions of international status or territory on lines agreed upon in international conference (*i*). At the instance of one or more of their number, the Powers in question meet together in conference, for the purpose of considering, and, in the event of agreement, formally declaring, the rules by which, in some particular department of international law, they will consider themselves to be bound. Thus—by way of example—by the Declaration of Paris, 1856, Great Britain, France, Austria, Prussia, Russia, Sardinia, and Turkey formulated a new body of rules in relation to maritime law, representing on some subjects a compromise between conflicting usages and on other subjects a distinct advance on existing usage (*k*). So by the Geneva Convention, 1864,

(*g*) As to the distinction between custom and comity, see Hall, Foreign Jurisdiction, p. 6 *n.*

(*h*) This appropriate term is suggested by Oppenheim.

(*i*) *Infra*, p. 11. Such efforts may even be said to date back to the Peace of Westphalia, 1648. At the Congress of Vienna, of 1815, moreover, several questions relating to the law of nations, as distinct from questions of status and territory, were also included in the final Act, such as the free navigation of certain European rivers, the different classes of ambassadors, and the abolition of the slave trade. *Cf.* Oppenheim, i. 706.

(*k*) See vol. ii.

which was originally entered into between nine European States, but which has since been acceded to by nearly all civilised States, a new body of rules was promulgated regulating the treatment of sick and wounded in war; although this has now been replaced by the Convention of 1906 (*l*). Again, by the Declaration of St. Petersburg, 1868, which was signed by a large number of civilised States, the use in war of explosive bullets below 400 grammes was prohibited. It is, however, as will be seen hereafter, in the conception and in the achievements of The Hague Conferences of 1899 and 1907, that this method of law-making has attained, so far, its most notable development.

It is true that these agreements are, in strictness, only binding on such Powers as may adopt them. Even such conventions as the Geneva Convention, 1906, and the various conventions framed by The Hague Conference, 1907, are merely facultative or optional—are only binding on and as between signatory Powers—and are commonly subject also to a right of withdrawal (*m*). In this respect it may be said that these so-called "law-making treaties" do not differ materially, as a factor in international law, from ordinary treaties made between particular States; which, as we have seen, do not affect the general law, except in so far as they may, by constant repetition, lay the foundation of new usage. Nevertheless, there is a great difference in effect. The law-making treaties really represent the deliberate judgment of the leading States—or more recently of the great body of civilised States—as to what rules ought to be observed in certain international relations. There is, moreover, amongst nations, as amongst individuals, a deep-seated tendency to imitate conduct approved or followed by any powerful or predominant section of their neighbours. Hence it has been found, so far, that rules originating thus tend to command more readily the express assent of other States, and so to pass at once into the treaty law of nations, instead of having to await the slower process of incorporation into international custom. And this is even more likely to be the case as regards most of the conventions framed by The Hague Conference, 1907.

(2) *International Settlements.*—There is also another class of international agreements, which may be said to affect not so much the rules as the *subjects* of international law. Such arrangements are primarily political, in so far as they purport to define the status or territory of particular States, or to regulate the use of international waterways, or to regulate international action with respect to certain parts of the earth's surface. At the same time they possess a certain importance in law, in so far as they impose certain obligations or restrictions on international conduct. Such arrangements appear to have had their rise in Europe, and to have been greatly fostered by

(*l*) See vol. ii.

(*m*) It is worthy of notice that the Declaration of Paris, 1856, reserves no right of withdrawal; and that the parties bind themselves to enter into no arrangements inconsistent therewith; *infra*, p. 330. But even where a right of denunciation is expressly reserved, it is improbable, in cases where the new rules have proved generally acceptable, that any one signatory would be allowed to revert to, or even that a non-adhering Power of minor importance would be allowed to enforce, the earlier rules, to the prejudice of the interests of other States.

the development of what has been called the "concert of Europe" (*n*), in virtue of which the Great Powers of Europe, acting in association with each other, but sometimes also with the co-operation of other States, have assumed the function of regulating the international position of minor States, as well as of dealing with other questions which in default of regulation might have given rise to conflict. So, by the Final Act of the Congress of Vienna, 1815, Switzerland was made a permanently neutral State, and freedom of navigation established as regards the great European rivers, with the exception of the Danube. Belgium was also made a permanently neutral State by the Treaty of London, 1831; and Luxemburg by the Treaty of London, 1867. By the Treaty of Paris, 1856, Turkey was formally admitted to the "public law of Europe," and an attempt was made to regulate the status of Turkey and that of her tributary principalities, as well as the navigation of the Black Sea and the Straits; whilst the navigation of the Danube was also brought under European control (*o*). By the Treaty of Berlin, 1878, a new attempt was made to settle the difficulties arising out of the "Eastern question." Servia and Roumania were made independent States; Bulgaria was constituted an autonomous principality under the suzerainty of Turkey, whilst the province of Roumelia (*p*) was endowed with administrative autonomy; Bosnia and Herzegovina were to be occupied by Austria-Hungary, but to remain under the sovereignty of Turkey (*q*); the independence of Montenegro, already recognised by some Powers, was recognised by Great Britain and Turkey; the boundaries of Servia and Montenegro were extended and a reapportionment of territory made as regards Roumania; subject to a common proviso in favour of the freedom of religious observance in all these States. By a convention of 1881 the Great Powers also defined the limits of an enlargement of territory which had been previously decreed in favour of Greece under the Treaty of 1878 (*r*). By the Final Act of the West African Congress at Berlin, 1885, which was signed not only by the Great Powers of Europe, but also by the United States of America, and by various minor Powers, freedom of commerce within the basin of the Congo and freedom of navigation both of the Congo and Niger were established; the transport of slaves was prohibited; provision was also made for the neutralisation of the territory of the Congo Free State; whilst certain new rules were laid down with respect to the obligations incident to the occupation of new territory on the coasts of Africa. This Act has been abrogated by the Convention of St. Germain of September 10, 1919, which renews and strengthens the above provisions for commercial equality and suppression of the slave trade (*s*). By the Treaty of Constantinople, 1888, provision was made for the free navigation and permanent neutralisation of the Suez Canal. By the Treaty of Sèvres of August 10, 1920, Turkey has renounced in favour of Great Britain

(*n*) For a more detailed account see Lawrence, Essays, p. 208 *et seq.*; also Holland, European Concert in the Eastern Question.

(*o*) Holland, *ibid.* 248; and Taylor, 119.

(*p*) Soon afterwards united with Bulgaria.

(*q*) But see pp. 56, 118, *infra*.

(*r*) Taylor, p. 125.

(*s*) Treaty Ser. (1919) No. 18 [Cmd. 447], *infra*, p. 110.

the powers conferred upon the Sultan by the Treaty of Constantinople (*t*). By the Brussels Conference, 1890, certain common measures were agreed upon for the suppression of the African slave trade, and certain restrictions were imposed on the trade in spirituous liquors as regards certain parts of the African continent. The latter restrictions were revised by the Convention of Brussels of November 3, 1906, but abrogated by the Convention of St. Germain of September 10, 1919, by which "trade spirits" are prohibited throughout the continent, except in Algiers, Egypt, Libya, Morocco, South Africa and Tunis (*u*).

(3) *International Co-operation.*—Finally, with the ever-increasing closeness of the connection between State and State, there has sprung up a tendency on the part of States to associate themselves together for the purpose of the joint regulation and management of certain common interests. Such interests relate for the most part, although not exclusively, to matters of economic concern; such as postal and telegraphic communication, the protection of industrial property and copyright, transport, weights and measures, official publications, sanitation, opium, white-slave traffic, and the like. Thus, by a convention originally entered into in 1874, but which is subject to revision by a congress held every five years, a Postal Union was established for the purpose of facilitating postal intercourse between States; this union has an international office at Berne; and now includes over fifty States, a large number of colonies and dependencies having also separate representation (*x*). A similar union for facilitating telegraphic communication was established by a convention originally entered into in 1875, although since revised; this union also has an international office at Berne, and a membership of thirty-one States, besides a large number of colonies and dependencies (*y*). By an international convention concluded in 1883, a similar union was established for the protection of industrial property, including patents, trade-marks, and designs; this union also has an international office at Berne, and includes some twenty of the more important States. By an international convention concluded in 1886, and ratified in 1887, a similar union was established for the protection of copyright in works of literature and art; this union also has a central office at Berne. All but Norway and Sweden are parties to the amending convention known as the Additional Act of Paris, 1896. An amended convention, which enlarges considerably the scope of the previous conventions, was signed at Berlin, in November 1908, by the representatives of thirteen States, and ratified by protocol signed on March 20, 1914 (*z*). By a convention entered into at Brussels in 1902, to which all the Great Powers of Europe, as well as various minor Powers, are parties, a Sugar Union was established for the purpose of securing and supervising the abolition of bounties on the

(*t*) Treaty Ser. (1920), No. 11, Art. 109 [Cmd. 964], *infra*, p. 154.

(*u*) Treaty Ser. (1919), No. 19 [Cmd. 478]. A useful summary of these and other great international compacts will be found in Oppenheim, i. 705.

(*x*) Fifty-one States were parties to the Universal Postal Convention of 1897; see Hertslet, Com. Tr. 21, 484.

(*y*) See Hertslet, Com. Tr. 14, 95; 24, 495.

(*z*) See Hertslet, Com. Tr. 17, 569.

production and export of sugar (*a*). Other forms of international co-operation also exist with respect to the slave trade (*b*), and the regulation of fisheries outside territorial waters (*c*); whilst co-operation in judicial matters is secured by a series of extradition treaties made between particular States (*d*). The international functions of the bureau established by the convention of 1907 relating to the "pacific settlement of international disputes" will be considered hereafter (*e*). Although many of these matters lie outside the domain of international law, yet the gradual formation of a habit of co-operation between States, in relation to matters of common interest, constitutes an important factor in the development of an international organisation of society.

Contrast between International Law and State Law.—A body of rules such as that which has been described must necessarily differ in many respects from State law. As between States which are independent and legally equal there can, of course, be no common law-making body having power to bind them by its decrees; nor is there any common tribunal having authority to interpret and apply law as between the parties at variance; nor is there any common executive having power at once to compel resort to the tribunals and to give effect to their judgments (*f*). For this reason international law is not only less imperative and less explicit than State law, but it also lacks, not, indeed, all coercive force, but that particular coercive force which lies behind State law. Hence the rules that go to make up international law do not, it must be admitted, conform to that type of law with which we are now most familiar. International law stands, in fact, to States in much the same relation as the early State law did towards the clans and families that then composed the State. It is law in the course of making, and possibly destined when full grown to become law in the most complete sense of that term; in the sense, that is, of rules of conduct explicitly stated, duly applied, and adequately enforced by some external authority. But apart from this, and viewing the system as it now obtains, it would seem that, on any rational view of law, whether reached by the methods of history or the process of analysis, international law must rank with "law" rather than with "morality." And this for the reasons that the rules which it embodies are in their nature not optional but compulsive, resting in the last resort on force, even though that force is exerted through the irregular action of society rather than through some definite and authorised body; that within the range of those "legal," as distinct from "political," relations, with which it professes to deal, its rules are accepted as law by States, and are appealed to in that character by the contesting parties; and, finally, that its rules have been elaborated by a course of legal reasoning, and

(*a*) For a summary of these and other unions, such as the Latin Monetary Union, the Railway Traffic Union, the Customs Tariff Union, see Ency. of Laws of England, vii. 17; also Oppenheim, i. 751; and as to the Sugar Union, Westlake, i. 310.

(*b*) *Infra*, p. 303.

(*c*) *Infra*, p. 165.

(*d*) *Infra*, p. 249.

(*e*) *Infra*, p. 35.

(*f*) These differences are well put in the judgment in *West Rand Central G. M. Co.* v. *Rex* [1905], 2 K. B., at p. 401.

are applied in a legal manner (*g*). It thus not merely operates as law, but it also stands clearly marked off from what is known as "international morality," by a radical difference both in the nature of its rules and its sanctions (*h*). That it is often ill-defined—that it is sometimes even set at naught by powerful States—does not appear to distinguish it effectually from the law that obtains in jurisdictions with which we are more familiar. Meanwhile the course of international affairs suggests that this body of rules is likely to become in the future at once more explicit and more directly imperative; that it will ultimately come to be declared on doubtful points, and even altered where alteration is necessary, by the joint declaration of the great body of civilised States periodically assembled in congress; and that its rules will be applied, at any rate in matters not affecting national status or national honour, by purely international tribunals. The jurisdiction of these tribunals, at first voluntary, will probably end by becoming compulsory; and their judgments will probably come to be enforced, not, indeed, by armed force, but by precluding subjects of a recalcitrant State from suing in the courts of other States, or, perhaps, by a total suspension on the part of other States of diplomatic relations with the offending Power. The trade "boycott," as applied in China and Turkey, suggests a new form of international sanction, equally available for breaches of comity or violations of law, which may in the future prove of some importance in international affairs. See "Le Boycottage," by M. Pinon, Revue des Deux Mondes, May, 1909.

N.B.—These observations must now be read subject to the new situation created by the League of Nations and the Permanent Court of International Justice. They have been retained in their original form as showing that Dr. Pitt Cobbett was in line with such jurists as Maine, Westlake, Pollock, Vinogradoff and Oppenheim. His suggestion of a trade "boycott" as a sanction has been adopted in the economic sanction provided in Article 16 of the Covenant.

THE RELATION OF INTERNATIONAL LAW TO ENGLISH LAW, AND THE QUESTION OF TREATIES.

THE WEST RAND CENTRAL GOLD MINING COMPANY, LTD. v. REX.

[L. R. [1905] 2 K. B. 391.]

Case.] THIS was a petition of right, in which the suppliants, a company registered in England, but owning and working a gold-mine in the Transvaal Colony, sought relief against the Crown

(*g*) See Hall, 13.

(*h*) See Pollock, Oxford Lectures, p. 19.

under the following circumstances: Prior to the outbreak of war between Great Britain and the late South African Republic, two parcels of gold, the property of the suppliants, were seized by the officials of the Republic and appropriated to its use. The Government was, according to the then law of the Republic, under a liability to return the gold or its value; but this obligation was never discharged. Soon after the seizure war broke out between Great Britain and the Republic, with the result that the latter was conquered, and its territory annexed, and incorporated in the dominions of the Crown (*i*). It was claimed that by reason of such conquest and annexation the obligations of the Government of the Republic with respect to the gold seized had devolved on the Crown. More particularly it was contended (1) that it is a rule of international law that when one civilised State after conquest annexes another, the former, in the absence of any stipulation to the contrary, becomes bound by the obligations of the latter, save as regards liabilities incurred for the purposes of the war; (2) that international law constitutes a part of the common law of England; and (3) that the English Courts had in fact recognised and adopted the rule of transmission of obligations by virtue of conquest and annexation (*k*). On demurrer by the Crown, it was held by the Court (Lord Alverstone, C.J., and Wills and Kennedy, JJ.) that the petition disclosed no right on the part of the suppliants which could be enforced against the Crown in any municipal Court.

Judgment.] The Court, in its judgment, which was delivered by Lord Alverstone, C.J., altogether declined to accede to the proposition that, even by international law, the sovereign of a conquering State was liable for the obligations of the conquered, except in so far as he might negative such liability by express stipulation. The assumption of such obligations was, in fact, entirely a matter of discretion for the conqueror. Many such liabilities must necessarily be unknown at the time of conquest, and such a rule might entail upon a conqueror an assumption of all the liabilities of a State otherwise insolvent. It was true that the conqueror might undertake certain liabilities by convention, and good faith would then require that this should be observed. But

(*i*) This by proclamation of the 1st of September, 1900.

(*k*) Pp. 395-397.

mere silence could not be construed as a novation of all existing contracts of the Government of the conquered State. Nor was the distinction which had been drawn between obligations incurred for general State expenditure and obligations incurred for the purposes of the war a distinction which was either tenable or capable of being determined by a municipal tribunal. With respect to the opinions of the text-writers which had been cited on behalf of the suppliants, it was pointed out (1) that such opinions were often merely an expression of the ethical views of the writers; (2) that the opinions actually cited did not fully bear out the contention of the suppliants; and (3) that even if they did they were inconsistent with the law recognised by the English Courts as to the powers of the Crown in cases of conquest (*l*).

With respect to the proposition that international law formed a part of the law of England, it was held to be true that whatever had received the common consent of civilised nations must be taken to have received the assent of England; and that rules which had been so assented to might properly be called international law, and would in that character be acknowledged and applied by English municipal tribunals, when occasion arose for them to decide questions to which international law might be relevant. But in order to admit of this, such rules must be shown to be actually accepted as binding between nations; and the international law sought to be applied must, like anything else, be proved by satisfactory evidence, which must show either that the proposition put forward had been received and acted upon in English Courts, or that it was of such a nature, and had been so widely and generally accepted, that it could hardly be supposed that any civilised State would repudiate it (at p. 407). The mere opinions of jurists, however eminent, that it ought to be so received, would not in themselves suffice to show that a rule was binding. It must have received the express sanction of international agreement; or it must gradually have grown to be part of international law by frequent practical recognition in the dealings of States with each other. The statement that "international law" forms part of the law of England ought therefore

(*l*) On this point reference was made to *Campbell* v. *Hall* (1 Cowp. at p. 209) and *Anon.* (2 P. Will. 75).

to be treated as correct only if this term is understood in the sense and subject to the limitations indicated.

With respect to the third proposition—that the claim of the suppliants based on the principle above mentioned could be enforced in an English Court by petition of right—it was pointed out that this part of the case exhibited in strongest relief the difficulties in the way of the suppliants. It was not denied that it was open to the conquering State to make whatever bargain it pleased with the vanquished. It was also admitted that some obligations, such as those contracted for the purposes of the war, could not reasonably be deemed binding on the conquering State. On what principle, then, of law or equity, applicable in municipal Courts, could those Courts decide what obligations ought and what ought not to be discharged by the conquering State? On this point, moreover, a series of authorities, extending from the case of the *Nabob of the Carnatic* (1 Ves. Junr. 371; 2 Ves. Junr. 56) down to *Cook* v. *Sprigg* [1899] (A. C. 572), made it quite clear that, from the point of view of English law, matters which properly belonged to the Crown to determine by treaty or as acts of State were not subject to the jurisdiction of municipal Courts, and that rights supposed to be acquired thereunder could not be enforced by such Courts (*m*).

This case is cited mainly as an authority on the relation of international law to English law; and as containing some important observations on the nature and sources of international law, as viewed from the standpoint of the English Courts. It is also noteworthy, however, and will be referred to later, as indicating the view adopted by the English Courts as to the effect of conquest and annexation on the liabilities of a conqueror (*n*). Finally, it affirms and applies anew the existing rule that municipal courts cannot take cognisance of questions arising out of what are known as "acts of State" (*o*). The term "act of State" in English law strictly denotes a public act, or act done by or under the authority of the Crown, outside the British territory, and affecting aliens. Such acts are not cognisable by the Courts; and in regard to them the plea of "act of State" will, if proved, serve to debar the Courts from exercising jurisdiction. So in *Buron* v. *Denman* (2 Ex. R. 167) it was held that a forcible seizure and liberation of slaves

(*m*) *Cf. Barbuit's Case* (Forrest, 281); *Triquet* v. *Bath* (3 Burr. 1478); *Heathfield* v. *Chilton* (4 Burr. 2015); *Viveash* v. *Becker* (3 M. & S. 284); *Reg.* v. *Keyn* (2 Ex. D. 63); *Cook* v. *Sprigg* [1899] (A. C. 572).

(*n*) *Infra*, vol. ii.

(*o*) *Infra*, p. 19.

owned by a foreigner in foreign territory, by a British naval officer acting under the orders of the Crown, was an "act of State" for which no action could be maintained. The same would apply to acts done in the course of war, and to transactions occurring between the Crown, or any body acting by delegation from the Crown, and some foreign State (*p*). The term "act of State," however, is sometimes used to express any lawful act done by the Crown or executive Government; but in so far as such an act affects the person or property of subjects within the jurisdiction its legality can always be questioned, and no plea of "State policy" or "necessity" will debar the Courts from taking cognisance of the matter (*q*)

WALKER v. BAIRD AND ANOTHER.

[1892; A. C. 491.]

Case.] This was an action of trespass originally brought by Baird and another (the present respondents) against Walker, the commander of H.M.S. "Emerald" (the present appellant), for entering and taking possession of certain lobster factories belonging to the respondents on the coast of Newfoundland. The appellant pleaded, in substance, that he had acted under the orders of the Crown for the purpose of enforcing a convention or *modus vivendi*, which had been entered into with the French Government, for regulating the conduct of the lobster fisheries on certain parts of the coast of Newfoundland; that such agreement had provided, amongst other things, that no lobster factories not in operation on the 1st of July, 1887, should be permitted except by the joint consent of the commanders of the British and French naval stations; that the lobster factories of the respondents had been carried on in contravention of such agreement; that the appellant in doing the acts complained of had acted in a public capacity and in the discharge of the authority committed to him by the Crown, and that such acts had been confirmed and approved by the Crown; and, finally, that any such acts, being matters of State arising out of political relations between her Majesty and the French

(*p*) See cases collected in *Elphinstone* v. *Bedreechund* (1 Knapp, 316); and *S.S. in Council of India* v. *Kamachee* (13 Moo. P. C. 22).

(*q*) *Entick* v. *Carrington* (19 St. Tr. 1030); Anson, Law of Const. ii. 279; and on the subject generally, Encyc. of Laws of England, i. 103.

Republic, and involving as they did the construction of treaties and of the *modus vivendi*, were "acts of State," and matters which could not be inquired into by the Court. On appeal to the Privy Council it was held, affirming the judgment of the Supreme Court of Newfoundland, that the defence alleged disclosed no answer to the action.

Judgment.] In the judgment of the Privy Council, which was delivered by Lord Herschell, it was laid down that on the facts disclosed the respondent must succeed, unless it could be shown that, as a matter of law, the appellant's acts could be justified on the ground of having been done by the authority of the Crown and for the purpose of carrying out a treaty entered into between the Crown and a Foreign Power. The suggestion that the appellant's acts could be justified as "acts of State," and that the Court was not competent to inquire into a matter involving the construction of treaties or similar Acts, was dismissed as wholly untenable. It was pointed out that it had been admitted in argument that the broad proposition that the Crown could sanction an invasion by its officers of the rights of private individuals whenever this might be necessary in order to compel obedience to the provisions of a treaty could not be maintained. Nevertheless it had been contended that, inasmuch as the power of making treaties belonged to the Crown, there must necessarily reside in the Crown a power of compelling its subjects to obey the provisions of a treaty made for the purpose of putting an end to a state of war. It had been further contended that if this were so, then such power must also extend to the provisions of a treaty having for its object the preservation of peace; and that an agreement which was made to avert a war which was imminent must be regarded as akin to a treaty of peace, and as being subject to the same constitutional rule. Whether such a power did exist in the case of treaties of peace, whether it existed in the case of treaties akin to treaties of peace, and whether, finally, in both or either of such cases interference with private rights could be authorised otherwise than by legislation, were grave questions on which the Judicial Committee did not find it necessary to express an opinion; but they agreed with the Court below in thinking that the allegations contained in the statement of defence did not bring the case within

the limits for which alone the appellant's counsel had contended (*r*).

This case decides, although not, perhaps, very definitely (*s*), that under the English law it is not competent to the Crown or executive, even when acting in pursuance of its treaty-making power, except possibly in the case of treaties of peace, to divest or modify rights conferred by the ordinary law. Indirectly, however, it serves to show that international agreements to which this country may be a party, and obligations arising therefrom, will not be regarded as a part of the ordinary law of the land, except in so far as they may have received the assent of the Legislature. Hence, in English law, treaties which affect private rights must have a legislative sanction. Thus extradition treaties are carried into effect by Orders in Council made under the Extradition Acts, 1870 to 1906; international copyright arrangements are carried out by Orders in Council made under the International Copyright Acts, 1844 to 1886; whilst even commercial treaties are sometimes given effect to by Act of Parliament.

General Notes.—*How International Law and Treaties may affect Private Rights.*—International law is primarily concerned with the relations of independent States. Such relations are outside the jurisdiction of municipal tribunals and cannot in themselves become the subject of judicial cognisance (*t*). Nevertheless private rights and obligations are often affected, and to an important degree, by the application or interpretation of those customary or conventional rules which govern the relations of States. Thus, under the customary rules of international law, a person otherwise subject to jurisdiction may be exempt by the reason of his representing some foreign State; or a contract otherwise valid may be dissolved by the outbreak of war between the States to which the parties respectively belong; or a commercial venture otherwise legitimate may become unenforceable by reason of its involving a breach of neutral duty. And the same observations apply also to treaties. A treaty is primarily a compact between independent States, and its observance or non-observance will be a matter solely for international negotiation or reclamation. Nevertheless treaties may

(*r*) *Cf.* also *Damodhar Gordham* v. *Deoram Kanji* (1 App. Cas. 332); *Conway* v. *Davidson* (10 East, 536); *Flindt* v. *Scott* (5 Taunt. 674); *Bazett* v. *Meyer* (5 Taunt. 824); *Aubert* v. *Gray* (32 L. J. Q. B. 50).

(*s*) The Privy Council, it will be noticed, contents itself with deciding, in terms, that the allegations contained in the defence did not bring the case within the limits of the proposition contended for by the appellant — viz., that such matters were acts of State, and not cognisable by the Courts.

(*t*) *Elphinstone* v. *Bedreechund* (1 Knapp, 316).

equally affect private rights and obligations; whilst in some systems of municipal law they will serve to confer rights or impose obligations which the Courts will enforce (*u*). So, a treaty may confer or limit the right of entry into the territory of a State; or it may affect the conditions under which goods from one State may be imported into another; or it may regulate the enjoyment of property by private persons, including copyright and patent right; or it may empower the surrender of persons charged with certain offences; or it may stipulate for the doing of acts which in some way restrict or invade ordinary rights. Hence in each system it is important to ascertain the relation in which treaties stand to the law of the land—whether, in fact, such treaties, if duly made, will of their own force operate as law, or whether, in so far as they affect private rights and obligations, they require some legislative or other sanction.

The Relation of International Law to English Law (*x*).—Notwithstanding some statements to that effect made by the text-writers, and some dicta to be found in the decisions, it can scarcely be said that the law of nations is "adopted in its full extent by the common law"; or that it is "deemed to be part of the law of the land" (*y*). The true relation may perhaps be expressed in the following propositions: (1) English law recognises the existence of international law as a body of rules capable of being ascertained, and when ascertained as binding on States either by immemorial usage or by virtue of agreement (*z*). (2) When once a rule of international law is shown to have received the assent of civilised States it will also be deemed to have received the assent of this country, and will in that character be applied by English Courts in cases coming before them to which such rule may be relevant (*a*). (3) But there are certain rights and obligations arising out of international relations, or purporting to rest on international law, which will not be deemed to be within the competence of municipal Courts (*b*). So in *Cook* v. *Sprigg* ([1899] A. C. 572) it was held that annexation was an "act of State," and that obligations arising under a treaty to that effect were not of a kind which a municipal Court could enforce (*c*). (4) Moreover, the Courts in interpreting and applying municipal law, whilst they will always seek to adopt such a construction as will not bring it into conflict with the law of nations, cannot of course give effect to its rules however clear, or to rights or obligations deducible therefrom, in a case where these rules derogate from or are inconsistent with the positive regulations of municipal

(*u*) See the *Head Money Cases* (112 U. S. 580).

(*x*) See an article on this subject by Westlake, L. Q. R. Jan. 1906, p. 14.

(*y*) See Blackstone, Com. 4th ed. iv. 67; and *Triquet* v. *Bath* (3 Burr. 1478).

(*z*) See *Reg.* v. *Keyn* (2 Ex. D. at 154); *West Rand Central G. M. Co.* v. *Rex* [1905] (2 K. B. at 407); and for instances of statutory recognition, 7 Anne, c. 12, and *Viveash* v. *Becker* (3 M. & S. at 292); and the Foreign Marriage Act, 1892, s. 19.

(*a*) See *West Rand Central G. M. Co.* v. *Rex* (at pp. 406 and 407); and for an illustration of such application, *Macartney* v. *Garbutt* (24 Q. B. D. 368).

(*b*) *See West Rand Central G. M. Co.* v. *Rex* (at p. 409).

(*c*) As to "acts of State" in English law, see *supra*, p. 19.

law (*d*). (5) With respect to treaties, in particular, the Crown or executive cannot claim, in virtue of any obligations arising out of a treaty not sanctioned by statute, to modify or interfere with rights arising under the ordinary law of the land (*e*). At the same time the inability of the Courts to give effect to international obligations as against subjects will not, of course, have the effect of freeing a State from its international responsibility for their non-fulfilment (*f*). (6) English law embraces a variety of statutes which have been passed from time to time for the purpose of enabling the Crown or executive to carry out more effectually its international obligations, and more especially to enter into and carry out particular treaty arrangements concluded with other States; and to this extent international law, and the obligations arising thereunder, will constitute a part of the law of the land, to which the Courts will in a proper case give full effect (*g*).

Treaties under the Law of the United States.—Although it has been laid down that international law forms part of the law of the United States (*h*), yet it is apprehended that, save in the matter of treaties, the relation of international law to municipal law is much the same as that which obtains under the English law. But on the subject of treaties, it is provided by the Constitution, Art. 6, that "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." Hence all treaties, if they are duly made and "self-executing," together with rights and obligations arising thereunder, will, in so far as they properly fall within the cognisance of the judicial power, be recognised and enforced. So in *Foster* v. *Neilson* (2 Pet. 314) it was said: "A treaty is in its nature a contract between two nations. . . . It does not generally effect, of itself, the object to be accomplished . . . but is carried into execution by the sovereign power of the respective parties. In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as an equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract when either party engages to perform a particular act, the treaty addresses itself to the political, not to the judicial department, and the legislature must execute the contract before it can become a rule of the Court." At the same time treaties, even though they may remain in force internationally, will not be given effect to by the Courts if the rights or obligations arising thereunder are nullified by subsequent statutes (*i*).

(*d*) This is probably now unquestionable, in spite of some dicta to the contrary contained in the Prize Cases; see Holland, Studies in International Law, p. 196 *et seq.*, and cases there cited.

(*e*) *Walker* v. *Baird* [1892] (A. C. at p. 497).

(*f*) *Infra*, pp. 26 *n* (*i*), 165, 213, 231.

(*g*) See, by way of illustration, 7 Anne, c. 12 (*supra*); the Seal Fishery Act, 1893, enabling effect to be given to the award made in the Behring Sea dispute; the Extradition Acts, 1870 to 1906; and the International Copyright Act, 1886. For a list of such treaties see Holland, Studies in International Law, p. 191.

(*h*) See the *Paquete Habana* (*supra*, p. 2).

(*i*) See *Whitney* v. *Robertson* (124 U. S. 190); Scott, 424. Picciotto, The Relation of International Law; Baldwin, A. J. I. L. Vol. 10, 180.

INTERNATIONAL COURTS OF ARBITRATION AND COMMISSIONS OF INQUIRY.

THE "PIOUS FUND" ARBITRATION, 1902.

[British and Foreign State Papers, vol. 95 (1901-2); and J. B. Moore, International Arbitrations, ii. 1349 *et seq.* (*k*); Scott's Hague Reports, p. 1.]

Case.] THE "Pious Fund" was a fund originally established by donations made by private persons to the Jesuit Fathers in California, for the conversion of the heathen. After the expulsion of the Jesuits in 1768 this fund was administered by the Spanish Government; whilst after Mexico had achieved her independence its administration devolved on the Mexican Government. In 1842 President Santa Anna decreed the sale of the property of the fund and the payment of the proceeds into the Public Treasury, recognising, however, an obligation on the part of the State to pay interest, at the rate of 6 per cent., on the capital. Under this decree property of the value of some $2,000,000 was disposed of; although the remainder was restored. In 1848, by the Treaty of Guadalupe Hidalgo, the territory of Upper California was acquired by the United States, and thereafter the Mexican Government refused to pay any further interest. In 1868 a convention was entered into between Mexico and the United States for the settlement of all claims which had arisen since 1848 on the part of the citizens of either country against the Government of the other. These claims were to be referred to two commissioners, with power to appoint an umpire in any case in which there might be a difference of opinion. Amongst the matters brought before this commission was a claim by the Bishop of Monterey and the Archbishop of San Francisco against the Mexican Government for the payment over to them of such a proportion of the "Pious Fund" and interest as might be found to be equitably due to Upper California, having regard to the original scope of the endowment. This matter was ultimately referred to the British Minister at Washington, Sir Edward Thornton, as umpire. In the result the umpire found the total value of the fund to be $1,435,033, and

(*k*) See also an article by W. L. Penfield (counsel for U.S.A.) in the North American Review, clxxv. 834.

held that the most equitable adjustment would be to divide the whole of the interest into two equal parts, and to award one moiety thereof to the claimants as the share of the Church of Upper California. On this basis the umpire estimated the yearly interest on a moiety of the fund at $43,050.99, in addition to which he awarded to the claimants a capital sum of $904,070.79, as arrears of interest for the twenty-one years which had elapsed between the 2nd of February, 1848, and 2nd of February, 1869. The latter amount, representing the arrears of interest, appears to have been duly paid by the Mexican Government, the last instalment having been paid in 1890 (*l*). But no payment appears to have been made in respect of the annual interest which accrued due after 1869. From 1890 onwards a claim for payment, under this head of the award, was repeatedly made by the representatives of the Roman Catholic clergy of Upper California, and promoted by the Government of the United States. Ultimately, by a convention of the 2nd of May, 1902, it was agreed to refer the matter for decision to a Court of Arbitration, instituted under The Hague Convention of 1899, for the pacific settlement of international disputes. By the terms of the present convention each party was to nominate two arbitrators, not being citizens of the contracting States; and these, again, were to appoint an umpire. The United States appointed Sir Edward Fry, formerly a Lord Justice of Appeal of the English High Court, and Professor De Martens, a Russian jurist; whilst Mexico appointed M. Asser, a member of the Dutch Council of State, and Dr. Lohman, a member of the Dutch Chamber of Deputies; all of them members of the permanent Court of Arbitration established under The Hague Convention. The arbitrators thereupon appointed Dr. Matzen, President of the Danish Landsthing, as umpire.

The questions submitted for decision were:

(1) Whether the claim of the United States was within the governing principle of *res judicata*, by virtue of the arbitral sentence of the 11th of November, 1875, pronounced by Sir Edward Thornton as umpire; and (2) if not, whether such claim was just.

The tribunal was empowered to render such judgment as might seem just and equitable; and if the decision were against

(*l*) This was so found by the Court of arbitration.

Mexico, then to decide in what currency any sum awarded should be paid.

The Mexican Government, whilst not denying the general applicability of the principle of *res juricata*, nevertheless disputed its applicability in the present case, both (1) on the ground that the arbitrator had exceeded his jurisdiction in making his award; and (2) on the ground, also, that the principle, even if it did apply, must be limited to the condemnatory or dispository portion of the award, and not extended to the law and facts on which it was based, which might have been—and in the present case were alleged to have been—wrongly found. It was also contended that by virtue of the treaty of 1848 and the convention of 1868 the two Governments had intended to settle and cancel all claims on the part of the citizens of either State against the Government of the other, and that the present claim, having arisen on the sequestration of the property prior to the treaty of 1848, must be deemed to have been included therein. Finally, it was contended that the present claim was barred by limitation, inasmuch as the claimants had failed to present it before the Mexican Courts within the period allowed by the local law. In the proceedings before the Court, French was adopted as the official language, but the counsel and agents of the two Governments were permitted to address the tribunal in the language of their respective countries.

Judgment.] The judgment of the Court, which was delivered on the 14th of October, 1902, was to the following effect:

"Considering that all the parts of the judgment or the Decree concerning the points debated in the litigation enlighten and mutually supplement each other, and that they all serve to render precise the meaning and bearing of the 'dispositif' (decisory part of the judgment), and to determine the points upon which there is *res judicata*, and which thereafter cannot be put in question;

"Considering that this rule applies not only to the judgments of Tribunals created by the State, but equally to arbitral sentences rendered within the limits of the jurisdiction fixed by the 'compromis' (*m*);

(*m*) The terms of the reference.

"Considering that this same principle should for a still stronger reason be applied to international arbitration;

. . . . . .

"Considering that . . . there is not only identity of parties to the suit, but also identity of subject-matter [in the two arbitrations];

. . . . . .

"Considering . . . that the rules of prescription, belonging exclusively to the domain of civil law, cannot be applied to the present dispute between two States in litigation;

"Considering . . . that the silver dollar, having legal currency in Mexico, payment in gold cannot be exacted, except by virtue of an express stipulation;

"Considering . . . that, with relation to this point [the currency in which the annual payment should be made], the sentence of Sir Edward Thornton has not the force of *res judicata*, except for the twenty-one annuities with regard to which the Umpire decided that the payment should take place in Mexican gold dollars, because question of the mode of payment does not relate to the basis of the right in litigation, but only to the execution of the sentence;

. . . . . .

"For these reasons the Tribunal of Arbitration decides and unanimously pronounces as follows:

"(1) That the said claim of the United States of America . . . is governed by the principle of *res judicata* by virtue of the arbitral sentence of Sir Edward Thornton . . .;

"(2) That . . . the Government of the Republic of the United Mexican States must pay to the Government of the United States of America the sum of 1,420,682 dol. 67 c. (Mexican) [in extinguishment of the annuity of 43,050 dol. 99c., due from the 2nd of February, 1869, to the 2nd of February, 1902];

"(3) The Government of the Republic of the United Mexican States shall pay to the Government of the United States of America on the 2nd February, 1903, and in each following

year . . . perpetually, the annuity of 43,050 dol. 99 c. (Mexican), in money having legal currency in Mexico" (*n*).

This case is noteworthy as having been the first case referred for decision to a Court of Arbitration constituted under The Hague Convention of 1899. The award embodies some important rulings as to the application and scope in international law of the principle of *res judicata*; and also as to the inapplicability of the principle of prescription to disputes between States. It is conceived, however, that the latter ruling must be confined to claims of the kind then before the Court; and that it was not intended to deny the applicability of prescription as a title, or as a factor in the title, to State territory or property (*o*). With respect to the matter submitted for decision, it was held in effect that Sir Edward Thornton had jurisdiction to make the award actually rendered by him; that this award, on the principle that a matter once duly adjudicated on cannot be reopened as between the same parties and in the same right (*p*), was therefore conclusive as to all findings, both in law and in fact, which were necessary to the decision arrived at; but that this principle did not extend to the mode of payment ordered by the original award, for the reason that this was a matter relating, not to the basis of the right, but only to the execution of the sentence; and finally that the claim was not barred by prescription. On these grounds Mexico was ordered to pay the amounts assessed by the judgments, and in Mexican currency. The rendering of this decision, although not important in itself, may be said to mark a new departure both in the progress of international organisation and in the development of international law.

THE NORTH SEA INCIDENT, 1904: REPORT OF THE INTERNATIONAL COMMISSION OF INQUIRY.

[British Parliamentary Papers: Russia, No. 2 (1905), and Russia, No. 3 (1905).]

Facts.] IN October, 1904, during the Russo-Japanese War, the Russian Baltic Squadron, then on its voyage to the East under the command of Admiral Rojdestvensky, encountered, when off the Dogger Bank in the North Sea, a fleet of British fishing steamers from Hull (*q*). Alarmed by rumours of the designs

(*n*) As originally awarded by Sir Edward Thornton, except as to currency.

(*o*) *Infra*, p. 112.

(*p*) The *exceptio rei judicatæ* of Roman law; the estoppel by judgment of English law.

(*q*) The disaster occurred on the night of the 21st of October, 1904, at 11.30 P.M.

of Japanese agents, and fearing a torpedo attack, the Russian squadron opened fire on the British trawlers, thereby sinking one vessel and damaging others, besides killing or wounding several of the fishermen. The Russian fleet then proceeded on its course, without notifying the disaster, until it put into the port of Vigo, in Spain. On these facts coming to the knowledge of the British Government, urgent representations were addressed to the Russian Government, and a demand made both for reparation and for the punishment of those who might be found responsible. The Russian Government expressed its regret, and made promise both of inquiry and compensation; but on being advised by the Russian admiral that his squadron had been attacked whilst passing the British trawlers by two torpedo-boats, it refused to give any pledge that the officers responsible for the occurrence should be punished, holding the injury to be a regrettable but inevitable incident of the attack. British feeling, already aroused by Russian interference with neutral commerce, ran high; the British fleet was mobilised, and war seemed imminent. After some negotiation, however, between the two Governments it was agreed to refer the incident to an "International Commission of Inquiry" under The Hague Convention for the pacific settlement of international disputes (*r*). By a convention signed at St. Petersburg on the 25th of November, 1904 (*s*), it was provided (*inter alia*) (1) that an international commission should be appointed, consisting of five members, one to be nominated by each of the parties, one by each of the Governments of France and the United States of America, and a fifth, to be chosen by the four members so appointed, or in default of agreement by the Emperor of Austria, together with a legal assessor to be nominated by each of the parties; (2) that the commission should inquire into and report on all the circumstances relating to the incident, and particularly as to the responsibility and degree of blame, if any, attaching to the subjects of either

(*r*) This was the Convention of 1899; see Arts. 9-14.

(*s*) Much correspondence took place as to the exact terms of the convention. The convention was expressly stated to be only "analogous" to that contemplated by The Hague Convention, and was expressly made to include questions of responsibility as incident to questions of fact. In the event of conflict it was stipulated that the provisions of the convention itself should be deemed to override those of The Hague Convention. See Parl. Papers, Russia, No. 2 [1905], at p. 53.

country or any third country; and (3) that the commission should assemble at Paris, and should present its report to the contracting parties signed by all members, its decisions being determined by a majority of votes, and the expenses of inquiry being borne equally by both Governments. The Russian Government also agreed to recall such of its officers as were implicated in or acquainted with the circumstances of the disaster, for the purpose of enabling them to appear before the commission (*t*). The Commission of Inquiry consisted of Admiral Beaumont, Admiral Davis, Admiral Dubassow (*u*), Admiral Fournier, and Admiral Spaun, together with Sir Edward Fry and Baron Von Taube as legal assessors. The commission commenced its sittings at Paris on the 25th of December, 1904, and presented its report on the 26th of February, 1905. On the part of Great Britain it was contended, in effect: (1) that on the night in question there was, in fact, no torpedo-boat or destroyer amongst the British trawlers, or in the neighbourhood of the Russian fleet; (2) that there was no sufficient justification for opening fire, and that when opened it was not properly controlled or limited; (3) that those on board the Russian ships ought to have rendered assistance to the injured vessels; and, finally, (4) that no hostile act was done by the British trawlers. On the part of Russia it was contended, in effect: (1) that the firing was caused by the approach of two torpedo-boats proceeding towards the squadron; (2) that the fire of the squadron was directed exclusively against the suspicious vessels; and (3) that the Russian squadron did everything in its power to minimise the risks incurred by the fishermen.

Report of Commission.] After a prolonged examination the commission presented a report containing an analytical statement of the facts upon which their findings were based. In substance it was found and declared: (1) that, in the opinion of the majority, there were no torpedo-boats or destroyers on the night in question amongst the British fishing fleet; (2) that, in the opinion of the majority, there was no real justification for

(*t*) Meanwhile the affair was also the subject of an inquiry in England, both on the part of a coroner's jury and on the part of the Board of Trade. See Parl. Papers, The North Sea Incident, 21st-22nd October, 1904.

(*u*) The representative of Russia originally appointed appears to have been Admiral Kaznakoff.

the opening of the fire, and that the fire was continued longer than was necessary, although the commissioners were unanimously of opinion that the Russian admiral did, personally, all that he could to prevent the trawlers, recognised as such, from being the object of the fire of the squadron; (3) that the commissioners unanimously recognised that the Russian admiral was, under the circumstances, justified in proceeding on his way, although it was regretted by the majority that it had not occurred to him, in passing through the Straits of Dover, to inform the authorities of the neighbouring maritime Powers that the firing in the vicinity of the trawlers had left them in need of assistance; and (4) that the commissioners unanimously recognised that the boats of the British fishing fleet had committed no hostile act. In the result the sum of £65,000 was paid on the 9th of March, 1905, by Russia to Great Britain by way of indemnity (*x*).

The "International Commission of Inquiry" is, as will be seen hereafter (*y*), one of the latest devices in the mechanics of peace-making. It was introduced by the "Convention relating to the Pacific Settlement of International Disputes" of 1899, and is substantially reproduced, although with a large number of additional regulations with respect to procedure, by the corresponding Convention of 1907 (*z*). The incident described throws some light on both its nature and uses. The result of the inquiry may also be said to emphasise the rule that neutrals, whilst they must accept the risks incident to actual hostilities between belligerents, are yet not subject to risks inspired by wholly illusory fears, except at the cost of adequate indemnity.

General Notes.—*New Aspects of International Organisation.*—Both these cases serve to illustrate certain new developments in the international organisation of society that have come into being as one of the results of The Hague Conference of 1899. It has already been pointed out that the meeting in conference of the representatives of the leading Powers, or, as happened in the case of The Hague Conference, of the representatives of the great body of civilised States, for the purpose of declaring the rules by which they, or such of them as are assenting parties, will hold themselves bound, in certain departments of international intercourse, has provided the family of nations with a germ of an international law-making body. Similarly, it was pointed

(*x*) See also Smith and Sibley, International Law as interpreted during the Russo-Japanese War, p. 446 *et seq.*

(*y*) *Infra*, p. 35.

(*z*) See Arts. 9-36. The differences between the two conventions are well marked in Whittuck, International Documents, pp. 94-99.

out that the adoption of a habit of co-operation in matters of common concern, requiring the appointment of a permanent central bureau, exercising a supervision over the conduct of the arrangements agreed upon, has furnished, perhaps, the starting-point for a system of international administration, as regards matters of common interest that may require such machinery. Finally, in the machinery provided by the conventions annexed to the Final Act of The Hague Conference of 1907—including the establishment of the "Permanent Court," the provision made for the appointment of "International Commissions of Inquiry," and the proposed Court of Arbitral Justice—we may perhaps discern the beginnings of an international judiciary. The cases cited are noteworthy mainly as being the first cases in which advantage was taken of this new organisation. But the results achieved by The Hague Conferences of 1899 and 1907 are so important in other respects as to need some detailed consideration; for those conferences have not only provided new facilities for arbitration and established new tribunals, together with an approximate scheme of judicial or arbitral procedure; but they have also codified certain branches of international law, and paved the way for codification of others. This alone is an achievement of vital importance, for the reason that it tends in some measure to get rid of that uncertainty and want of definiteness which have hitherto characterised international law and have been one of its chief sources of weakness.

The Hague Conference, 1899.—This conference, which was summoned at the instance of the Czar of Russia, met on the 18th of May, 1899, and sat until the 29th of July, 1899. Some twenty-six States in all, including the Great Powers of Europe and the United States of America, together with China and Japan, were represented. Its objects, shortly, were to discuss (1) the possibility of some agreement on the subject of disarmament; (2) the adoption of more effective methods for the pacific settlement of international disputes; and (3) the humanising of the rules of warfare. The work of the conference was entrusted, in the main, to three grand committees, dealing respectively with armaments and instruments of war, the amelioration of the laws of war, and the subject of arbitration and mediation. Resolutions on these subjects were formulated in committee, and were then submitted for the approval of the conference.

1. *The Final Act.*—By its Final Act, dated the 29th of July, 1899, the conference agreed on the text of three conventions, and three declarations, which were to be submitted for signature to the plenipotentiaries of such Powers as might choose to adopt the same. On the subject of disarmament the conference contented itself with adopting an abstract resolution to the effect that some limitation on armed forces and military budgets was desirable in the interests of the welfare of mankind; and with expressing a hope that the Governments represented would take into consideration the possibility of some agreement on the subject. The Final Act also gives expression to certain wishes (*vœux*) to the effect (*inter alia*) that a special conference should be held, in the near future, to revise the Geneva Convention of 1864 (*a*);

(*a*) In pursuance of this wish a special conference was held in 1906, by which this revision was duly accomplished; see vol. ii.

to deal with the rights and duties of neutrals in time of war; to consider the possibility of exempting private property from seizure during naval war; and to consider the question of bombardment of ports and towns by naval forces.

2. *The Conventions and Declarations.*—The conventions referred to include (1) a convention for the pacific settlement of international conflicts; (2) a convention regarding the laws and customs of war by land; and (3) a convention for the adaptation to maritime war of the principles of the Geneva Convention, 1864 (*b*). The declarations comprise (1) a declaration prohibiting, for five years, the launching of projectiles or explosives from balloons; (2) a declaration prohibiting the use of projectiles the only object of which is the diffusion of asphyxiating or deleterious gases; and (3) a declaration prohibiting the use of expansive bullets (*c*).

The Hague Conference, 1907.—In pursuance of the desire expressed by the previous conference, a second conference of the Powers was convoked in 1907. The proposal on this occasion emanated from the President of the United States, although the actual convocation of the conference was undertaken by the Emperor of Russia. The programme submitted included: (1) the question of the revision in certain particulars of the convention of 1899, relating to the pacific settlement of international disputes; (2) the question of the amendment of the convention of 1899, relating to the laws and customs of war on land; (3) the question of the declarations of 1899, and especially whether one of them, that had already expired by lapse of time (*d*), should be renewed; (4) the framing of a new convention on the laws and usages of naval war, more particularly with respect to such matters as the bombardment of open towns, the laying of torpedoes, the conversion of merchant vessels into warships, the exemption of the private property of belligerents at sea, the days of grace to be accorded to enemy shipping, the rights and duties of neutrals in relation to contraband, the destruction of neutral vessels, the position of belligerent vessels in neutral ports, and the adoption of such of those provisions relating to land warfare as might be applicable to naval warfare; and (5) the question of additions to the convention of 1899, for applying to naval warfare the principles of the Geneva Convention. To these there were afterwards added, at the instance of the United States, (6) the question of the reduction of armaments; and (7) the question of restricting the use of force for the recovery of public debts arising out of contract (*e*). The conference met at The Hague on the 15th of June, and concluded its sittings on the 18th of October, 1907. No fewer than forty-four Powers took part in it, including Bulgaria, China, Cuba,

(*b*) For a full account of these conventions and declarations, see Whittuck, International Documents, pp. 17, 35, 62, 67 *et seq.*; also Parl. Papers, Misc. No. 1 [1899].

(*c*) These declarations were not, however, so generally accepted as the conventions; and Great Britain in particular did not originally accede to any of them. But since the second conference, and the renewal of the first declaration, Great Britain has accepted them; although the declaration of 1907 forbidding the launching of explosives from balloons was not adopted by Germany, France, Italy, Russia, or Japan.

(*d*) That forbidding the launching of explosives from balloons.

(*e*) Parl. Papers, Misc. No. 1 [1908].

Persia, and Siam, as well as the South and Central American States. The work of the conference was distributed, in the main, between four committees, which respectively dealt with arbitration and kindred matters, land war, maritime war, and prize law. In the result the conference left on record a Final Act, to which are annexed no fewer than thirteen conventions and one declaration, dealing with various branches of international law; whilst it also embodies a number of formal resolutions and recommendations.

The Final Act and Resolutions.—The Final Act, after a recital of the circumstances under and purposes for which the Conference was convoked, and an enumeration of the Powers represented and the various Acts submitted for their acceptance, proceeds to record a number of resolutions and wishes (*vœux*) that had been come to on certain matters of international importance: (1) In the first place, it puts on record a unanimous declaration in favour of the principle of compulsory arbitration; and more especially in favour of submitting to compulsory arbitration, without restriction, certain disputes, such as those relating to the interpretation and application of international agreements. (2) Next, it reaffirms a resolution of the previous conference with respect to the limitation of military expenditure. (3) Finally, it embodies a number of wishes (*vœux*) in favour of (a) the adoption of a proposed convention for the establishment of a special Court of arbitral justice, distinct from the permanent Court, as soon as an agreement shall have been reached respecting the appointment of the judges of this Court; (b) the ensuring in time of war of the maintenance of pacific relations between the inhabitants of the belligerent States and neutral countries; (c) the regulation by special treaties between the Powers of the position, as regards military charges, of foreigners resident within their territories; and (d) the framing by the next conference of regulations on the subject of naval warfare, and the application in the meantime of such of the rules of the convention as to land warfare as might be applicable to naval warfare. The Final Act concludes by recommending to the Powers the assembling of a third Peace Conference, at an interval corresponding to that between the first and second, and the preparation of a programme in advance by means of a preparatory committee. These resolutions do not, of course, involve any element of legal obligation. Some of them, moreover, as may be seen by reference to the text of the convention, are in their terms studiously vague; whilst as to several the sincerity of some of the attestants may perhaps be open to question. The Final Act was signed by forty-three States, including the Great Powers of Europe, the United States of America, and Japan.

The Conventions and Declaration.—Annexed to the Final Act are conventions relating to: (1) The pacific settlement of international disputes, revising that of 1899; (2) The limitation of the employment of force for the recovery of contract debts; (3) The opening of hostilities between States; (4) The laws and customs of war on land, revising that of 1899; (5) The rights and duties of neutral Powers and persons in case of war on land; (6) The status of enemy merchant ships at the outbreak of hostilities; (7) The conversion of merchant ships into warships; (8) The laying of automatic submarine contact mines; (9) The use of bombardment by naval forces in time of

war; (10) The adaptation to naval war of the principles of the Geneva Convention; (11) The exercise of the right of capture in maritime war; (12) The establishment of an international Prize Court; (13) The rights and duties of neutral Powers in maritime war; together with (14) A declaration prohibiting the discharge of projectiles and explosives from balloons, for a period extending to the close of the next Peace Conference. In addition to these there is also annexed to the Final Act a draft convention relating to the establishment of a new Court or arbitral justice, the adoption of which is recommended, so soon as an agreement can be arrived at. All these remained open for signature till the 30th of June, 1908, with the exception of No. 12, which was to remain open till the 30th of June, 1909 (Art. 52). The subject-matter of these various conventions will be discussed in connection with the topics to which they immediately refer. For the present we are only concerned with the Peace Convention.

The Convention for the Pacific Settlement of International Disputes, 1907.—The convention of 1907 replaces the convention of 1899, as between all Powers that may expressly accept it. It is based on, and reproduces largely, the earlier convention (*f*); although it embodies a number of amendments, the more important of which are directed towards providing an optional system of procedure, and thus dispensing with the necessity for the framing of rules of procedure in each particular case. After pledging the signatory Powers generally to use their best efforts to ensure the pacific settlement of international differences (Art. 1), it proceeds to deal specifically with the subjects of (i) good offices and mediation, (ii) international commissions of inquiry, and (iii) international arbitration.

(i) *Good Offices and Mediation.*—With respect to this matter, the convention embodies an agreement on the part of the contracting Powers, to have recourse to mediation, in cases of serious dispute, before appealing to arms (Art. 2); and also affirms the right of other Powers to offer their good offices, whether before or after the outbreak of hostilities, without this being regarded as unfriendly (Art. 3). At the same time, in default of agreement to the contrary, the acceptance of mediation is not to hamper either side in its preparations for war (Art. 7). Beyond this the signatory Powers recommend the adoption of a special method of mediation, under which each of the disputants is to choose another Power as mediator; the two mediators thereupon assuming the control of all negotiations for the adjustment of the dispute, to the exclusion of the principals, for a period of thirty days (Art. 8).

(ii) *International Commissions of Inquiry.*—With respect to this matter, the convention recommends that in disputes on questions of fact, not involving the honour or vital interests of the parties, the latter should institute an international commission, whose duty it will be to inquire into and report on the facts, but whose determination will not possess the character of an arbitral award, and will leave the parties free to act thereon or not as they may think fit (Art. 35). Such commissions are to be constituted by special agreement; the agree-

(*f*) Art. 91. See Whittuck, International Documents, p. 92 *et seq.*, where the differences between the two conventions are clearly indicated.

ment is to define the subject-matter and scope of the inquiry and the powers of the commissioners; the members of the commission being appointed, unless otherwise agreed, in the manner provided for the appointment of arbitrators (Arts. 9 to 12). The convention also embodies a code of rules regulating the procedure to be followed in the prosecution of such inquiries (Arts. 13 to 36).

(iii) *International Arbitration.*—With respect to international arbitration, the convention declares the settlement of disputes between States by judges of their own choice, on the basis of respect for the law, to be the most equitable method of settling disputes in questions of a legal nature, including the interpretation and application of international conventions, and one that the signatory Powers should resort to in so far as circumstances permit; it also puts on record the principle that recourse to arbitration implies an engagement to submit loyally to the award; and reserves to the Powers the right of concluding special agreements with a view to extending compulsory arbitration so far as possible (Arts. 37 to 40). The convention next provides the necessary machinery for the purpose of facilitating recourse to arbitration. This includes the maintenance of the Permanent Court of Arbitration, established by the convention of 1899 (Arts. 41 to 50), and the providing of a new code of arbitral procedure (Arts. 51 to 90).

1. *The Permanent Court and its Organisation.*—The seat of this Court is to be at The Hague (Art. 43). Its organisation embraces: (a) A permanent Administrative Council, consisting of the diplomatic representatives of the signatory Powers accredited to the kingdom of the Netherlands, with the Dutch Minister for Foreign Affairs as president. This body is charged with the direction and control of the International Bureau and its officials, the control of the general expenditure, the decision of all questions of administration arising with regard to the operations of the Court, and the duty of reporting to the signatory Powers (Art. 49). (b) An International Bureau, which serves as the registry of the Court, keeps it archives, and conducts all administrative business. The signatory Powers agree to communicate to the Bureau a certified copy of any conditions of arbitration entered into by them, and of any award made by any special tribunal, and also information as to the execution of awards (Art. 43). The cost of administration is to be borne by the contracting Powers in the same proportions as those fixed for the Bureau of the Universal Postal Union (Art. 50). (c) A Court of Arbitration, which is to be constituted as follows: Each of the contracting Powers is to appoint four persons of known competence, and of the highest moral reputation; such persons are to be appointed for a period of six years, and when appointed will be inscribed and notified to the contracting Powers as members of the Court. This constitutes a standing arbitral body from which the members of the Court are to be selected, in a case where recourse to arbitration has been decided on (Art. 44). In such a case the Powers at variance may agree as to who shall constitute the arbitral body. Failing agreement, each party is to select and appoint two members of the Court, whilst the members so appointed are then to proceed to choose an umpire. If the members so appointed cannot agree on the appointment of an umpire, then such appointment is to

be left to a third Power. If they cannot agree on a third Power, then each side is to nominate one Power, and the two Powers so nominated are to proceed to appoint an umpire; but in the event of the latter not proceeding to make any appointment within two months, then each is to nominate, from the list of members of the Permanent Court, two candidates, not being members already selected, and not being nationals of either of the countries at variance, and from amongst such candidates an umpire is then to be appointed by lot (Art. 45). The tribunal having been thus constituted, the parties thereupon notify to the Bureau their intention to proceed with the arbitration, with the text of their *compromis* (*g*) and the names of their arbitrators; and the Bureau thereupon concludes the necessary arrangements for the meeting. In the exercise of their duties and outside their own country, the members of this tribunal are to enjoy diplomatic privileges and immunities (Art. 46). It is the duty of all signatory Powers to remind disputants that the Permanent Court is open to them (Art. 48); and the jurisdiction of this Court may be extended by agreement to non-contracting Powers (Art. 47).

2. *The Code of Procedure.*—The convention also provides a code prescribing the procedure to be followed in arbitration proceedings with respect to the submission of the matter in issue, and the conduct of the case before the tribunal (Arts. 51 to 85). Amongst other things it is provided that the parties shall sign a *compromis* stating the subject in dispute, and other terms and conditions of the arbitration (Art. 52). This may be settled by the Court if both parties so agree; or even at the request of one party in certain exceptional cases, if all other attempts to reach an understanding have failed. These exceptions comprise—cases where the dispute is one covered by a general arbitration treaty (*h*) which provides for a *compromis* and does not preclude its settlement by the Court (*i*);—and cases where the dispute arises out of contract debts claimed by one Power as due to its subjects, as to which an offer of arbitration has been accepted, unless some other provision has been made for the settlement of the *compromis* (Art. 53). In such cases the commission for the settlement of the *compromis* is to consist of five members, selected in the same manner as a court of arbitration (Art. 54); and unless otherwise agreed, such commission shall afterwards form the arbitration tribunal (Art. 58). Other provisions relate to the presidency of the tribunal (Art. 57); the appointment of arbitrators in the place of those who have died or resigned (Art. 59); the place of sitting (Art. 60); questions of pleading, evidence, and discussion (Arts. 63 *et seq.*); the making and effect of the award, from which there is to be no appeal (Arts. 78 *et seq.*); and the question of costs (Art. 85). The convention also provides a body of special rules of a less elaborate kind, which are designed to facilitate arbitration in disputes admitting of a summary procedure (Arts. 86 to 90).

(*g*) The preliminary agreement defining the points at issue and arranging the procedure to be followed.

(*h*) Made or renewed after the convention.

(*i*) Art. 53 (1); although in such a case a declaration by the other party that the case is not one intended for compulsory reference is to be conclusive unless the treaty expressly reserves this question for the Court.

(iv) *General Provisions.*—The convention, when ratified, is to replace as between the contracting Powers the earlier convention of 1899 (Art. 91). All ratifications are required to be deposited at The Hague as soon as possible. The first ratifications are to be accompanied by a *procès-verbal*, signed by the representatives of the ratifying Powers and by the Netherlands Minister for Foreign Affairs. Subsequent ratifications are to be by written communication addressed to the Netherlands Government, and accompanied by the instrument of ratification. Copies of these instruments, with the dates of ratification, are thereupon to be forwarded by the Netherlands Government to all Powers invited to the second Peace Conference (Art. 92). Non-signatory Powers invited to the second Peace Conference may adhere to the convention; and even other Powers, with the consent of the contracting parties (Arts. 93 and 94). Any signatory Power wishing to denounce the convention must give notice of its intention to the Government of the Netherlands, which will then communicate the fact, together with the date at which it was received, to other Powers; but the denunciation is only to affect the notifying Power, and is only to take effect after one year from the date of notification (Art. 96). Similar forms, as regards ratification, notification of subsequent adhesion, and denunciation, are prescribed under the other conventions framed by the conference. These forms, it will be seen, bear some resemblance to the notarial proceedings frequently prescribed by municipal law, in the case of contractual engagements between private persons; the function of Notary-General as between States having apparently been committed to the Netherlands Government. Up to the 30th of June, 1908, this convention had been signed by forty-four Powers, although in some cases subject to certain reservations.

Proposed New Court of Arbitral Justice.—Another proposal for promoting international arbitration is embodied in a draft convention which is also annexed to the Final Act. This convention, however, was not formally adopted by the Conference, owing to disagreements which arose as to the methods to be followed in the appointment of the judges, although it is recommended for adoption if and when this difficulty may have been overcome. In this it is proposed to establish a new Court, to be known as the "Court of Arbitral Justice," consisting of paid judges representing the different juridical systems of the world. This Court, acting through delegations of three judges appointed annually, would be permanently and constantly available, and would be capable of dealing immediately with all preliminary or minor questions, without the need of recourse to any special appointment. Such a Court, it was conceived, being an actual and not a mere potential body, would be at once more readily available and more easy of access than the Permanent Court; and would, if its jurisdiction were frequently resorted to, ensure a certain continuity in the jurisprudence of arbitration. But it was not to supersede the Court established by the Peace Convention, and was, indeed, to stand in the same relation as that Court to the Administrative Council and the Bureau; whilst the same rules of procedure were to apply, except where otherwise provided by the convention (Art. 22). The convention for

the establishment of an international Prize Court will be considered hereafter (*k*).

Voluntary Arbitration.—Arbitration is defined in The Hague Peace Convention as "the settlement of disputes between States, by judges of their own choice, and on the basis of respect for law" (Art. 37). Recourse to this mode of settlement may be secured either (1) by virtue of the facilities provided by the convention itself, this method being recognised as peculiarly applicable to disputes of a legal nature (Art. 38); or (2) by virtue of special treaties concluded between particular Powers, which are also contemplated by the convention (Art. 40). Both these methods may be considered as voluntary forms of arbitration (*l*). The facilities and proceedings under the convention have already been described. Turning, then, to special treaties, we find that a large number of such treaties have already been concluded, although they vary greatly in their scope. By some treaties the contracting parties agree to refer to arbitration all disputes that may arise between them, without exception; such is the case with a treaty concluded in 1904 between Denmark and the Netherlands (*m*). By other treaties the contracting parties agree to refer to arbitration, and generally to that of The Hague tribunal, all disputes falling under certain categories; although questions affecting the "national honour," "independence," or even "vital interests" are commonly excluded. So by the Anglo-French Arbitration Treaty of 1903, it was agreed for five years to refer to The Hague tribunal "all differences of a juridical character, or relating to the interpretation of existing treaties, incapable of solution by diplomacy, which do not involve the vital interests, or independence, or honour of the contracting parties, or affect the interests of a third party." And since October, 1903, similar agreements, limited in their scope, have been entered into by over forty Powers. By other treaties or more commonly by arbitration clauses inserted in treaties, dealing primarily with other matters, the parties agree to refer to arbitration any differences that may arise between them with respect to some particular matter. It is of course possible to regard all such treaties as involving a certain "compulsory" element (see Art. 40), inasmuch as they purport beforehand to render all controversies within the scope of the treaty determinable by arbitration, and not by recourse to other methods which would otherwise be available. But, in fact, if one of the contracting parties refused to proceed, there would, except to the extent indicated below, and save for the sanction of international opinion, be no means of either defining, or enforcing the actual submission of, the issue. It is, moreover, difficult to assign any limits to such exceptions as "national honour," "independence," "vital interests," by which such treaties are often safeguarded (*n*). In 1908

(*k*) Both this convention, and the declaration of maritime law framed by the International Naval Conference, 1909, will be dealt with in vol. ii.

(*l*) Although subject to a certain element of compulsion as regards the framing of the *compromis*, in certain cases; *infra*, p. 40.

(*m*) Similar treaties have also been concluded between other Powers, but they are for the most part Powers as between whom vital differences are scarcely likely to arise, such as Belgium, Switzerland, Spain on the one side and some of the American republics on the other; see Westlake, i. 338.

(*n*) As to the general limits of arbitration, see Westlake, i. 337 *et seq.*

treaties of arbitration were also concluded between Great Britain and the United States; the United States and Spain; the United States and Denmark; and the United States and France—the last extending to any issues that may arise between the two countries. During the year 1914 the United States concluded nineteen treaties for the advancement of peace with China, Denmark, France, Great Britain, Italy, Norway, Portugal, Burma, Spain, Sweden, and a number of South American States. These treaties provide that *all disputes of every nature whatsoever*, other than disputes otherwise provided for, shall be referred to a permanent international commission composed of five members appointed by the parties as therein provided. The parties agree not to declare war or begin hostilities during the commission's inquiry and before its report is issued (*o*).

Compulsory Arbitration.—The question of the adoption of a system of compulsory arbitration in certain cases was also considered by the Conference of 1907, but failed to reach any embodiment in the shape of a convention. Nor does the system which was considered by the Conference appear to have involved any real element of compulsion; or, indeed, anything more than a formal undertaking by which the signatory Powers were to bind themselves to accept arbitration unconditionally, in certain classes of cases. Nevertheless the Conference, as we have seen, included in its Final Act a declaration unanimously admitting the principle of compulsory arbitration, and affirming also that certain disputes, and particularly those arising out of the interpretation and application of international agreements, might be made the subject of compulsory arbitration without any restriction. Further, by the Peace Convention, the Permanent Court is, as we have seen, empowered to settle the *compromis*, or agreement for reference, at the request of one party only,—in cases where the dispute falls within a general treaty of arbitration made after the convention, so long as this provides for a *compromis* and does not exclude its settlement by the Court, and provided that the other party does not deny its applicability,—and, also, in cases where the dispute relates to contract debts, and arbitration has been accepted without any stipulation that the *compromis* should be otherwise settled (Art. 53). Among the difficulties incident to the adoption of a system of compulsory arbitration are (1) the want of some executive power wherewith to enforce both the submission of the issue and the performance of the award; (2) the difficulty of determining what issues should be made the subject of compulsory reference; and (3) the difficulty arising from the vague and unsettled character of many of the rules of international law. The last of these defects will, it is believed, be gradually surmounted (*p*). The second difficulty may perhaps be solved by looking to the character of those disputes which have been the subject of arbitration, and especially of successful arbitration, in the past. These may be approximately grouped as follows: (a) boundary disputes; (b) claims for damage for an act admittedly wrongful; and (c) disputes involving questions of legal right, such as those indicated by the Final Act of The

(*o*) A. J. I. L., 1916, Supplement, 263-309.

(*p*) *Supra*, p. 10 *et seq*

Hague Conference (*q*). Disputes falling under any of these heads ought, unless complicated by other issues, to lend themselves most readily to settlement by arbitration. There are, however, circumstances likely to encourage a resort to voluntary arbitration as a method of settling international disputes. These are: (1) the intolerable strain on the national resources, the dislocation of industry, and the consequent danger of social revolution, which modern war on a large scale is likely to involve; (2) the progress of scientific invention and the increased efficiency of modern methods of destruction; (3) the fact that, owing to the complexity of modern life, war between two or more States of any magnitude is likely to affect seriously the interests of other States; and (4) the growing strength of international opinion and international morality. These causes should serve to impose some considerable restraint on war in the future, save, perhaps, in cases where it is the outcome of national passion, or the dictate of self-preservation, or a necessary condition of national or economic expression. Since the "Pious Fund" arbitration, seventeen cases have been heard by the Permanent Court of Arbitration; and although its awards may have failed to give complete satisfaction to all the parties, they have been loyally accepted, and disputes which might have resulted in armed conflict amicably settled.

Judicial Settlement.—By the Covenant contained in the Peace Treaty of Versailles, 1919, the Hague Convention for the Pacific Settlement of International Disputes is by implication recognised, and consequently the Permanent Court of Arbitration is maintained. In accordance with the Covenant, the League of Nations was formally constituted in January, 1920, and in the following December the Permanent Court of International Justice was established by the League. By an ingenious scheme the judges are to be elected regardless of nationality by the League from persons nominated by the national groups in the Court of Arbitration. The Court now consists of fifteen members, eleven titular and four supplementary judges, to hold office for nine years. They must be persons of high moral character, possessing the qualifications required in their respective countries, for appointment to the highest judicial office, or jurists of recognised competence in international law. By the Covenant members of the League are given a choice of bringing their disputes before an international arbitration tribunal already agreed or to be agreed upon, before the Council of the League or before the Permanent Court of International Justice.

But by Art. 36 of the Statute adopted by the League "the jurisdiction of the Court comprises all cases which the parties refer to it, and all matters specially provided for in Treaties and Conventions in force." Further, States may, on signing or ratifying, or subsequently, recognise the jurisdiction as compulsory either unconditionally or on condition of reciprocity. Several minor States have already so recognised the Court.

It will be seen that the Court is empowered to deal with all cases of whatever nature. The distinction between justiciable and non-justiciable disputes is not recognised. The choice of referring a dispute to

(*q*) *Supra*, p. 34. For a convenient summary of the chief arbitrations of the nineteenth century, see Phillipson, Studies in Int. Law, p. 27.

conciliation by the Council, to arbitration or to judicial decision is ignored. The Court is to exercise the functions of all these bodies. And it would appear to be the intention of the Assembly in amending the statute to deprive the decisions of the Court of the force of precedents. (See sects. 38 and 59).

Thus upon the Court as a Court of Arbitration, have been thrust the functions of a court of justice, and of a court of conciliation. As a court of justice, it is deprived of compulsory jurisdiction, and it is not bound by its own decisions. It is neither a proper tribunal of arbitration, nor a real court of justice.

By Art. 16 of the Covenant, if a member of the League resorts to war without having submitted the dispute in accordance with the provisions in the Covenant, such an act will be deemed an act of war against all the other members, and will be met by such military, financial or economic measures as the League determines (*r*).

INTERNATIONAL PERSONS—
(i) STATES.

THE "CHARKIEH."

[1873; L. R. 4 A. & E. 59, 120.]

Case.] THIS was an action *in rem* instituted by the owners of the ss. "Batavier" and others against the ss. "Charkieh" for the recovery of damages sustained by reason of a collision that took place between the two vessels on the Thames on the 19th of October, 1872. After the arrest of the "Charkieh" an application was made to restrain further proceedings on the ground that she was the property of the Khedive of Egypt, and hence a public vessel of the Government of Egypt, and as such not amenable to the jurisdiction of the English Court of Admiralty. It appeared, however, that the "Charkieh," although carrying the flag of the Ottoman navy, had come to England with cargo and had been entered at the Customs like an ordinary merchant ship, and that at the time of the collision she was under charter to a British subject and advertised to carry coals to Alexandria. In the result it was held that the Khedive was not entitled to the

(*r*) Bellot, Texts Illustrating the Supreme Court of the United States and the Permanent Court of International Justice. Grotius Society, No. 8.

privilege of a sovereign prince; and the protest against the jurisdiction was therefore overruled.

Judgment.] Sir Robert Phillimore, in his judgment, considered two questions: (1) whether the "Charkieh" could be said to be the property of the sovereign prince; and (2) whether, assuming the Khedive to enjoy the status of a sovereign prince, the vessel could, under the circumstances, still claim immunity from jurisdiction. On the question as to whether the "Charkieh" was exempt from the local jurisdiction by reason of her being the property of a sovereign prince, Sir Robert Phillimore stated, as the results of an historic inquiry into the subject of the status of the Khedive of Egypt: (1) that in the firmans granted by the Porte to the Khedive, Egypt was invariably spoken of as one of the provinces of the Ottoman Empire; (2) that the Egyptian army was regulated as part of the military force of the Ottoman Empire; (3) that the taxes were imposed and levied in the name of the Porte; (4) that the treaties of the Porte were binding on Egypt, and that she had no separate *jus legationis*; and (4) that the flag for both the army and navy was the flag of the Ottoman Empire. All these facts, according to the unanimous opinion of accredited writers, were incompatible with those conditions of sovereignty which were necessary in order to entitle a country to be ranked as a member of the great community of States. Nor did the fact that the office of the Khedive was hereditary make any difference in this respect; for the hereditary character did not in itself confer on the holder the right of making war and peace, of sending ambassadors, or maintaining a separate naval and military force, or of governing at all except in the name and under the authority of his Sovereign. For these reasons the Khedive could not be regarded as a sovereign prince, or even as the ruler of a "semi-sovereign" State; although the learned Judge incidentally expressed the opinion that if the Khedive could have established a claim to be the ruler even of a semi-sovereign State he would have been entitled to require from foreign States the consideration and privileges incident to the status of sovereignty (*s*). Nor could it be urged in favour of the exemption of the "Charkieh"

(*s*) At p. 77.

that, although claimed as a public vessel of the Egyptian Government, she must nevertheless be regarded as a public vessel of the Ottoman Government, of which the Government of Egypt formed a part, for the reason that, although an intimation of the circumstances had been made to the Ottoman Ambassador, no reply had been received, and no intervention had taken place on behalf of the Porte. On these grounds, therefore, the learned Judge came to the conclusion that the Khedive had failed to establish his title to the status of a sovereign prince according to the criteria of sovereignty required by "the reason of the thing," and by the usage and practice of nations as expounded by accredited writers upon international jurisprudence.

It should be noticed that the question in this case was not whether Egypt could be regarded as a semi-sovereign State, but whether it could be regarded as a separate political society, or as "a State" in international law. Amongst the various criteria which were applied in determining this question, prominence was given to the following: (1) the independent exercise of authority over the inhabitants of the territory in question in the matter of government and taxation; (2) the maintenance of a separate military and naval force; (3) the possession of a separate flag and a separate *jus legationis*; and (4) the possession of an independent right of making peace and war, and treaties. If to these tests be added that of recognition by other States, the result may be said to embody a fair statement of the conditions necessary to constitute a "State" in international law. It needs to be observed, however, that questions of international status, when they arise in cases tried before municipal Courts, are usually referred for determination to the political department of government. Thus in *Mighell* v. *Sultan of Johore* ([1894], 1 Q. B., at p. 158) Lord Esher, M.R., in referring to the question of proof of sovereignty, took exception to the method of investigation pursued in the case of *The Charkieh*, and laid down that an authoritative certificate from the political department with respect to the status of another sovereign State should be regarded as decisive by the Courts (*t*). In the case in question the Court, acting on information furnished by the executive, to the effect that the relation between Johore and Great Britain was rather one of alliance than dependence, and that the Sultan of Johore maintained his own armed forces and his own civil establishment, dispensed justice through regularly constituted Courts, and generally exercised the attributes of a sovereign ruler, held that the claim to sovereignty must be taken to have been proved.

(*t*) See also *Taylor* v. *Barclay* (2 Sim. 213); *City of Berne* v. *The Bank of England* (9 Ves. Jun. 347; *The Ionian Ships* (2 Spinks, 212).

In view of the present connection between Great Britain and Egypt, it may be instructive to trace the changes that have taken place in the political position of Egypt since the date of the judgment. By firmans issued in 1873 and 1879 further powers were granted to the Khedive, including the right of making non-political treaties and the right of maintaining armed forces; although the coinage was still to be issued in the name of the Sultan, and the flag was to remain that of the Ottoman Empire; whilst certain restrictions were also imposed on the construction of warships (*u*). From 1879 to 1883 the government of Egypt was conducted under the supervision of two Controllers-General, appointed by Great Britain and France respectively. In 1882 a military insurrection under Arabi Pasha broke out, having for its object the abolition of the foreign control. France held aloof; but Great Britain intervened, and ultimately restored the authority of the Khedive. In 1883, as the result of this intervention, a decree was promulgated abolishing the joint control, and an English financial administrator was appointed, the British military occupation continuing. By a convention of 1885 made between the Great Powers of Europe, Turkey, and Egypt, a new agreement was come to with respect to the internal and financial affairs of the country (*x*); whilst by a further convention of 1888 the Suez Canal and its approaches were neutralised (*y*). The British occupation, although undertaken in the first instance as a temporary measure, has continued ever since; and by the Anglo-French agreement of 1904 France, amongst other things, abandoned her demand for the British withdrawal. Owing to the capitulations, which applied to Egypt as part of the Ottoman Empire, the administration of justice remained under European control (*z*). In these circumstances, the international status of Egypt would appear to have been altogether anomalous (*a*). On 18th of December, 1914, Great Britain declared a protectorate over Egypt.

General Notes.—*Meanings of the Term "State."*—In the domain of municipal law "the State" is commonly used to denote "the organised community," as distinct from its individual members (*b*). This in some systems is itself a juristic person, capable of legal rights and duties, and often invested with special privileges and immunities not possessed by ordinary persons, whether natural or legal; whilst in other systems it is legally represented only through the person of the Sovereign (*c*). Again, under that particular form of State organisation known as Federal

(*u*) Holland, European Concert, pp. 121 and 125.

(*x*) *Ibid.* p. 194.

(*y*) *Infra*, p. 155.

(*z*) *Infra*, p. 259.

(*a*) See Westlake, i. 27.

(*b*) It has, of course, a variety of other meanings, such as the "central political authority," as distinct from local authorities; the "civil power" as distinct from the "ecclesiastical."

(*c*) This is so in English law, where the King lsgally represents the State. As to the mischief and confusion resulting from this misconception, in England, see "The Crown as Corporation," by the late Professor Maitland, L. Q. R. 1901, p. 131; and, in Australia, an article by the author on "The Crown as representing the State," Commonwealth Law Review, i. 145. That the Crown is partible, and represents each community in a separate character, see *The King* v. *Sutton* (5 C. L. R. 789).

Union, "a State" denotes one of a number of political communities, formerly distinct, which have become united on terms by which they retain their separateness for some purposes, but for other purposes transfer their powers to some central authority, which represents internationally the entire Union. But for the purposes of international law, "a State" denotes not merely an organised community, but an organised community possessing certain qualifications which are deemed essential to the maintenance of international relations. A "nation," on the other hand, denotes a similar community, considered, however, rather "with reference to the persons composing it than with reference to the common authority which represents it, or the territory which it inhabits" (*d*).

States as International Persons: "Normal" and "Abnormal."—A "State" for the purposes of international law may be described as a people permanently occupying a fixed territory; bound together into one body politic by common subjection to some definite authority; exercising, through the medium of an organised government, a control over all persons and things within its territory (*e*); and above all capable of maintaining relations of peace and war with other communities. Such communities, whether designated as States or Nations, will, if recognised by other States, constitute international "persons." Each such State, in fact, constitutes a collective person into whose corporate body, for the purposes of international law, all its individual members are absorbed. It would seem, although this is not the prevalent view, that any community which possesses these attributes, and which is capable of foreign relations, including those of peace, war, and neutrality, is entitled to be regarded as an international person, and as a State of international law; this, whether it be fully sovereign or semi-sovereign, and whether Christian or non-Christian. At the same time, in view of the fact that international law is the special product of European civilisation, and that some of its rules are in their nature scarcely applicable to the States that have arisen outside that civilisation, and in view, also, of the fact that some States possess only a limited capacity for foreign relations, a distinction has been drawn between normal and abnormal international persons (*f*). In the former category are placed those States which are at once recognised as fully sovereign and as members of the family of nations (*g*). It is as between this class of States that the theory of legal equality and the most complete application of the rules of international law may be said to prevail. In the latter category are placed (1) States which, although fully sovereign, are yet, by reason of their difference of civilisation or their removal from Western influences, not recognised as members of the family of nations, although it will not follow that they are therefore to be regarded as outside the pale of international law (*h*); and (2) States which, even though they may have inherited the European

(*d*) Westlake, i. 4.

(*e*) Although not always an exclusive control.

(*f*) See Holland, Jurisprudence, p. 395; for a judicial recognition of this view as regards the applicability of rules of international law, see *The Hurtige Hane* (3 C. Rob. 324); and *The Madonna Del Burso* (4 C. Rob. 169).

(*g*) As to the meaning of this term, see p. 47, *infra*.

(*h*) *Infra*, p. 48.

civilisation, are yet not fully sovereign, but have parted with some share of control over their foreign relations. Such States are only in a limited degree the subjects of international law (*i*), and may, for the purposes of international law, be said to resemble persons subject to the disabilities of minority or alienage in municipal law. The line of demarcation is, it is true, somewhat hard to draw, and the practical consequences of the distinction are somewhat difficult to define, both being interpretable only by reference to the origin and development of the system of international law. Nevertheless the distinction is one that needs to be recognised; for the reason that it not only corresponds with existing conditions, but also serves to explain much which might otherwise appear anomalous as regards the treatment of certain States which are admittedly international persons, although not of the family of nations. At the same time it must always be borne in mind that abstract classifications such as these are not to be treated as being in themselves a source of legal right; and that questions of international status must always depend upon the actual relations of States (*k*).

The Family of Nations.—Strictly, perhaps, international law should be regarded as applying equally to all communities that answer to the description of States. But in fact, owing to the circumstances of its development, its actual scope, at any rate as regards the most complete application of its principles, is probably somewhat narrower. It was in its commencement the outcome of conditions and of a civilisation exclusively European; and many of its rules still bear the impress of their origin. It grew up amongst a group of European States, which, although in frequent conflict with each other, were yet linked together by the ties of a common religion, a common civilisation, somewhat similar ethical standards, as well as by a multitude of common interests. At the outset it did not embrace even all the Christian States of Europe; for Russia can scarcely be regarded as having become a member of the European group until towards the end of the seventeenth century and is now no longer a Great Power. It gradually extended its range, however, until it came to embrace not only the Christian States of Europe, but also their offshoots in America; all States, in fact, of European civilisation. But some time was to elapse before it was conceived as applicable to non-Christian States. In the course of the eighteenth century permanent diplomatic relations were established with Turkey; but it was not until 1856 that Turkey was formally admitted to "the public law and system of Europe" (*l*). Japan, again, can scarcely be said to have been admitted as a member of the family of nations until 1899 (*m*). Hence the term "family of

(*i*) See *The Madonna Del Burso* (4 C. Rob. 169, at p. 172), where Lord Stowell, in speaking of certain non-Christian communities, said that, "In consideration of the peculiarities of their situation and character, the Court has repeatedly expressed its disposition not to hold them bound to the utmost rigour of that system of public laws, on which European States have so long acted, in their intercourse with one another."

(*k*) See judgment in *Ionian Ships* (*infra*, p. 57).

(*l*) As to the precise effect of this, see Westlake, i. 47.

(*m*) It was in 1895 that the treaties for the abolition of the consular jurisdiction were entered into; although the new system did not come into force until 1899.

nations" may fairly be employed for the purpose of describing a community of States which have attained a certain level of civilisation; which are bound together by a variety of common interests; and which are also in the habit of acting together in matters necessary to the maintenance of joint international life. Such States enjoy the full community of international law; and it is as between members of this group that its rules have their most complete application (*n*).

States outside the Family of Nations.—At the same time it can scarcely be said that States, such as The Hedjaz, Afghanistan, Abyssinia, and Liberia, are altogether outside the pale of international law. Such States may be said to occupy in the international system much the same position as persons subject to the disabilities of infancy or alienage occupy in municipal law; but their exact position is hard to define. Some, like Korea and Morocco, are subject to external control, and possess at the most only a limited capacity for foreign relations. Others, like Persia, Thibet, and Abyssinia (*o*), lie so much outside the track of civilised life that the question of their legal position is not, perhaps, of general importance. Nevertheless such States, or such of them as are capable of independent relations, are recognised as competent to enter into treaties and as being responsible for their observance; they send and receive ambassadors, and are held responsible for any invasion of the rights of embassy; whilst they are also held responsible for the security of foreigners residing within their limits, as well as for other international delinquencies (*p*). They are also recognised as capable of making peace and war; and in the case of a maritime war a State like China would, if belligerent, be allowed to enforce and be expected to observe the customary rules with respect to neutral trade; whilst in the case of war between other States the obligations of neutrality would probably be enforced against her (*q*). On the other hand, their position differs from States within the "family of nations" in several particulars. Their territorial supremacy is less scrupulously respected; intercourse is not only often forced on them, but Europeans and Americans living within their limits are also commonly exempted from the local jurisdiction and invested with the privilege of exterritoriality (*r*); their conduct in relation to other States similarly situated, especially in time of war, would not, probably, be judged by ordinary international standards; nor do such communities generally participate in those forms of joint action and organisation (*s*) which constitute so strong a bond between civilised States. At the same time some of these traits are marks rather of

(*n*) For an account of States of European civilisation, see Westlake, i. 40; and for a list of existing States, and an estimate of their international character, see Oppenheim, i. 169–191.

(*o*) But as to the position of Abyssinia, see Westlake, i. 40.

(*p*) See p. 317, *infra*.

(*q*) Although Chinese neutrality was very inadequately observed during the Russo-Japanese War; *infra*, vol. ii.

(*r*) Although this is also the case with Turkey, which otherwise possesses the full attributes of a State in international law.

(*s*) Such as extradition, postal communication, the regulation of trade and navigation, and the protection of industrial property; see p. 13, *supra*. At the same time Persia, Korea and Siam are members of the Postal Union, and Persia and Siam also of the Telegraph Union; see also p. 260, *infra*.

political than legal inequality; whilst others are mere incidents of their geo-political position. Moreover, States like China, Persia, and Siam were represented at The Hague Conferences of 1899 and 1907; whilst both Persia and Siam have adopted most of the conventions framed by the latter conference (*t*), whilst China, Haiti, The Hedjaz, Liberia and Siam were parties to the Peace Treaty of Versailles, 1919. These facts, added to the rapid spread of Western ideas, render it probable that all communities possessing the general attributes of statehood, and not cut off from international intercourse, will ultimately be brought within the family of nations (*u*). But international law cannot be said to apply to barbarous or semi-barbarous communities, which do not possess any organised government, or have no fixed territory, or are incapable of maintaining international relations, as understood by civilised States. In their dealings with such communities as these, civilised States are subject only to such restraints as may be imposed by their own notions of humanity, and the sanctions of international morality (*x*).

The Commencement of Statehood: the Question of Recognition.—A State becomes an international person when it acquires those attributes of statehood already described; and when it enters into relations with other States. It is sometimes suggested that recognition by other States is necessary before a State can be regarded as an international person, or a subject of international law. This is true in so far as the tribunals of one State will, in any case in which the sovereignty of another political community or the validity of any public act done on its behalf may be involved, usually ascertain whether the community in question has been in fact recognised by their own Government before they will themselves concede such recognition (*y*); but so long as a political community possesses in fact the requisites of statehood formal recognition would not appear to be a condition precedent to the acquisition of the ordinary rights and obligations incident thereto.

Different Kinds of Recognition.—Recognition differs greatly in its object and effects, and cannot, generally, be said to be governed by legal rules; although custom furnishes certain rules of guidance in specific cases. These will be considered more particularly hereafter, in connection with the subjects to which they are most appropriate; but, briefly, the different aspects of recognition would seem to be these: (1) In the case where a community revolts from the parent State of which it has hitherto formed a part, recognition by other States, whilst the issue remains undecided, is merely an acknowledgment of belligerent rights (*z*). (2) In the case where such a community succeeds in establishing its independence, or where any community severs itself even by peaceable means from the parent State, and establishes itself as a

(*t*) Although in some cases with reservations; whilst Siam has refused to adopt Convention No. II.

(*u*) As to the judicial recognition of the public acts of such States, see *The Helena* (4 C. Rob. 3); and for a general account of the non-Christian States see Oppenheim, i. 179.

(*x*) The retention of the dum-dum bullet was justified by Great Britain on the ground of its necessity for stopping the onrush of savage foes; see Taylor, 479.

(*y*) See *supra*, p. 44; *Mighell* v. *Sultan of Johore* (*infra*, p. 94); and *Republic of Peru* v. *Dreyfus* (*infra*, p. 80).

(*z*) *Infra*, p. 67.

new State, recognition by other States constitutes at once an acknowledgment of its independence and of its international personality (*a*). (3) In the case where a new State is formed by the union of States previously recognised as separate, recognition would seem merely to amount to a formal acknowledgment of the new State, and of its entry into the family of nations (*b*). (4) In the case where, in a State previously recognised, a new organisation or new form of government, not in privity with the old, has been set up, whether by violent or peaceable means, recognition by other States merely amounts to a formal acknowledgment of the adoption by the State in question of a new organ or agency for the conduct of its external relations (*c*). (5) In the case of a new accession to the sovereignty or titular headship of a State, recognition is merely a matter of formal courtesy (*d*). (6) Finally, in the case of States hitherto outside the sphere of European civilisation, recognition by other States may be said to operate as an acknowledgment of their capacity and intention to accept the existing international system, and, in some instances, of their full "membership" of the family of nations (*e*). But in any case it seems to be admitted that the mere fact of entering into diplomatic or treaty relations with a State will in itself amount to recognition (*f*). Recognition by one State will not, of course, bind other States; but recognition on the part of one or more of the leading Powers will generally be followed by recognition by others. Recognition has sometimes been accorded by formal act of the Great Powers. Thus, by the Treaty of Berlin, 1878, Roumania, Serbia, and Montenegro were recognised as independent States; although this was made conditional on the adoption by those States of the principle of freedom of religion. Roumania was also recognised as a kingdom in 1881; and Servia in 1882 (*g*). The Congo Free State was recognised as an independent State by the West African Conference, 1884—85 (*h*).

The Extinction of States.—Once established or recognised as an international person, a State will retain its personality notwithstanding any subsequent changes of government, however considerable, for these are at bottom only changes in the agency by which it is internationally represented. It will also continue notwithstanding any subsequent changes of territory, so long as what remains can be considered as perpetuating the national being. But it will cease to exist if it become absorbed into another State, whether as the result of conquest or agreement; or if it is split up into new States, in such a way that its original identity is lost (*i*).

"*Sovereign*" *and* "*Semi-Sovereign*" *States.*—A "sovereign" State is one which, whilst possessing those attributes of statehood already

(*a*) *Infra*, p. 69.
(*b*) *Infra*, p. 52.
(*c*) *Infra*, p. 84.
(*d*) *Infra*, p. 83.
(*e*) As to the cases of Turkey and Japan, see p. 47, *supra*.
(*f*) On the subject generally, see Westlake, i. ch. iv.; Hall, 83; Oppenheim, i. 134.
(*g*) See Taylor, pp. 126, 180; and as to the effect of conditional recognition, Oppenheim, i.
(*h*) See Taylor, p. 90. Although now annexed to Belgium; see p. 52 *n* (*t*), *infra*.
(*i*) See Hall, p. 22; and Oppenheim, i. 140.

described (*k*), is also independent of external control (*l*). The explanation of the term "sovereign" State is to be found in the fact that, at the time when international law first came into being, most of the European States were under some form of monarchical government. In accordance with the prevailing juridical conceptions, each such State was legally identified with the person of its ruler, and was represented by him in all its foreign relations. If the ruler was supreme and independent of external control, he was styled "Sovereign." It was, indeed, as between Sovereigns that the rules of international law were first applied. But with the development of powerful republics and the gradual spread of constitutional government it became more and more apparent that it was the organised community, and not its ruler, that was the true international person; and so the notion of personality gradually came to be transferred from the ruler to the State. In this way States have now come to be recognised as being in themselves the subjects of international law; whilst if they are free from external control they are then styled sovereign States. The earlier notion of the identification of the State with the person of its ruler still obtains, however, in the forms of international intercourse, with the result that in monarchical States treaties and other State acts are still made and transacted in the name of the ruler (*m*). "Semi-sovereign" States, on the other hand, are States which, whilst otherwise possessing the attributes of statehood, are not free in their external relations (*n*). A State, however, which merely retains its sovereignty and independence for certain internal purposes, but is for external purposes only a part of some larger political body (*o*), will not be regarded as being an international person. Such, according to the judgment in the case of *The Charkieh*, was the position of Egypt in 1873; and such is also the position of a member State of a union. The various forms and attributes of "semi-sovereignty" will be dealt with hereafter (*p*).

The Equality of States.—The legal, as distinct from the political, equality of States is commonly regarded as a fundamental principle of international law. It really means that all States, whether great or small, have equal rights and duties in matters of international law; and that the existing law cannot be altered by any one State or by a section of States without the express or implied assent of the others (*q*). It is, however, subject to some qualifications. In the first place, if the distinction previously drawn between normal and abnormal international persons be correct, then it would seem that the latter are only in a limited degree, and to the extent previously indicated, the subjects of international law; in which case its rules can scarcely be said to be equally or uniformly applicable to all States alike (*r*). In the second place, the recognised primacy of the six Great Powers of

(*k*) *Supra*, p. 46.

(*l*) For a judicial recognition of this, see *The Cherokee Nation* v. *The State of Georgia* (5 Pet. 1).

(*m*) See *U.S.* v. *Wagner*, p. 89, *infra*.

(*n*) *Infra*, p. 60.

(*o*) *Supra*, p. 44.

(*p*) *Infra*, p. 60.

(*q*) See *The Antelope*, 10 Wheat. 66; but see also p. 9, *supra*.

(*r*) *Supra*, p. 48; and the observations of Lord Stowell in *The Madonna Del Burso* (4 C. Rob., at p. 172).

Europe in relation to matters of European concern, and that of the United States on the continent of America, although primarily political, would seem also to involve an ultimate control over territorial arrangements, and a consequent restriction on the territorial supremacy of other States, which are scarcely in keeping with the theory even of legal equality (*s*).

Unions of States.—It sometimes happens that communities which constitute separate States for some purposes of government nevertheless constitute for other purposes only part of a larger political organisation. Strictly, international law is not concerned with questions of internal organisation, but only with the organisation which a State presents from the outside and in connection with its external relations. Amongst the various forms of union recognised by writers on public law, however, such as personal union, real union, federal union, and confederate union, we find some forms in which the constituent parts retain their international personality, and others in which they do not. A "Personal Union" occurs where two or more States otherwise distinct are ruled, although not by virtue of any permanent arrangement, by the same Sovereign. Such a form of union existed between Great Britain and Hanover from 1714 to 1837; and from 1885 to 1909 between Belgium and the Congo Free State (*t*). Such States, however, constitute distinct persons in international law, and are in no way responsible for each other's action, even though they may employ the same international representative (*u*). A "Real Union" occurs where two or more States are permanently united under one dynasty or Government, in such a way as to constitute one State for external purposes, although each retains its s parateness in matters of domestic concern. Such a form of union formerly existed between Austria and Hungary and between Sweden and Norway (*x*). In such cases it is really the united body that constitutes the international person; although, in matters not vital to the maintenance of union, separate international arrangements are occasionally made on behalf of the constituent States. A "Federal Union" occurs where several States, or communities, formerly distinct, are united by permanent compact

(*s*) As to the primacy of the Great Powers of Europe and of the United States of America respectively, and its effects, see Lawrence, International Law, pp. 66, 242 *et seq.*; and Essays, p. 208. As to the Monroe doctrine, see Taylor, pp. 140, 150. But for a different view, see Oppenheim, i. 199. For an account of the customary rules governing the rank of States, see Oppenheim, i. 200.

(*t*) In September, 1908, it was arranged that the Congo Free State should be taken over by Belgium. Great Britain and the United States refused to recognise this annexation, unless some guarantee were given for the better treatment of the native inhabitants. But Germany, another signatory of the Act of the Berlin Conference of 1885, disputed this right of withholding recognition, as being a claim to interfere in the internal affairs of another State.

(*u*) For an account of an international controversy turning on this point, see the case of the Suhlingen Convention, 1803; Hall, p. 546.

(*x*) The union between Sweden and Norway, which existed from 1814 to 1905, was less complete, for the reason that each State retained its own commercial and naval flag. The independence of Norway as a separate State was guaranteed by Great Britain, France, Germany, and Russia in 1907 and 1908.

in such a way that the ordinary powers of sovereignty are in part vested in a federal or national Government whose authority extends over the whole union, whilst others remain vested in the Governments of the separate States; both authorities being co-ordinate within their respective spheres. Such a form of union now exists in the United States of America, the United States of Argentina, the United States of Brazil, and the United States of Mexico. Such unions constitute for the most part only one international person, for the reason that in their external relations the constituent States are represented exclusively by the national or federal Government. Some federal unions, moreover, are found to exist within the limits of a wider political organisation; but in this case they possess no separate international personality (*y*). A "Confederate Union" occurs where several States otherwise distinct unite for the purposes of mutual co-operation and defence, but without derogating from the sovereignty or separate identity of the individual members, save for certain limited purposes prescribed by the bond of union. Such an organisation amounts in fact to little more than a permanent league of separate States, which agree to act in concert touching certain matters of common interest (*z*). Such a form of union existed formerly, from 1815 to 1866, between the States composing the Germanic Confederation (*a*); and more recently, from 1896 to 1898, between the States of Honduras, San Salvador, and Nicaragua, in Central America (*b*). In such cases the constituent States may be said to retain their international personality; although if any considerable restriction were imposed on their external freedom of action they might perhaps more accurately be designated as part sovereign States (*c*). The German Empire, which under the constitution adopted in 1871 purported to be a union of the German federal princes and free cities, was, technically, a confederation of States; for the reasons that the reigning heads of the constituent States retained their position as Sovereigns, and that a limited right of diplomatic intercourse with foreign Powers was reserved to certain States, such as Bavaria, Saxony, and Würtemberg, to whom Ministers were accordingly accredited by foreign States. But in its actual working it approximated more closely to the federal type of union; for the reasons that the Emperor really represented the Empire internationally, and that the control of all

(*u*) As is the case with the Dominion of Canada, the Commonwealth of Australia, the Federation of the Leeward Islands, and the South African Federation, within the limits of the British Empire; but see p. 54, *infra*.

(*z*) In such cases, moreover, the Diet or common authority, in so far as it is empowered to act, acts even in internal matters only through the Governments of the separate States.

(*a*) For an account both of the Germanic Confederation and of the North German Confederation, which succeeded it, see Wheaton (Boyd), pp. 68 and 73.

(*b*) See P. S. Q. x. 756. As the result of the Central American Peace Conference, held at Washington in 1907, eight treaties were concluded between the conferring Powers. These treaties, amongst other things, provide for the neutralisation of Honduras and the institution of a Court of Justice for the five Republics. This Court, composed of judges appointed by the several States, was empowered to hear and determine all disputes that might arise and to determine its own jurisdiction. With the non-renewal of the Convention the Court died a natural death in 1917.

(*c*) For the use of this term, see Oppenheim, i. 161 and 641.

external relations of any intrinsic importance virtually rested with the imperial Government (*d*). Switzerland also, although nominally a confederation, must nevertheless be regarded since 1848 as a federal union of States; for the reason that the control of all foreign relations now rests with the federal executive (*e*).

Permanently Neutral States.—These are States whose independence and territorial integrity have been guaranteed by act of the Great Powers. Such States are called "permanently neutral," because by virtue of their position they are debarred from engaging in war with other Powers except in self-defence; nor may they even enter into engagements in time of peace which might jeopardise their neutrality in time of war; nor, it seems, would they be at liberty to cede any part of their territory without the consent of the guaranteeing Powers. Such, virtually, is the position of Switzerland under the Final Act of the Congress of Vienna, 1815 (*f*); and such was the position of Belgium under the Treaties of 1831 and 1839. It would seem, however, that the sovereignty or international personality of these States was not in any way impaired (*g*). But in the case of Luxembourg, whose permanent neutrality was guaranteed by the Treaty of London, 1867, the guarantee was subject to the condition that that State should not erect fortresses or retain armed forces. The Congo Free State in 1885 also declared itself perpetually neutral; but such neutrality was not guaranteed, although the signatories of the Final Act of the West African Conference, 1885, were conditionally bound to respect it (*h*). With the exception of Switzerland all these States have ceased to be neutralised.

Colonies and Dependencies.—Colonies and dependencies belonging to a State, even though they may enjoy complete domestic autonomy, are yet for all external purposes regarded as a part of the parent State, and are bound by its action in all their foreign relations (*i*). Nevertheless treaties entered into by the parent State will not usually affect its colonies and dependencies, unless such an intention is either expressed or may be implied from the very nature of the subject (*k*).

British Colonies possessing Domestic Autonomy.—With respect to British colonies possessing "responsible government," it is the practice of the Imperial Government when entering into certain kinds of treaties —usually commercial—which it is proposed to make applicable to its colonies, to provide that such treaties shall only apply with the consent of the colonial authorities (*l*). Such colonies are, moreover, occasionally permitted to make special arrangements with foreign States, through the agency of the Imperial Government, and are sometimes allowed to

(*d*) Taylor, 169.

(*e*) Taylor, 168; and on the subject generally, Westlake, i. 31, and Oppenheim, i.

(*f*) But see Westlake, i. 28.

(*g*) See Westlake, i. 28.

(*h*) Although only as a territory within the free trade zone; see Westlake, i. 30; and p. 52, *supra*, n (*t*). As to the neutralisation of particular portions of States not otherwise neutral, such as Savoy, Corfu, and Paxo, see Lawrence, p. 495 *et seq.*; and as to neutralisation of waterways, *infra*, p. 154.

(*i*) Although not incorporated with it for internal purposes; see Westlake, i. 41.

(*k*) Todd, Parl. Gov. in the British Colonies, 2nd edit. 265.

(*l*) See Todd, 266 *et seq.*

participate in the conduct of negotiations (*m*). Such colonies are also at liberty to enter into commercial arrangements with each other (*n*). In the case of colonies possessing public vessels, such vessels would, it is conceived, share the ordinary privileges of public vessels, as belonging in name to the Crown (*o*). As a result of the Great War the status of the Dominions has undergone a fundamental change. Canada, Australia, New Zealand, South Africa, and India, were not only separately represented at the Peace Conference but became original members of the League of Nations. A Canadian Minister has also been appointed to Washington.

The Dependency of India.—With respect to the great dependency of India, British India of course constitutes an integral part of the British dominions. The native States are subject to the suzerainty of Great Britain, although they are debarred from all external relations. Even in their relations with the British Government they are declared not to be subject to the ordinary rules of international law. Nevertheless, for other purposes, and within the domain of private international law (*p*), such States are to be regarded as separate political societies, and as possessing an independent civil, criminal, and fiscal jurisdiction (*q*).

Organisations not properly States (*r*).—Occasionally we find organisations not properly States invested with some of the attributes of States for the purposes of international law. So an insurgent province whose belligerency has been recognised by other States, especially where it is in a position to carry on war by sea, possesses the privileges and is subject to the duties attaching to belligerents under the maritime law. Such was the position of the Confederated States during the American Civil War. For certain purposes, moreover, the Holy See, although not a State, is yet treated as possessing some of the privileges of a State; and this both in the matter of the status of the Pope himself, and the recognition of his right to conclude treaties (*concordats*) with other States in relation to ecclesiastical matters, and to send and receive envoys who are entitled to ordinary diplomatic privileges (*s*). It is sometimes stated that trading corporations, such as the British South Africa Company, may be affected by rights and obligations of international law, on the ground that "such bodies are political entities to whom their creators have delegated powers little short of complete sovereignty" (*t*). But although it is true that a wide political authority is occasionally committed to such corporations, including the right of acquiring territory and entering into treaties with adjoining communities, yet such dealings are in fact only contemplated in relation

(*m*) Todd, p. 269 *et seq.*

(*n*) See the Australian Colonies Duties Act, 1895, which abolishes certain restrictions imposed by the previous Acts of 1850 and 1873.

(*o*) See *Young* v. *SS.* "*Scotia*" [1903] (A. C. 501), although in this particular case no question arose in relation to a foreign State.

(*p*) *Infra*, pp. 242—243.

(*q*) *Sirdar Gurdyal Singh* v. *The Rajah of Faridkote* [1894] (A. C. 670).

(*r*) As to the place of individuals in international law, see Oppenheim, i. 456; Lawrence, 83; and Taylor, 210.

(*s*) For a more complete account of the present position of the Holy See, see Westlake, i. 37; Oppenheim, i. 181; and Nys (Ernest), Le Droit International, ii. 297—323.

(*t*) See Taylor, 269.

to barbarous or semi-civilised communities that are themselves outside the range of international law; whilst in so far as the acts of such corporations touch the interests of other States, the parent State alone would be recognised as responsible (*u*).

Double Sovereignty.—It sometimes happens that particular areas are found to be subject to a dual authority which varies greatly in its nature. Thus Trieste was formerly under the joint sovereignty of Austria and the Germanic Federation (*x*). From 1878 to 1908 Bosnia and Herzegovina were occupied and administered by Austria-Hungary; although the sovereignty of Turkey over these provinces was expressly reserved (*y*). Similarly, from 1878 to 1914, Cyprus was occupied and administered by Great Britain, without any formal abandonment of the sovereignty of Turkey (*z*). In other cases territory has been ceded to one Power in usufruct, whilst the ultimate dominion remains in another (*a*). Since the reconquest of the Soudan by the Anglo-Egyptian forces in 1898, and under a convention of 1899, that province has been recognised as subject to the *condominium* of Great Britain and Egypt. Nevertheless in *The Clan Grant* (31 T. L. R. 321), it was held to be assimilated to a neutral country. In all such cases, in determining questions both of right and responsibility, it would seem that it is the fact of actual control and exercise of authority that must be looked to. For instance, during the Turco-Italian war of 1911, Italy treated Egypt as neutral.

(ii) SEMI-SOVEREIGN STATES.

THE IONIAN SHIPS.

[1855; 2 Spinks, 212.]

Case.] In 1854, during war between Great Britain and Russia, certain ships sailing under the flag of the Ionian States were captured in the Black Sea by British cruisers and brought in for

(*u*) At the same time the public acts of such corporations as the East India Company are recognised in English law as being acts done in the exercise of sovereignty, and therefore as "acts of State," which are not cognisable by municipal Courts; *cf. Salaman* v. *The S.S. for India in Council* [1906] (1 K. B. 613).

(*x*) For an account of an interesting question which arose out of the blockade of this port in the Austro-Sardinian War of 1848, see Hall, 519.

(*y*) On the 6th of October, 1908, Austria annexed these provinces, and thus put an end to the Turkish claim to sovereignty. This involved a complete repudiation of the general engagement to Europe under the Treaty of Berlin, 1878, and also of a specific engagement made with Turkey at the same time, which was not, apparently, contradicted by a subsequent convention of 1879; see p. 118, *infra*.

(*z*) *Infra*, p. 118.

(*a*) *Infra*, p. 113; Oppenheim, i. 308.

adjudication, on the ground that, being owned by British subjects, they were engaged in trade with the enemy. Before going into the question of proof in each particular case, the preliminary question was argued, as to whether the inhabitants of the Ionian Islands were to be considered as British subjects and as enemies of Russia. As to this it appeared that these islands, which had been conquered by Great Britain during the war ending in 1815 (*b*), had by the Treaty of Paris, 1815, been declared to be an independent State under exclusive protection of Great Britain; the dispositions of the treaty in this respect being guaranteed by Austria, Prussia, and Russia. The government of the islands was regulated by a constitutional charter adopted by the local Legislative Assembly. In view of the actual relation between Great Britain and the Ionian States, disclosed alike by the articles of that treaty and by the construction subsequently put upon those articles in practice, it was held, in effect: (1) that the Ionian Islands constituted a free and independent State, but under the protectorate of Great Britain; (2) that although the protecting Power was invested with the right of making peace and war on behalf of the protected State, yet the mere fact of the former being at war with a third Power did not in itself involve the latter, unless such an intention was clearly expressed; and (3) that inasmuch as, in the present case, Great Britain had not declared war on behalf of the Ionian Islands as against Russia, their trade with Russia could not, under the circumstances, be regarded as illegal, or as a ground for condemning the captured vessels.

Judgment.] In his judgment, Dr. Lushington first expressed a doubt as to whether the case was one for the solution of a court of justice at all; and whether the question did not more properly belong to the executive government. But, in any case, the question must be decided, not by reference to any general principles as to the constitution of States, but on a due construction of the treaty and other engagements upon which the actual relation of Great Britain and the Ionian States depended. The case for the claimants was that they were subjects of the Ionian States, and that no war having been declared for or by them

(*b*) This was assumed in the judgment; see p. 217.

against Russia, they were at peace with the latter country, and their trade consequently lawful. In these circumstances the onus of proof was thrown on the captors. It was true that the Ionian Government had published the terms of the proclamation issued in London, containing a declaration of war by Great Britain against Russia; but the terms of this proclamation were quite consistent with its being regarded as a simple notification of the fact that hostilities had broken out. The question then was, whether it followed from the fact of Great Britain being at war with Russia that the Ionian States were also involved in that war. The answer to this question must depend upon the actual relation existing between Great Britain and the Ionian States; and this, again, must under the circumstances be regarded as depending upon the terms of the Treaty of Paris, 1815. By that treaty the Ionian Islands were constituted a free and independent State under the immediate and exclusive protectorate of Great Britain. It seemed to follow from this that Great Britain thereby became invested with a power of making war and peace on behalf of the Ionian States. But it did not by any means follow that the Ionian States would become *ipso facto* the enemies of any Power with which Great Britain might be at war; or even that Great Britain would necessarily be at war with any State against whom it might be necessary to adopt measures solely for the protection of the Ionian States. This conclusion was greatly strengthened by the fact that the other Powers who guaranteed the dispositions of the Treaty of Paris could scarcely have intended to guarantee a relation on the part of the Ionian States to Great Britain, which would involve the guarantors, on their behalf, whenever Great Britain might find herself at war with a third Power. After considering other articles of the treaty it was pointed out that by Article VII. the trading flag of the Ionian Islands was acknowledged by the contracting parties as the flag of a free and independent State. There was thus a single free and independent State; having also the flag of an independent State; even though the military, naval, and diplomatic powers were vested in the protecting State. But the inhabitants were clearly in the position of protected persons, and not in the position of subjects of the protecting Power. The position was an anomalous one; but, at the same time, in view of

the fact that the Ionian Islands were declared to be an independent State, it was incumbent on the Court to maintain all the rights and attributes of independence, except in so far as these might be modified by the treaty. The Ionians were clearly not British subjects in the proper sense of that term; nor were they allies in war either by their own act or that of the protecting Power. The relation between the Ionian States and Great Britain was not in itself such as to involve the former in a war to which Great Britain might be a party; whilst no act had been done by the protecting Power to place the Ionians in that predicament. This conclusion was also thought to be confirmed by the manner in which Great Britain had exercised her treaty-making power on behalf of the Ionian Islands; such conventions having been the subject of separate negotiation, and having been concluded as on behalf of a distinct and separate State (*c*). If such special inclusion was necessary for purposes of a secondary character, it seemed *a fortiori* that measures of peace and war must be expressed in formal and definite shape in order to affect the relation of the Ionian States to other States.

In this case the question was whether a community, which was under the protection of another State, and which clearly did not possess complete external or even internal independence, could nevertheless be regarded as a separate entity in international law, and as capable of foreign relations distinct from those of the protecting State. It was held in effect: (1) that this question depended, not on any general principles of State classification, but on the actual relations which could be shown to subsist between the protecting State and the protected community; and (2) that an examination of those relations disclosed the fact that in spite of large powers conceded to the protecting State, including the power of concluding treaties and making peace and war on behalf of the protected community, the latter was nevertheless intended to be treated, and had in fact been treated, as a separate political body. The latter conclusion was based on the grounds, amongst others, that the protected community had been declared to be a separate State, that it retained a separate and independent flag, and that its foreign relations, although controlled by the protecting Power, were yet required to be entered into avowedly on behalf of the protected community before they would become binding on it. As a matter of fact, Great Britain controlled not only the foreign relations, but also, to a large extent, the internal executive government of the

(*c*) Such were the convention of 1852 with the Netherlands, and of 1854 with Tuscany.

Ionian States; but despite this it was held that the latter, in view of their capacity for separate foreign relations, constituted a separate international person. In 1864, however, the Ionian Islands were, with the consent of the guaranteeing Powers, ceded by Great Britain to Greece, and now form part of that country; although the islands of Corfu and Paxo, together with their dependencies, were declared to be permanently neutral (*d*).

GENERAL NOTES.—*Semi-Sovereign States.*—A semi-sovereign State is one which, whilst possessing internal independence, or, at any rate, such an amount of internal independence as is necessary to constitute it a distinct body politic, together with a capacity for separate foreign relations, is yet subject, in its dealings with foreign Powers, to some restriction or control on the part of some other State. It differs from a "member State" of a federal union, for the reason that such a State, although a participant in the sovereign power, has usually no capacity for separate foreign relations. It differs from a self-governing colony for the reason that such a community has strictly neither any share in the sovereign power, nor any capacity for separate foreign relations. Whether a particular community possesses a capacity for separate foreign relations, and, if so, to what extent, will depend on the actual nature of the tie by which it is bound to the superior Power. Indeed, the question of sovereignty, or semi-sovereignty, or no sovereignty at all, is really a question of fact depending on the circumstances of each particular case. In determining this, regard will be had to such criteria as the possession of a separate flag, the recognition of a separate right of embassy, the exercise of a separate even though limited treaty-making power, and the recognition of a capacity for remaining neutral in the event of war between the superior Power and foreign States (*e*). Once, however, it is clear that a civilised community, possessing in other respects the attributes of a State, has this capacity for separate foreign relations, then it would seem that it is entitled to be regarded as an international person, and as having all the rights incident to that condition, in so far as they are consistent with that control over its external affairs which it has formally conceded to any other State. Its ruler, for instance, will in other countries be entitled to the personal privileges of a foreign Sovereign; its public vessels, when in foreign ports, will be exempt from the local jurisdiction (*f*); whilst its diplomatic agents will enjoy the usual privileges. Nor will it be bound by the acts of the superior Power, even within the sphere of its control, unless these are avowedly done on its behalf. Although the term "semi-sovereignty" really covers varying degrees of dependence, and although it is not possible to reduce these to definite categories, yet a distinction is usually drawn between (i) States which are subject to the suzerainty of other States, and (ii) States which are the subject of a declared protectorate.

(*d*) Taylor, 118.

(*e*) Although this, of course, may be the issue to be decided; as occurred in the case of *The Ionian Ships*.

(*f*) See p. 43, *supra*.

(i) *States Subject to Suzerainty.*—The terms suzerainty and vassalage are really terms of feudal law, and scarcely appropriate to modern State relations. Nevertheless they have survived, although with a somewhat altered meaning. The term "subject to suzerainty" has, indeed, no fixed meaning; and is sometimes applied to communities that are not "States" in international law. But, in its most appropriate sense, it would appear to denote a State which, although once a part of the paramount State, has as the result of agreement or disruption established itself as a separate political community, although without achieving complete independence in its external relations. The use of the term in relation to any political community is sometimes said to carry "a presumption against the possession of any given international capacity" (*g*). But having regard to its various applications in practice, it would scarcely seem to imply any definite relation in law; whilst the question of capacity would appear to depend on the facts of each particular case. If we look to modern instances of "States under suzerainty," we shall find (1) that some possess no international capacity whatever, this being the case with the native States of India, which are officially declared to be "under the suzerainty" of the Crown, but which are really altogether subordinate and incapable of foreign relations; (2) that others are wholly independent, as was the case with the kingdom of Naples in its relation to the Holy See down to 1818; and (3) that others, again, are really semi-sovereign, as was the case with Bulgaria from 1878 to 1908. By the Treaty of Berlin, 1878, Bulgaria was established as an "autonomous tributary principality, under the suzerainty of the Porte"; existing treaties between the Porte and other Powers were to remain in force; and the principality was to bear a portion of the Turkish public debt. Eastern Roumelia, on the other hand, was constituted an "autonomous province of Turkey"; but in 1885 this province seceded from Turkey and was virtually united to Bulgaria. Payment of tribute and contribution to the Turkish debt were strictly due in respect of both these territories, although the amounts do not appear to have been determined; whilst an imperial Ottoman commissioner also resided at Sofia. Notwithstanding her status of semi-sovereignty, Bulgaria maintained direct relations with foreign States; she entered into treaties of a certain kind, mainly postal and commercial; she sent and received consuls; and on one occasion at least she waged war on her own account. On the 5th of October, 1908, however, Prince Ferdinand was proclaimed Czar of Bulgaria; and Bulgaria assumed the position of an independent State (*h*). Egypt, when under the suzerainty of the Porte, occupied technically a somewhat similar position to that formerly occupied by Bulgaria, and an imperial Ottoman commissioner also resided at Cairo; but both its internal and external relations were for the most part controlled by Great Britain. Korea was formerly under the suzerainty of China; but this was abandoned in 1895. By a treaty entered into between Japan and Korea, in 1904, Japan undertook to guarantee the integrity

(*g*) See Hall, 29.

(*h*) This was strictly subject to confirmation by the signatories of the Treaty of Berlin, 1878; but see p. 118, *infra*.

of Korea, reserving to herself a right of occupation so far as circumstances might require; whilst the Korean Government undertook to appoint its diplomatic and financial advisers on the recommendation of Japan, and to make no treaties wth foreign Powers except with its assent. By a further treaty, entered into in 1905, it was stipulated that Japan should have the control and direction of the external relations and affairs of Korea, and should take charge of its interests in foreign countries; that Japan should see to the execution of treaties then subsisting between Korea and other countries, but that no new engagements should be concluded except through the Government of Japan; and, finally, that a Japanese Resident-General should be appointed to reside at Seoul for the purpose of directing all diplomatic affairs. In 1910 Korea voluntarily became united with Japan. Crete, in 1898, was constituted an autonomous principality, subject to the suzerainty of Turkey, although without tribute; and was governed by a High Commissioner appointed with the assent of Great Britain, France, Italy, and Russia. By the Peace Treaty of London, 1913, Crete was ceded to Greece. The late South African Republic was under the convention of 1881 formally—and even under the altered convention of 1884, substantially—subject to the "suzerainty" of Great Britain (*i*).

(ii) *Protected States.*—These are States which have either placed themselves (*k*), or have by international arrangement been placed, under the protection of some other Power, under conditions entitling the latter to exercise a certain measure of control, which differs in different cases, over their external, and sometimes also over their internal, relations (*l*). The mere fact of being protected will not in itself impair the sovereignty of a State. Thus, the independence of Norway is guaranteed by a treaty of 1907 by Great Britain, France, Germany, and Russia; but as this involves no abrogation of sovereign power, it does not affect the position of Norway as a sovereign State. If, however, a State permanently hands over the control of its foreign relations, or any material part thereof, to another State, it will then cease to be fully sovereign; although if it retains its political separateness, together with some capacity for separate foreign relations, it will not cease to be an international person (*m*). The term "protected State," however, does not appear to imply any definite relation in law. It is sometimes said to carry with it a presumption in favour of international capacity (*n*); but here, as in the case of States "subject to suzerainty," the international capacity of the "protected State" will really depend on the nature of the bond or arrangement subsisting between it and the protecting Power. Amongst existing European States the republic of Andorra is still under the protectorate of France and Spain; and the republic of San Marino is still under that of Italy (*o*). The republic of Cuba, whose independence was recognised by the United States on the condition, amongst others, of abstaining

(*i*) On the subject generally, see Hall, 29; Westlake, i. 25; Oppenheim, i. 161.

(*k*) Whether willingly or unwillingly.

(*l*) *Supra*, p. 59.

(*m*) See p. 60, *supra*.

(*n*) See Hall, 29.

(*o*) Westlake, i. 23.

from all direct relations with other States, would seem to be virtually under the protectorate of that Power (*p*). The same may possibly be said of the State of Panama, by virtue of the arrangements, including a guarantee of independence, embodied in the treaty of the 18th of November, 1903 (*q*). Somewhat different in character, as being exercised over communities that would not otherwise belong to the family of nations, are the protectorates exercised by Great Britain over Egypt and Zanzibar; and by France over Tunis. These, again, differ, in their turn, from those protectorates which are assumed over regions inhabited only by barbarous tribes possessing no coherent organisation, which are for the most part a mere prelude to the acquisition of territory, and which do not involve any question of international personality (*r*).

Mandatory Territories.—Since the Great War yet another class of territories has come into existence. Germany having lost her Colonies, and Turkey a large part of her Empire, a number of territories have ceased to be under the sovereignty of the States to which they formerly belonged. By Art. 22 of the Covenant of the League of Nations, such territories are to be placed under the guardianship of the League, which is to give a mandate to such member-States of the League as "by reason of their resources, experience or their geographical position are best fitted to administer them." Mandates with varying degrees of power have already been granted to Great Britain, for Mesopotamia and Palestine; to France, for Syria; to Belgium, for German East Africa; to the Union of South Africa, for German South-West Africa; to New Zealand, for Samoa; to Australia, for German possessions south of the Equator; to Japan, for those north of the Equator; and to Great Britain and France, for Togoland and the Cameroons (*s*).

(iii) BELLIGERENT COMMUNITIES.

CONTROVERSY BETWEEN GREAT BRITAIN AND THE UNITED STATES OF AMERICA WITH RESPECT TO THE RECOGNITION OF THE BELLIGERENCY OF THE SOUTHERN CONFEDERACY, 1861—71.

[British and Foreign State Papers, vols. 51 (1860-61), 57 (1866-67), 59 (1868-69).]

Controversy.] In December, 1860, the State Convention of South Carolina adopted an ordinance of secession, dissolving its

(*p*) Both the foreign relations and the foreign debt of Cuba are subject to the control of the United States. The military occupation renewed in 1906 came to an end in 1909. But Cuba was a party to the Peace Treaty of Versailles, 1919. So also was Panama.

(*q*) See pp. 68, 156, *infra*.

(*r*) Although it has been thought convenient to treat of both under the common head of "protectorates"; see p. 115, *infra*. See *Rex* v. *Crewe (Earl)*, *Ex parte Sekgome* [1910] (2 K. B. 576).

(*s*) Oppenheim, i. 288.

union with the United States. In the course of January, 1861, this example was followed by five other States; and before June, 1861, by five more; making eleven in all. The seceding States purported to form themselves into a new body politic under the style of the Southern Confederacy. The body politic so constituted comprised a population of some five millions of people, and possessed an organised Government (*t*); whilst its Government assumed control of all public property, and exercised in fact, and so far as was consistent with the existence of warlike operations, all the powers of government within the limits of the seceding States.

Hostilities between the Confederacy and the United States commenced on the 12th of April, 1861 (*u*). On the 15th of April, President Lincoln issued a proclamation calling out the Militia, and before the end of the month some 100,000 men were under arms in the revolted portion of the country. On the 17th of April, the President of the Southern Confederacy, Jefferson Davis, invited applications for letters of marque, with a view to carrying on war by sea. On the 19th of April, President Lincoln proclaimed a blockade of the coasts and ports of the seceding States, "in pursuance of the laws of the United States, and of the law of nations"; whilst, at the same time, threatening the penalties of piracy in the case of any molestation of vessels of the United States by persons acting under the pretended authority of the Confederate Government.

In April, 1861, certain commissioners were dispatched to Europe with a view to procuring a recognition of the Confederacy as an independent State. In Great Britain, Earl Russell declined to enter into any official communication with the commissioners on this point; merely stating that when the question of recognition of independence arose inquiry would have to be made as to "whether the body seeking recognition could maintain its position as an independent State," and "in what manner it proposed to maintain relations with foreign States." But

(*t*) A provisional and thereafter a permanent constitution was adopted and duly ratified, although the latter did not take effect until February, 1862.

(*u*) This was on the occasion of the bombardment of Fort Sumter; but as early as the 9th of January a vessel sent to relieve Fort Sumter had been fired on.

whilst refusing to entertain the question of independence, the British Government, nevertheless, on the 13th of May, 1861, issued a proclamation of neutrality, reciting that hostilities had "unhappily commenced between the Government of the United States of America and certain States styling themselves the Confederate States of America"; and enjoining a strict neutrality in the contest between the respective belligerents. This virtually amounted to a recognition of the belligerency of the Confederacy. The United States thereupon protested that the British proclamation was precipitate, unprecedented, and, inasmuch as the Confederate States had as yet no ships of war, unnecessary. The British Government, in reply, pointed out that inasmuch as there was a war actually prevailing, which affected British subjects and commerce, it was bound to come to some decision with respect to the recognition of belligerency; that a community comprising some five millions of people, which had declared its independence, could not be treated like a band of marauders or filibusters; that the United States Government had itself treated its prisoners as prisoners of war, and not as rebels; and that in any case the question of the recognition of belligerent rights was essentially a question, not of principle, but of fact, depending on the size and strength of the insurgent body, and not on the goodness of its cause. So originated a controversy which extended over a period of ten years. In the course of this controversy Great Britain asserted that the blockade of the coasts of the Southern States under the proclamation of the 19th of April in itself was an acknowledgment that a civil war existed; that this had been recognised by the United States Courts (*x*); and that the United States could not at one and the same time exercise a belligerent right of blockade and a municipal right of closing the ports of the south (*y*). With respect to a proposal on the part of the United States to prohibit all intercourse with the ports of the Southern States by municipal decree (*z*) under pain of forfeiture, Great Britain announced that she would consider such a

(*x*) The District Court of Columbia had in fact so held in the case of the *Tropic Wind*; although the Supreme Court did not so decide until December, 1862.

(*y*) Earl Russell to Lord Lyons, 19th of July, 1861 (51 S. P. at p. 206).

(*z*) As distinct from effective blockade.

decree as null and void, and would not submit to measures taken on the high seas in pursuance of such decree (*a*); with the result that although a proclamation was formally issued prohibiting commercial intercourse between the rebellious States and other States, yet in practice the prohibition of intercourse with foreign States was left to the operation of the blockade.

In 1866, after the rebellion had been suppressed, the action of Great Britain, in the matter of the recognition of the Southern Confederacy, was included in the list of grievances exhibited by the United States against Great Britain; and was made the subject of a claim for indemnity, which it was sought to include amongst those claims for alleged breaches of neutrality that were ultimately referred to the Geneva Tribunal. With respect to this particular ground of complaint, it was contended that the British Government had acted precipitately, for the reason that the civil war was as yet undeveloped; that the insurgents were without any organised military force or treasury; that the proclamation took place before they had a national flag, or were in a position to carry on war by sea; and that the proclamation, being for these reasons unwarrantable, amounted to a wrongful act of intervention (*b*). In reply, the British Government pointed out that the proclamation did no more than acknowledge a state of war first recognised by the United States Government itself, and subsequently recognised by its Courts; that the act of recognition was fully justified at the time it was made, both by the exigencies of British commerce, by the position then actually occupied by the Confederacy, and by the fact that its Government had announced its intention of carrying on war by sea. The act of recognition, moreover, was an act as to which every State must be held to be sole judge of its duty; and no precedent existed for submitting to arbitration the question whether the policy of a State had or had not been suitable to the circumstances in which it found itself placed. For these reasons the British Government, whilst willing to submit other claims to arbitration, was of opinion that on this question no such reference was possible (*c*).

(*a*) Earl Russell to Lord Lyons, 19th of July and 8th of August, 1861 (51 S. P. pp. 205, 217).

(*b*) Mr. Seward to Mr. Adams, 27th of August, 1866 (57 S. P. p. 1119).

(*c*) Lord Stanley to Sir F. Bruce, 30th of November, 1866 (57 S. P. p. 1126).

In rejoinder the United States contended that the President's proclamation did not expressly recognise a state of war; that the recognition of a state of war by the Supreme Court was itself based on the consequences of the British proclamation; that it was the duty of a friendly nation towards a State temporarily disturbed by insurrection to forbear from conceding belligerent privileges to an insurgent body in anticipation of their concession by the State against which the insurrection was directed; that the proclamation was not justified by any necessity in the interests of British subjects; and, finally, that the United States could not consent to the waiving of any claim on the ground that it involved a point of national honour (*d*).

At this juncture the negotiations between the two Governments for a peaceful adjustment of the various causes of dispute existing between them threatened to break down; for the reason that Great Britain refused to submit to arbitration any claim arising out of the recognition of the Southern Confederacy; whilst the United States, on the other hand, refused to submit the so-called "Alabama" claims to arbitration without this. In the result, however, and after several other abortive attempts at a settlement, it was finally agreed by the Treaty of Washington, 1871, to refer to the tribunal of arbitration "all claims growing out of the acts committed by the 'Alabama' and other vessels." The effect of this appears to have been to exclude the action of Great Britain in the matter of the recognition of the Southern Confederacy from the scope of the reference, as a direct subject of pecuniary indemnity; whilst leaving it open to the United States to use it as evidence that Great Britain was at the time actuated by a conscious unfriendly purpose towards the United States, which might conceivably be regarded by the arbitrators as having a bearing on other alleged breaches of neutrality; and it was in fact in this character that the incident was dealt with in the presentment of the American case (*e*).

It will be noticed that, on the question of the recognition of independence, the British Government adopted the view that this would depend on whether the insurgent States succeeded in fact in maintaining

(*d*) Mr. Seward to Mr. Adams, 12th of January, 1867 (57 S. P. p. 1138).

(*e*) Moore, Arb. i. 500, and 563.

their position as an independent community, and on whether they gave proof of a capacity for maintaining international relations; a position which was in fact never achieved. The recognition of belligerency, however, was accorded, on the ground that the Confederacy comprised an organised community, numbering several millions of persons, having a Government in full possession of a wide area of territory, and both in a position to carry on war, and intent on carrying on war, by sea. The agents of such a body could not be treated as pirates; and in default must be treated as belligerents, and brought under the recognised rules of maritime war. The justification put forward by the British Government is now commonly recognised as sound. On the other hand, the views put forward by the United States on this occasion would appear to be altogether at variance with its recent practice in connection with the recognition of the State of Panama in 1903. That State seceded from the United Republic of Colombia on the 3rd of November, 1903. The United States recognised it as a *de facto* Government on the 6th of November; and as an independent State, with which it made a treaty, on the 18th of November; whilst at the same time it ignored the protests of the United Republic and refused to allow the Colombian troops to land (*f*).

GENERAL NOTES.—*Belligerent Communities.*—These are communities which, although still forming part of some existing State, are seeking to establish either their independence, or some alteration of the existing relation, by armed force. In such cases various questions are likely to present themselves for determination by other States, and incidentally also by their tribunals. Of these the most important are (1) whether such a community or body should be recognised as belligerent, and therefore as subject, although only to a qualified extent, to international law; and (2) in a case where the object of the revolt is severance, then under what conditions and at what stage such a community ought to be recognised as an independent State.

Recognition of Belligerency.—The right of one State to recognise the belligerent character of the subjects of another State, without incurring the imputation of hostility or unfriendliness, depends on a variety of considerations. In the first place, the insurgent community or body must have at its head an organised Government capable of carrying on war according to recognised rules and methods; next, there must be a war actually prevailing at the time; whilst, finally, the circumstances of the war must be such as to affect the interests of the State conceding such recognition, and to make some decision on the subject incumbent on it. If the insurgent community occupies territory situated in the midst of loyal provinces, then the question of recognition will scarcely arise, except, perhaps, in relation to responsibility for injuries affecting foreign subjects (*g*). If, on the other hand, the insurgent community occupies territory adjoining that of some other State or States, then the question of recognition will be important from the point of view of the latter, in connection with the observance and enforcement of neutrality as between the contending parties. Finally, if the insurgent

(*f*) See p. 156, *infra*. (*g*) *Infra*, p. 212.

community is in a position to carry on war by sea, then the question of recognition will become important as regards all maritime Powers, for the reason that on this will depend the right of the insurgent Government to issue commissions and to interfere with neutral commerce (*h*). Whether such recognition should be accorded or not is a question for the political or executive department of Government, by whose action the Courts will be guided. It would seem that such recognition cannot be demanded as of right; for the reason that it is strictly a question of policy, and not of law (*i*). But once recognition is conceded it cannot be withdrawn unless the conditions upon which it depends have ceased to exist (*k*) A recognition of belligerency, if accorded, has the effect of conferring on the insurgent community, although only provisionally, and in relation to the conduct of hostilities, the rights and duties of a State in international law (*l*). It relieves the parent State from further responsibility, as regards any acts of the insurgent Government that may affect the interests of other States or their subjects. But at the same time it precludes it from assuming to close, as against other States, any ports or territory in the actual possession of the insurgents otherwise than by regular process of blockade; and also from interdicting to other States intercourse with the insurgent Government (*m*). It brings both parties under the recognised rules of war; and as regards maritime war, confers on both the right to visit and search neutral vessels on the high seas, to establish and enforce blockades, and to intercept and confiscate contraband of war. The position of the insurgents with respect to the parent State is a question only of policy or municipal law, and is not affected by their recognition by other States (*n*); although the treatment of insurgents as rebels and not as belligerents, in a case where their belligerent character had been recognised by other States, would probably be reprobated by international morality. The position of insurgents whose belligerency has not been recognised will be dealt with hereafter, in connection with cases bordering on piracy (*o*). Here it need only be said that such bodies or persons will not be treated as pirates, and that other States will not recognise any obligation of interfering with their operations, so long as they do not commit acts of aggression against the property or subjects of States other than that against which they are in rebellion.

Recognition of Independence.—With regard to the recognition of independence, some writers suggest that this cannot be admitted until either the parent State recognises the new order of things, or until the recovery of its ancient rights has become an impossibility (*p*). But so far as any practical rule can be deduced from historical examples, it seems to be this—that if the insurgent community has established a *de facto* independence, as evidenced by the fact of the parent State

(*h*) Hall, 33.

(*i*) On this question, however, and also on the question of partial recognition, see Westlake, i. 55, 56.

(*k*) On the subject generally, see Hall, 29.

(*l*) See *The Three Friends* (166 U. S. 1; and Scott, at p. 752).

(*m*) Hall, 34 *n*.

(*n*) See Scott, p. 757, and cases there cited.

(*o*) *Infra*, p. 300.

(*p*) Heffter, § 23.

having relinquished active efforts to re-establish its authority, and if it possesses an organised Government capable of maintaining relations of peace and war, then recognition by other States must follow; although some may be later in according it than others. "No State is entitled to prolong its sovereignty by a mere paper assertion of right." But if the contest is still proceeding in fact, then a recognition of the independence of the insurgent community by a foreign State would be a hostile or unfriendly act, which the parent State would be entitled to resent (*q*). The position of the new State, in the case where the revolting province succeeds in establishing its independence, as regards rights and obligations of the parent State in which it was previously a participant—and the position of the parent State in the case where it succeeds in re-establishing its authority, as regards the property or rights of the suppressed Government—will be considered hereafter in connection with the subject of the succession of States (*r*).

SUCCESSION IN INTERNATIONAL LAW.

THE UNITED STATES OF AMERICA v. McRAE.

[1869; L. R. 8 Eq. 69.]

Case.] DURING the American Civil War the Confederate Government and their agents had consigned goods and remitted money to the defendant, who was apparently domiciled in England. The defendant having sold the goods and received the sale moneys, a suit for an account was instituted against him by the United States Government, after the suppression of the rebellion, in the English Courts. The defendant put in no answer, and simply left the plaintiffs to make out their own title to relief. James, V.C., asked if the plaintiffs were willing to have the account taken as it would be taken between the Confederate Government on the one hand and the defendant on the other; but the plaintiffs declined to accept the decree in any form which would recognise the authority of the belligerent States or involve any privity with their agent. In view of this the suit was dismissed with costs.

Judgment.] The Vice-Chancellor, in giving judgment, stated that he would deal with the case as if the plaintiffs had been the Government of India, and the defendant an agent of insurrec-

(*q*) See Historicus Letters, 9; for notable instances of recognition, Hall, 85; Taylor, 192.

(*r*) *Infra*, pp. 72, 74.

tionists there. What was at the outbreak of the rebellion the public property of the plaintiffs would still continue their property, and if at the end of the rebellion any such property capable of being identified could be traced to any person, the rightful owners would be entitled to apply for restitution. But moneys voluntarily contributed to the rebellion could not be recovered as moneys had and received to the use of the lawful Government. With regard to property taken by force from innocent persons, the right of possession would still remain in them. The learned Judge expressed an opinion that it was clear public universal law that any Government *de facto* succeeding another succeeded to all the public property of the displaced Power. Any such public property would, on the success of the new or restored Power, *ipso facto* vest in the latter; and it would have the right to call to account any agent, debtor, or accountant to or of the persons who had exercised the authority of the Government. But the right was only a right of succession or of representation; it was not a right paramount, but was derived through the suppressed authority, and could only be enforced in the same way and to the same extent, and subject to the same correlative obligations and rights as if that authority were seeking to enforce it. Assuming this to be true, it was not open to the plaintiffs to claim from the agent, and at the same time to repudiate all privity with him and his former principals. The learned Judge expressed himself satisfied that the plaintiffs' claim, as they had framed it, was based on their paramount title to what they alleged to be their own property, in respect of which they sought to treat the possession of the defendant as the possession of the agent of public plunderers, and in this part of the case the proceedings must wholly fail. There was no evidence that any money or goods of the plaintiffs (*i.e.*, of the plaintiffs in their own right, as distinguished from their right as successors of the Government which had been suppressed) had ever reached the hands of the defendant, or that there were in his hands on or after the suppression of the rebellion any public moneys or goods which had become vested in the plaintiffs.

If, following what is conceived to be the true meaning, we substitute the term "State" for the term "Government," for the reason that the

Southern Confederacy must, by virtue of its recognition, be deemed to have constituted for the time being a quasi-State in international law (*s*), then this judgment may be said to embody a fair statement of the principle of succession, at any rate on its active side. This, shortly, and so far as it finds expression in the terms of the judgment, is—that where one State *de facto* succeeds to another, it succeeds to all the public and proprietary rights of the displaced Power; but that this is not a right paramount, but only a right of succession derived through the predecessor in title, and is therefore subject, at any rate as against foreign States or their citizens, to any lawful claims attaching to such rights or property which would have availed against the displaced Power. On its passive side, the doctrine of succession involves, as we shall see, also a succession to obligations, although only to obligations of a certain kind (*t*). The case actually before the Court was that of a revolting province which had been recognised by other States as a belligerent, and which had therefore been invested temporarily with some of the attributes of a State. In the result the parent State had re-established its authority. Thereupon it succeeded to all public and proprietary rights previously inherent in the rebel Government, subject, indeed, to any obligations properly incident thereto, but not to any others. The succession in such a case is, therefore, only a "qualified" succession, in the sense of a succession to rights and not to obligations; the reasons for this limitation being the want even of formal privity as between the two Powers, and the fact that it would be contrary to the principle of self-preservation to require the parent State to assume liabilities incurred for the very purpose of promoting its overthrow (*u*). But, both in this and other cases of succession, it needs to be borne in mind that, in English law, claims against the State itself, whether supported by treaty or not, would not be regarded as falling within the cognisance of the municipal Courts. This, it will be remembered, was emphatically laid down in *The West Rand Central Gold Mining Co.* v. *Rex* [1905] (2 K. B. 391) (*x*). So, too, in *Cook* v. *Sprigg* [1899] (A. C. 572) it was held that the grantees of certain concessions made by the ruler of Pondoland could not, upon the annexation of that country by Great Britain, enforce any of the rights and privileges thereby conferred, as against the Crown; on the ground that the annexation was an "act of State," and that any obligations assumed under any treaty to that effect, whether with the ceding Government or with individuals, were not obligations which municipal Courts could enforce.

The doctrine of succession also carries a right on the part of the

(*s*) Although the term "Government" is sometimes used to indicate the "State," yet, so far as external relations are concerned, "the Government" is really only the organ of the State. The question as to how far a State is bound by obligations contracted by a prior Government, not in privity with its present Government, is really a question of agency, and not a question of succession; see p. 77, *infra*.

(*t*) *Infra*, p. 74.

(*u*) On the same principle, in cases of conquest and annexation, the conqueror is not expected to assume liabilities incurred by the conquered State for the purposes of the war. See also *The King of the Two Sicilies* v. *Wilcox* (1 Sim. N. S. 301); and *U.S.* v. *Prioleau* (35 L. J. Ch. N. S. 7).

(*x*) *Supra*, p. 17.

new State to the allegiance of those who were formerly subjects of the displaced Power. Such persons may, indeed, in the case of cession or conquest, avoid the consequences of such allegiance by migration (*y*), and such a right is frequently conferred by treaty; but if they stay in the conquered or ceded territory they will be deemed to have elected to become the subjects of the new Government (*z*). So in *Re Bruce* (1 L. J. N. S. Exch. 153) the Court, dealing with the case of a person who was borne in Maryland, of parents there domiciled, before the separation of the American colonies, and who after a long intermediate residence in foreign countries returned to America and died there, observed: "The plaintiff, upon the treaty between this country and the United States, had the option of continuing a British subject if he should elect Great Britain as his country, or of ceasing to be a British subject and becoming to all intents and purposes an American; and it seems to us that he made his election to the latter" (*a*).

General Notes.—*The Doctrine of Succession in International Law.*—This doctrine applies in cases where one State takes the place of another, either partly or wholly, and by virtue of this is deemed to succeed to such of the rights and obligations of the prior State as are, in the circumstances, recognised by usage and the reason of the thing as transmissible. The question here, it will be observed, is not a question of succession as between two forms of government representing the same State, which is really a question of representation (*b*), but a question of succession as between States, or as between one State and a part of another. With respect to the general character of the rights and obligations which pass by succession, these may relate either to the territory itself, or the allegiance of its inhabitants, or the prerogatives and property of the displaced Power (*c*); or they may be rights or obligations arising out of certain kinds of treaties, concessions, or contracts previously made by that Power, or relating to its public debts. With respect to the different forms of succession, it has already been pointed out that, in the case of a revolting province over which the parent State establishes its authority, the succession is only a "qualified" succession, in the sense of a succession to rights and not to obligations (*d*). Other cases of succession, which involve a transmission of obligations as well as of rights, may be roughly grouped

(*y*) Or, at any rate, the personal consequences; for in cases of conquest, if their proprietary rights are not secured by treaty, or if the conditions of the treaty are not complied with, such rights may be forfeited: *U.S.* v. *Repentigny* (5 Wall. 211; Scott, 98).

(*z*) But for an exception to this general rule, see p. 74, *infra*.

(*a*) See also *Doe d. Thomas* v. *Acklam* (2 B. & C. 779); *Jephson* v. *Riera* (3 Knapp, P. C. 130); and *Doe d. Stansbury* v. *Arkwright* (5 C. & P. 575); and as to other aspects of succession in municipal law, *U.S.* v. *Smith* (1 Hughes, R. 347; Scott, p. 89); *U. S.* v. *Percheman* (7 Peters, 51; Scott, p. 95); and *U. S.* v. *Repentigny* (5 Wall. 211; Scott, p. 98).

(*b*) See *The Sapphire* (11 Wall. 164); *infra*, p. 78.

(*c*) Although this is for the most part a question only important in municipal law.

(*d*) *Supra*, p. 72.

under two heads: (i) cases where a part of one State is severed from the parent stock, and either becomes independent or is incorporated in another State, which we may designate, shortly, as cases of "partial succession"; and (ii) cases where an entire State is absorbed by some other State or by a union of States, which, for want of a better term, we may perhaps designate as cases of "universal succession" (*e*). It is, however, necessary to remember that although a doctrine of succession is undoubtedly recognised for some purposes, both in the practice of States and in the decisions of municipal tribunals in cases falling within their competence, yet it is not a subject which, so far, can be said to be governed by settled rules; for the reason that the arrangements made on this subject between States are commonly dictated by considerations which are in the main political rather than legal. Nor, indeed, can any settled rules be deduced from the writings of the publicists (*f*). All that can be done, therefore, is to consider some of the more prominent cases in which the question is likely to arise, and to suggest a few rules of general application, which appear to be at once warrantable in principle and not devoid of some measure of authority as regards opinion and practice.

(i) "*Partial*" *Succession.*—A partial succession may occur either (1) as the result of secession; or (2) upon the cession by one State of part of its territory to another State; or (3) upon the dismemberment of an existing State in such a way that its previous identity is lost. And, although these cases would appear to be governed by very similar principles, yet it will perhaps be convenient to consider them separately.

(1) *Secession.*—The first case is that in which a province secedes from the parent State and establishes its independence; as occurred when the United States of America separated from Great Britain. In such a case, in default of treaty, or in so far as the provisions of any treaty may not extend, the governing rules would appear to be these: The new State will succeed to such territory as it has won (*g*), together with all attendant rights; but the latter will not include privileges which formerly belonged to its inhabitants over or in relation to other parts of the territory of the parent State (*h*). It will succeed also to all the sovereign rights and prerogatives of the parent State in relation both to the territory so acquired and its inhabitants; including a right to the allegiance of such of the latter as choose to remain, although in modern practice a right of election is sometimes conceded,— as occurred in July, 1899, when, on the secession of Cuba from Spain, a registration was opened for Spaniards who desired to retain the Spanish character. It will succeed also to all the public domain and other

(*e*) This term is, in some respects, scarcely appropriate; for the reason that the succession in such cases is more limited than in cases of "universal succession" proper, and the distinction between it and "partial succession," although there is a distinction, is less clearly marked. It has been suggested that it would be more in keeping with modern practice to assume, instead of a law of "universal succession," a law of "singular succession" to rights only, and to such only as can be enforced in the courts of the successor; see Theory of State Succession (1907), by A. B. Keith.

(*f*) Hall, 94 *n.*

(*g*) As to the question of boundaries in such a case, see Hall, 98 *et seq.*

(*h*) See *infra*, 158, 164; and Hall, 93.

public property and assets of the parent State within the territory acquired. On the other hand, the new State will be bound by the sovereign acts of its predecessor done prior to, although not by those done after, severance (*i*). It will become liable for all debts locally connected with such territory; such as debts charged on local revenues, or on revenues derived from property situated within the territory—at any rate, to the extent of the security involved. It will also succeed to other civil obligations of a local kind, such as guarantees and concessions; but not to obligations arising under contracts personal to the former State, or obligations arising out of torts. With respect to the general debt of the parent State, the new State will not incur any legal liability, except by special arrangement. Such arrangements have, however, sometimes been made. So, in 1839 Belgium took over a part of the Netherlands debt; whilst in 1878 Serbia, Montenegro, and Bulgaria were saddled with part of the Turkish debt. By the Peace Treaty of Lausanne, 1912, whereby Italy acquired Tripoli, Italy assumed part of the debt. So, too, the territories ceded by the Central Powers have taken over their pre-war debts, with the exception of the pre-war debt of Alsace-Lorraine. These are, however, rather equitable settlements, since no rule of international law can be said to exist, although many writers maintain the contrary. But in 1898 the United States expressly prohibited Cuba from assuming liability for any debts incurred under Spanish rule—debts incurred by Spain in the unsuccessful attempt to retain possession and charged upon the island. Upon the secession of Panama in 1909, Colombia agreed to recognise her independence on receiving £500,000, as Panama's share of the Colombian debt. At the same time, if the disruption were of such a kind as to affect seriously the financial stability of the parent State, a complete repudiation of all responsibility as regards the general debt of the latter might, if foreign interests were largely involved, arouse some opposition on the part of States whose subjects were affected (*k*). With respect to the treaty rights and obligations of the parent State, the new State will not, of course, be entitled or liable under any personal treaties, such as treaties of alliance, arbitration, or commerce; but it will succeed to rights and obligations under treaties specifically relating to territory comprised within its limits, such as treaties of cession, or treaties relating to boundaries or regulating the navigation of rivers (*l*).

(2) *Cession of Territory.*—In the case where a part of one State is ceded to or acquired by another State, whether as the result of the pressure of war or by voluntary arrangement, the question of succession will commonly be provided for by treaty; but in default of treaty, or in so far as its provisions may not extend, it would seem that the rights and obligations of the transferee State, in the matter of succession, will be governed by rules similar to those set forth above. So in 1859 on the cession of Lombardy, and in 1866 on the cession of Venetia, by Austria to Italy, the latter Power assumed all liability for the local debts of the ceded provinces. But here again, if the cession

(*i*) Wharton, Dig. i. §§ 5 and 6.

(*k*) This on the same principle as that which gave rise to the protest of the United States, upon the acquisition by Chili of the Peruvian guano-beds; see Wharton, Dig. i. 348.

(*l*) Hall, 93.

were such as to impair seriously the financial resources of the ceding Power, the claim to some arrangement with respect to the general debt would probably be even stronger than in cases of secession. Hence in 1866, after the cession of Schleswig-Holstein by Denmark, Prussia agreed to assume such an amount of the general debt of Denmark as was proportionate to the population of the ceded provinces. In 1856 Italy also assumed a proportion of the general Papal debt based on the revenues of the territory which she had appropriated. But, in 1871, Germany, on the cession of Alsace-Lorraine, refused to take upon herself any part of the French national debt. Nor, in 1878, did Russia assume any part of the general Turkish debt, in respect of territory then acquired by her (*m*).

(3) *Dismemberment.*—Again, in the case where a State is dismembered in such a way that its identity is wholly extinguished, whether by the creation of new States or by the absorption of its different parts by other States, the same principles would seem to apply to the succession of the new States, or of the acquiring States, as the case may be; subject, however, in this case, to a still stronger claim on the part of foreign States or their subjects for a rateable division of the general debt of the extinguished State.

(ii) "*Universal*" *Succession.*—The merger of one State, in its entirety, in another State may occur in various ways: (1) It may arise out of the union of two or more States, formerly independent, in such a way as to form an entirely new State; as occurred in 1871, when the German States (*n*) united to form the German Empire. (2) It may arise out of the peaceful absorption of one State by another State, or by a union of States; as occurred in 1845, when the republic of Texas was admitted as a member of the American Union. (3) Or, it may arise out of the annexation of one State by another, as the result of conquest; as occurred in 1900 on the incorporation of the South African Republic and the Orange Free State in the British dominions. In such cases the rights and obligations of the successor are usually regulated by the pact of union, or by treaty of cession, or by the terms of peace, as the case may be (*o*). In default of arrangement, or so far as the same may not extend, the rules previously indicated with respect to succession would seem to apply generally; although with results that appear to differ somewhat according to the organisation of the absorbing State, and subject also to some modification as regards obligations incident to State debts. Thus, (1) if the government of the absorbing State be a "unified" government, then it will succeed to all the public domain and property, and the prerogative rights of the State absorbed, without qualification. It will also become liable for all civil obligations, including the State debts, whether general or local, and this apparently without regard to the

(*m*) Although this was excused on the ground of its being regarded as a partial set-off against the claim for a war indemnity.

(*n*) Including several States not previously forming part of the North German Confederation.

(*o*) Succession in cases of "conquest" is subject to certain special considerations, which will be described in vol. ii., *sub nom.* "The Effects of Conquest," and in connection with the report of the Transvaal Concessions Commission.

value of the assets received (*p*). But treaties and political obligations arising therefrom, other than treaties locally connected with the territory of the State absorbed, will come to an end with the extinction of the latter. So on the annexation of Madagascar by France in 1896 it was recognised by other Powers that all commercial treaties must be deemed to have been extinguished. (2) But if the organisation of the absorbing State be that of a "real" or "federal union," under which the internal sovereignty of the constituent States is preserved, then it would seem that the civil rights and obligations of the State absorbed will continue to inhere in the latter, except in so far as the essential conditions of union preclude their retention or fulfilment, in which case such rights and obligations should, to that extent, be deemed to devolve on the Government of the union. At the same time, even where such rights or obligations remain in the State which has been so incorporated, they will become enforceable, in so far as they may affect external relations, only through the Government of the union (*q*). So, in 1845, on the admission of Texas as a State of the American Union, the United States, relying on an express stipulation contained in the instrument of cession, which could not, however, strictly be regarded as binding on third parties, refused to assume any liability for the Texan debt. The right to do so would, it seems, have been unquestionable, had it not been for the fact that the terms of union involved a transfer to the Federal Government of the whole customs revenue of the absorbed State, which constituted the main element in the bondholders' security. To this extent the discharge of its original obligations by the "State" absorbed was impaired, and should, it seems, have been attended by a corresponding assumption of liability by the Federal Government (*r*). Treaties previously made will, except in so far as they are locally connected with the territory of the State absorbed, commonly be extinguished, either by reason of the extinction of the State person, or by reason of their having become incompatible with the terms of union. At the same time even personal treaties, such as extradition treaties, if susceptible of enforcement under the terms of union, and not denounced by the central Government, will, it seems, continue operative. So in *Terlinden* v. *Ames* (184 U. S. 270) it was held that an extradition treaty made between the United States of America and Prussia, prior to the formation of the German Empire, continued operative after the union, for the reason that it was not insusceptible of enforcement under the new conditions, and that it had in fact been officially recognised by the imperial Government (*s*).

(*p*) But for a possible exception see Westlake, i. 77.

(*q*) *Supra*, p. 52.

(*r*) Wharton, Dig. i. 19-23; Scott, 94 *n.*

(*s*) On the subject of succession generally, see Hall, 93; Westlake, i. 68.

THE PLENARY REPRESENTATION OF STATES; ORGANS OF A STATE IN ITS EXTERNAL RELATIONS.

THE "SAPPHIRE."

[1870; 11 Wall. 164; 18 Wall. 51 (*t*).]

Case.] ON the 22nd of December, 1867, the American ship "Sapphire," a private vessel, came into collision with the French transport "Euryale," in the harbour of San Francisco, in consequence of which the latter vessel sustained considerable damage. Subsequently a libel was filed, in the District Court, in the name of Napoleon III., Emperor of the French; and as the result of these proceedings the libellant was awarded a sum of $15,000. This decree was subsequently confirmed by the Circuit Court, and an appeal was then taken to the Supreme Court. The case came on for argument on the 16th of February, 1871, by which time the Emperor Napoleon had ceased to reign. Before the Supreme Court two questions, apart from the question of merits, were raised: (1) as to the right of the Emperor to bring a suit in the United States courts; and (2) whether the suit, if rightly brought, had not abated by the deposition of the Emperor. In the result it was held: (1) that a foreign Sovereign is entitled to bring a suit in the courts of the United States; and (2) that a claim arising by virtue of being such Sovereign is not defeated, nor does such suit abate, by a change in the person of the Sovereign. At the same time the Court was of opinion that if a vessel at anchor, during a gale, could avoid a collision threatened by another vessel, and did not adopt the means for doing so, she became a participant in the wrong, and must divide the loss with the other vessel; and on this ground the decree of the Circuit Court was reversed, and the case remanded, with a mandate directing a decree in conformity with this opinion.

Judgment.] The judgment of the Supreme Court was delivered by Mr. Justice Bradley. With respect to the first question, it was held that a foreign Sovereign, as well as any

(*t*) The latter report only relates to certain questions of Admiralty practice, and does not affect the principles as to the representation of foreign States previously laid down by the Supreme Court.

other foreign person, having a demand of a civil nature against any person in the United States, was at liberty to prosecute it in the courts of that country. There were many examples of such suits in the United States courts. There were also numerous cases in the English reports, in which suits of foreign Sovereigns had been sustained, although it had been held that a foreign Sovereign could not be forced into court by suit. On the second question the Court held that the suit had not abated by the recent deposition of the Emperor. The reigning Sovereign represented the national sovereignty, and that sovereignty was continuous and perpetual, residing in the proper successors of the Sovereign for the time being. The Emperor Napoleon had been the owner of the "Euryale," not as an individual, but as the Sovereign of France; and this was substantially averred in the libel. On his deposition the sovereignty did not change, but merely the person or persons in whom it resided. The foreign State was the true and real owner of its public vessels. The reigning Emperor, or the National Assembly, or other actual person in power, was but the agent or representative of the national sovereignty; and upon any change therein, the next successor was competent to carry on a suit already commenced and to receive the fruits of it. If any substitution of names were necessary or proper, this could be done under the powers of the Court. It was not alleged even that any change in the real ownership of the "Euryale" had occurred by the recent devolution of the sovereign power. If, in any such case, the vessel really belonged and had always belonged to the French nation, and it could be shown that any injustice to the other party to the suit would be caused by the continuance of the proceedings after the death or deposition of the Sovereign, the Court, in the exercise of its discretionary powers, could make such order as the nature of the case required, in order to prevent such a result.

In monarchical States it is usual to regard the public property of the State as the property of the Sovereign or ruler; to enter into State transactions in his name; and to regard him as the sole representative of the sovereignty of the State in its external relations. This, of course, is a survival of the earlier theory, according to which the "personality" and "sovereignty" of the State were both identified with the person of

its Sovereign or ruler. The gradual transformation of this theory, and the transfer of the notions of personality and sovereignty from the ruler to the State itself, have already been described (*u*). The judgment in the case of *The Sapphire* serves to show that, even in monarchical States and in cases where the old attributes have survived, the Sovereign or ruler is, at bottom, only the representative of the State, and that all proprietary or other rights attributed to him in his public or official capacity are really rights belonging to the State itself. The "Euryale," it was held, although in name the property of the deposed Emperor, "really belonged and always had belonged to the French nation." Once it is conceded that the Sovereign or Government is only the external representative of a State, then it follows that the continuity of a State will not be affected by any change, however considerable, in its form of government; for the reason that such a change is from the point of view of international law only a change in the mode or form of its external representation.

THE REPUBLIC OF PERU v. DREYFUS BROS. AND CO.

[1888; L. R. 38 Ch. D. 348.]

Case.] IN this case the Republic of Peru sought an injunction to restrain the defendants, a firm carrying on business in France, from taking out of Court certain funds standing to the credit of an action previously brought by them against the Peruvian Guano Company under the following circumstances: In 1869 the defendants had entered into a contract with the then Government of Peru for the purchase of a large quantity of guano. In the carrying out of this contract various disputes arose between the parties. In 1879 a revolution took place in Peru, with the result that the existing Government was overthrown and replaced by a dictatorship under Señor Pierola. The new Government was recognised by Great Britain, France, and other European States. After Pierola had become dictator, and as the outcome of a long series of negotiations between the new Government and Messrs. Dreyfus, a settlement of the latter's claim under the guano contract was effected; and the terms of the settlement were ratified by a decree of Pierola, as head of the State, with the consent of his council. It was by virtue of this arrangement that the defendants had succeeded in establishing their claim, in

(*u*) *Supra*, p. 51.

the English courts, as against the Peruvian Guano Company, to the proceeds of a large quantity of guano that had been exported from Peru. These proceeds had been paid into Court, and would in the ordinary course of things have been at the disposal of the present defendants. In the meantime, however, the Government of Pierola had itself been overthrown, and the former constitution and Government re-established; whereupon, in 1886, an Act was passed by the Peruvian Legislature rendering nugatory and void all acts previously done by the Government of Pierola, including the settlement which had been come to between Pierola and defendants. In virtue of this law it was now sought by the Peruvian Government to attach the moneys standing to the credit of Messrs. Dreyfus in the action which had been brought by them against the Peruvian Guano Company. The Court, however, found that the defendants were entitled to the moneys in question, holding that where a *de facto* Government had been recognised by a foreign State the subjects of the latter were entitled to deal with the *de facto* Government (as the proper international representative of the State); and that if in such a case the *de facto* Government were itself subsequently displaced, then the new or restored Government was bound by international law to treat such dealings as valid and effectual, and could only claim thereunder such rights as the *de facto* Government could have claimed.

Judgment.] In his judgment Kay, J., pointed out that the question was one to be determined, not by Peruvian law, but by international law. The question virtually was whether the citizens of one State could safely have dealings with the Government of another State which had been recognised by their own Government. If not, then of what value would such recognition be to citizens of the former State? In European countries there had been many instances of usurpations of power, and of the overthrow of one form of Government by another, which had been recognised by Great Britain and other States. When Great Britain recognised the third Emperor of the French, could it be maintained that, if any Englishman had entered into a contract with his Government, the validity of such contract would depend on the law of France as settled by the decree of

the Republic which was established in his place? If this were so, then it would follow that no Englishman could safely contract even with the present Government of France, or, indeed, with any existing Government; for such Government was in its turn liable to be displaced by some other Government, which might treat its acts as void. In the present case the law must therefore be taken to be that an Englishman or Frenchman could safely contract with Señor Pierola's Government, if not before, at any rate after, that Government had been recognised by Great Britain and France respectively. That view was borne out by the English decisions, such as *Barclay* v. *Russell* (3 Ves. Junr. 424), *The City of Berne* v. *The Bank of England* (9 Ves. Junr. 347), and *The United States of America* v. *McRae* (L. R. 8 Eq. 69); as well as by the decisions of the Supreme Court of the United States, such as *Gelston* v. *Hoyt* (3 Wheat. 246, 324). The learned Judge also quoted with approval the statement made by Wheaton (International Law, 2nd edit. p. 41), to the effect that transactions duly entered into between a *de facto* Government and foreign States or subjects ought to be recognised as valid by the lawful Government on its restoration to power, notwithstanding that it might consider the prior Government to have been unlawful, and even though it might think fit to pursue some other course with respect to transactions between the *de facto* Government and its own subjects. Even in the case of a rebel Government, which had not been recognised as independent, it had been held that upon the suppression of the rebellion the parent State could not recover (as against foreign subjects) anything but what the rebel Government could have recovered. Hence it followed in the present case that the existing Government could not recover the proceeds of the cargoes in question unless the Government of Pierola could have done so, and inasmuch as it was clear that the latter could not have recovered them in derogation of its own contract, it was not open to the present Government to do so.

The decision in this case is virtually an application of the same principle as that laid down in the case of *The Sapphire* (*supra*), with the substitution of the term Government for the term Sovereign. It was held, in fact, that any obligations duly entered into by a *de*

facto Government—as the recognised organ of the State for the time being—with foreign subjects would be binding on any succeeding Government, even though not in privity with its predecessor. And, although some stress was laid on the previous recognition of the *de facto* Government by the contractors' own Government, as a condition essential to complete safety, it was nevertheless recognised that even where a transaction had been entered into between a foreigner and a rebel Government which had not been recognised as independent, the succeeding Government could not recover from the former anything but what the rebel Government could have recovered (*x*).

General Notes.—*The External Representation of States.*—A State, like a corporation or any other juristic person, can only act through some visible representative. In considering the subject of State representation, however, it is desirable, in the first place, to distinguish the question of the representation of a State in its international relations from the question of its representation for the purposes of suit in foreign Courts, which is for the most part a question of municipal law (*a*). Next, it is desirable to distinguish the plenary representation of a State by its Sovereign or Government, for all purposes in the domain of external relations, from its representation by particular agents, such as ambassadors and envoys, for the conduct of some particular business, or in relation to some particular State (*b*). Finally, it is desirable to distinguish between the titular headship of a State and the actual controlling authority in its external relations.

The Titular Headship of a State.—Every State has a titular head who represents the State formally in its foreign relations. In monarchical States these functions naturally devolve on the Sovereign or ruler; and in such States the Sovereign is not only the formal representative of the State, but all acts of State are commonly done in his name. Such Sovereigns are, in fact, in international law invested with two sets of rights and attributes; the one personal to themselves, although available only so long as they remain sovereign; and the other belonging to the States of which they are the formal representatives. In republics the titular headship of the State may be vested either in a single person, such as the president, as in France; or in a body of persons or council, as in Switzerland. But in the case of republics acts of State, although done through and, so far as his competence extends, by the titular head, are yet not done in his name, but in the name of the State itself. As regards both Sovereigns and other titular heads of States, it is usual to notify to other States any change in the titular headship, although such a proceeding is merely a matter of courtesy and convenience.

The "Government" of a State.—In every State there is some person or body which, under the constitution for the time being in force, is entrusted with the control and direction of the policy and action of

(*x*) *Supra*, p. 71.

(*a*) As to the rights of suit of foreign States in the English Courts, and the style under which they must sue, see p. 91, *infra*.

(*b*) *Infra*, p. 312.

the State in relation to other States. It is this person or body that controls all subordinate agents, including the Minister immediately charged with the conduct of foreign affairs, and as well as those other officers, civil, or military, or diplomatic, who aid in the carrying on of the business of the State in its external relations. The seat of this controlling authority varies, of course, with the constitution of different States. In some States, such as Great Britain, although the Sovereign is technically the controlling authority, yet constitutionally the real controlling authority is vested in "his Majesty's Government" (*c*). Even in republics the controlling authority may rest with the titular head of the State for the time being; although more often the titular head only constitutes a member of such controlling body. But wherever this authority may lie, it is only by its action that the State will be bound in its external dealings; the Foreign Minister or Foreign Office being only its accredited agent for certain purposes (*d*). This body can scarcely be designated as the Sovereign body, for the reason that it often is not identical either with the "titular Sovereign," or with that body which is "legally Sovereign." In *The Republic of Peru* v. *Dreyfus*, as well as in other cases, this body is styled the "Government" of the State; and despite some obvious objections (*e*) it is perhaps convenient to adopt this as a term of description. We have thus to take count of the "State" itself, which is always the true international person, and sometimes also a juristic person, in municipal law; the "titular head" of the State, who is usually, although not invariably, its formal international representative; and the "Government" of the State, which is sometimes identified with the titular headship and sometimes not, but which in any case we shall take to denote that body which really directs and controls the external relations of the State.

The Recognition of "Governments."—The question of recognition has already been considered so far as relates to the recognition of new States of international law, and the recognition of belligerency (*f*). The notification and recognition, as a matter of formal courtesy, of the accession of a new Sovereign or titular head of a State have also been noticed. But, apart from this, changes may occur, whether by revolution or otherwise, in the fundamental organisation of a State, or in the character of its sovereign body, in virtue of which the authority which formerly controlled its external relations is replaced by some other authority not in privity with it; and in such a case the change of Government is usually subject to the recognition of other States. The object of this is to enable other States to judge of the probable stability of the new "Government" before entering into relations

(*c*) Although in this, as in other cases, a very circumscribed prerogative is not, perhaps, incompatible with the exercise of considerable personal influence in the domain of foreign affairs.

(*d*) It may, in fact, be necessary to ascertain that the body or authority for whom even an accredited agent acts, really represents the State in the matter in question; *infra*, p. 332.

(*e*) As that it is somewhat vague and ambiguous; whilst in English law it is not a term of the law, and conveys no notion of legal personality: *cf. Sloman* v. *The Governor and Government of New Zealand* (L. R. 1 C. P. D. 563); and *The Colombian Government* v. *Rothschild* (1 Sim. 94).

(*f*) *Supra*, pp. 19, 68, 69.

with it. Recognition in this case is a matter of discretion; but if the new "Government" maintains its position such recognition cannot long be withheld, for the reason that non-recognition would virtually mean a complete breaking off of diplomatic relations. At the same time, in cases where the prior Government has been displaced under circumstances involving the disapproval of any other State or States, formal diplomatic relations are sometimes suspended, in token of disapproval; although even in this case intercourse is often allowed to continue informally or unofficially. Thus, after the murder of King Alexander of Servia, and the accession of King Peter, Great Britain refused to maintain diplomatic relations with Servia; and these were not formally revived until the retirement of the offending officers in 1906. The propriety of this proceeding, however, has been questioned, as involving an interference in the internal affairs of another State.

The question of the status of the Esthonian National Council was raised in *The Gagara* [1919] P. 95. It was stated by the Attorney-General on behalf of the Foreign Office that his Majesty's Government had recognised the Council as a *de facto* independent Government, and had received an informal diplomatic representative of the Provisional Government. It was held by the Court of Appeal, affirming the decision of Hill, J., that such provisional recognition accorded, for the time being, to the Esthonian National Council the status of a foreign Sovereign.

On the other hand, in *The Lomonosoff* [1921] P. 97, the Court refused to recognise the Bolsheviks who had overturned the Government of Northern Russia in February, 1920, as a politically organised society. The particular agents of States in their external relations, together with their privileges and immunities, will be considered hereafter (*g*).

ACTS OF STATE IN INTERNATIONAL LAW.

McLEOD'S CASE.

[1842; Parl. Papers, 1843, vol. lxi.; Wharton, Digest, vol. i. p. 64 *et seq.*; Moore, International Arbitrations, iii. 2419.]

Case.] In January, 1841, a British subject named McLeod was arrested, whilst in the State of New York, on a charge of having been concerned in the murder of one Durfee, a United States citizen. Durfee had been killed in 1838 in the course of an attack which had been made on the "Caroline," under the following circumstances (*h*): The "Caroline" was a small

(*g*) *Infra*, p. 312.

(*h*) *Infra*, p. 168.

passenger steamer carrying the American flag and on the American register; but at the time in question she was in fact in the employment of the Canadian insurgents. The latter, who had armed and organised on American territory, in the neighbourhood of Niagara, were proposing to use the vessel for the purpose of making a descent on British territory. In order to prevent this a British force crossed the river by night, and after a short resistance took possession of the "Caroline," and sent her adrift down the falls of Niagara. It was in the course of this attack that Durfee was killed; and McLeod, who was an officer in the Colonial forces, was one of the assailants.

Controversy.] On McLeod's arrest, the British Minister at Washington at once demanded his release, claiming that the destruction of the "Caroline" was a public act, done by persons in her Majesty's service, acting in obedience to superior orders; and that the responsibility, if any, rested with her Majesty's Government, and could not, according to the usage of nations, be made a ground of legal proceedings against the individuals concerned, who were bound to obey the authorities appointed by their own Government. The United States Government replied that, as the matter had passed into the hands of the Courts, it was out of its power to release McLeod summarily; and that its action must be confined to using all possible means to secure his liberation at the hands of the Courts, and to seeing that no sentence improperly passed upon him was executed. Great Britain, however, caused it to be understood that the condemnation and execution of McLeod would be followed by a declaration of war (*i*). A writ of *habeas corpus* was applied for on McLeod's behalf; but the Courts of the State of New York refused to release him; with the result that, after being detained in prison for several months, he was ultimately brought to trial and acquitted (*k*). In the course of the correspondence that took place Mr. Webster, the United States Secretary of State, admitted that his Government was not inclined to dispute that it was a principle of public law, sanctioned by the usages of all

(*i*) Lord Palmerston, then Secretary of State for Foreign Affairs, told Mr. Stevenson, the U.S. Minister in London, that such would be the case.

(*k*) Apparently on proof of an *alibi*; the State Courts having rejected the defence of act of State; Scott, p. 67.

civilised nations, "that an individual forming part of a public force and acting under the authority of his Government is not to be held answerable as a private trespasser or malefactor"; and he therefore agreed that "after the avowal of the transaction as a public one by the British Government, there could be no further responsibility on the part of the agent." The fact of an acquittal rendered it impossible to challenge the proceedings in the State Court. But, to prevent the occurrence of any like incident in the future, an Act of Congress was passed in 1842, which, in effect, empowered the Federal Courts to grant a writ of *habeas corpus* in any case where a person, who was a subject or citizen of a foreign State, and domiciled therein, might be held in custody in respect of acts done or omitted under the alleged authority or protection of any commission or orders issued by any foreign State, the validity and effect of which depended on the law of nations (*l*). In 1857 a claim for damages for wrongful arrest and detention was made before the Claims Commission appointed under the Convention of 1853, but the claim was rejected by the umpire (*m*).

It is an admitted rule that the public agents of one State cannot be made amenable to the laws of another State, in respect of acts done under the authority of their own State. This would really seem to be only a branch of the wider doctrine, that the acts of the State itself, done in its sovereign capacity, cannot be called in question before the tribunals of another State (*n*); for, if the acts of the State itself are exempt from the jurisdiction of foreign tribunals, it follows that the acts of its agents done under its authority and within their delegated powers, or adopted by it, must also be exempt. And this applies to acts done under the authority both of States proper and *de facto* Governments (*o*). The most obvious application of this principle is seen in the universal recognition of the fact that members of the military forces of a State, although subject to the laws of war (*p*), cannot be made amenable to the civil laws of another State, in respect of acts done in the legitimate exercise of belligerent powers (*q*). In

(*l*) See also Hall, 270, 314; and Taylor, p. 171.

(*m*) Moore, Arbitrations, iii. 2419.

(*n*) *Infra*, p. 91.

(*o*) See *Underhill* v. *Hernandez* (26 U. S. App. 573); Scott, p. 62, and cases there cited.

(*p*) Including liability for war crimes: *infra*, vol. ii. Offenders against the laws of war are, however, liable to be tried by the military courts, if apprehended, of the other State, whether they acted under orders or not.

(*q*) Scott, p. 68.

McLeod's Case this was extended by the British Government, and rightly, to acts done, even in time of peace and against the subjects of a nominally friendly Power, under the authority of the State, and for which the State assumed full responsibility. The issue thus became one between the States themselves. In this particular case, Great Britain was able to show that the acts in question had been done under the pressure of self-defence (*r*). But even had this not been so, the fact of their having been done under the authority of the State should have sufficed to shield the agent, although reparation might of course have been sought from the State itself. And the same principle applies to acts, not being belligerent acts, done by other public agents in their official capacity, and within their delegated powers. So, in *Hatch* v. *Baez* (7 Hun. 596) it was held by the Courts of New York State that no action could be maintained in that State against a former President of the Dominican Republic for acts done by him in his official capacity. So, again, in *Underhill* v. *Hernandez* (26 U. S. App. 573) it was held that no action could be maintained in the United States against the defendant, who had been one of the leaders in a revolutionary movement in Venezuela and for some time the civil and military chief of the revolutionary Government there, in respect of divers acts of aggression committed by him against the person of the plaintiff, a United States citizen; such acts having been done as acts of State. But it will not apply to acts which, although done under the orders of an immediate superior, were yet not done under the authority of the State, nor yet subsequently adopted by it (*s*). So long as the circumstances are not such as to call for an express adoption of the agent's act, the tacit acquiescence of the State will suffice to make the act effectual as an act of State as against foreigners (*t*). On the other hand, just as a State is at liberty to adopt the act of an agent purporting to have been done on its behalf, so it is also at liberty to disown acts which were not actually done by its orders or within the authority committed to its agents. But, if any injury has accrued to another State or its subjects, by reason of any transgression of authority, then such right of disavowal will be subject to an obligation on the part of the State to repair the injury in so far as possible, and to punish the transgressor. Moreover, by pardoning a wrongdoer in a case of this kind, a State will be deemed to accept responsibility as regards the acts complained of (*u*). In the case where a treaty or international agreement has been entered into by an agent in excess of his authority, there is also a right of disavowal; but this is equally subject to the obligation of restoring any advantage that may have been gained thereunder (*x*).

(*r*) *Infra*, p. 169.

(*s*) See *Commonwealth* v. *Blodgett* (12 Metcalf, 56; Scott, 308). This case, although decided in relation only to a member State of a federal union, yet covers in principle the case also of independent States.

(*t*) *The Rolla* (6 C. Rob. 364).

(*u*) See award in the case of *Cotesworth and Powell* (Moore, Arb. ii. 2050, at 2085).

(*x*) See Hall, 335; and as to the capitulation of El Arisch, 593. But all treaties, except such as are concluded directly by the treaty-making Power, are now regarded as subject to ratification; see p. 333, *infra*.

PROCEEDINGS BY AND AGAINST FOREIGN STATES.

THE UNITED STATES OF AMERICA v. WAGNER.

[1867; L. R. 2 Ch. App. 582.]

Case.] THIS was a suit brought in the name of the United States of America, asking for an account of certain moneys and goods, which had come into the hands of the defendants as agents of the Southern Confederacy during the rebellion; and that the defendants might be ordered to pay over any moneys found due thereunder. The defendants demurred generally; objecting that the bill ought to be put forward by the President of the United States, or some State officer, upon whom process might be served, and who might answer a cross-bill. It was, however, held by the Court of Appeal in Chancery, overruling the demurrer, that a foreign sovereign Government, adopting the republican form of Government and recognised by the Crown, might sue in the English Courts, in its own name so recognised.

Judgment.] Judgments in this case were delivered by Lord Chelmsford, L.C., Sir G. J. Turner, L.J., and Lord Cairns, L.J. In his judgment, Lord Cairns pointed out that upon the statement contained in the bill, it must be taken that the property claimed in the suit belonged to the United States of America, a foreign sovereign State, adopting the republican form of Government and recognised under that style by her Majesty. It was, however, contended that this foreign State, being a republic, could not sue in its own name, and must either associate with it as plaintiff, or must proceed in the name of, the president of the republic, or some other officer of State. In pursuance of this contention it was said that when a monarch sues in our Courts he sues as representative of the State of which he is Sovereign, and that he is permitted to sue, not as for his own property, but as head of the executive Government of the State to which the property belonged; and hence that where the property belongs to a republic, the head of the executive ought to sue for it. This argument, however, was founded on a fallacy. The

Sovereign, in a monarchy, might, as between himself and his subjects, be a trustee for the latter. But in the English Courts, as in diplomatic intercourse with the British Government, it was the Sovereign, and not the State, that was recognised. It was also from the Sovereign, and as representing him individually, and not his State, that an ambassador was received. It was in him individually, and not in a representative capacity, that the public property of the State must be assumed to be vested. In a republic, on the other hand, the sovereign power, and with it the public property, was deemed to reside in the State itself, and not in any officer of the State; whilst it was from the State that an ambassador was accredited; and with the State that diplomatic intercourse was conducted. With respect to the question of discovery, that question could not affect the question as to who was the proper plaintiff. The right of a plaintiff to sue did not depend in any way on the effectiveness of the discovery which on a cross-bill could be exacted from him. The true rule was that the person, State, or corporation which had the interest must be plaintiff, and that the Court would then do its best to secure to the defendant such defensive discovery as he might be entitled to. The Court could in fact suspend relief on the original bill, until justice in this respect was done to the defendant.

No question of succession, such as was in issue in *The United States* v. *McRae* (*supra*), arose in this case; the only question being as to the style and name in which a foreign State, possessing a republican form of government, ought to sue in the English Courts. In consequence of the earlier conception, under which every State having a monarchical Government was personified in its ruler or Sovereign (*y*), foreign States had always been wont to sue in the English Courts in the names of their Sovereigns. And, in the case of republics, some difficulty was experienced in securing a recognition of the right of a State, possessing this form of government, to sue in its corporate name and in its character as a juristic person. This was nominally based on the difficulty of obtaining discovery except through the medium of a tangible person; but it was really due to the fact that English law itself had failed to recognise the State as a juristic person, and had put the Sovereign in its place, and also to the general reluctance of the English Courts to recognise any kind of juristic person differing substantially from an English corporation. This difficulty was disposed of in the judgment in *The United*

(*y*) *Supra*, pp. 50, 79.

States v. *Wagner*, where it was held that, although in the case of monarchical States the Sovereign must still be regarded as representing the person, property, and interest of his State, yet in the case of republics both personality, property, and interest must be regarded as inhering in the State itself, as a juristic person, and that such States could therefore sue in their corporate character and under their own name (*z*). Even in the case of a monarchical State, however, it is really the State that constitutes the true international person, the Sovereign being merely its formal representative for the time being; and even in the English cases this appears to be recognised to the extent that the Sovereign is sometimes spoken of as a trustee for his State (*a*). In English law, moreover, in those dependencies which have assumed a federal form, the older theory of the State or organised community being personified by the Sovereign is gradually being transformed (*b*). At the same time, there is no rule in English law that all suits in respect of the public property or interest of a foreign State must be brought in the name either of the Sovereign or of the State itself, as the case may be. Such suits may also be brought in the name of any other agent or body, so long as the latter is duly authorised to represent the interests of the State in relation to the matter in question. Thus, in *Yzquierdo* v. *Clydebank Engineering Company* [1902] (A. C. 524) it was held by the House of Lords that it was quite competent to the Spanish Minister of Marine to sue on a contract that had been made between the "Chief of the Spanish Royal Naval Commission, in the name and in representation of the Spanish Minister of Marine in Madrid," of the one part, and the respondents on the other part—and this although the Minister actually suing had not been Minister at the time of the contract—for the reason that these were the actual parties to the contract. But such suits cannot be brought in the name of a body which is neither a natural nor a juristic person. So, in the case of *The Colombian Government* v. *Rothschild* (1 Sim. 94) it was laid down that an unknown and undefined body, such as the "Government" of a State, could not sue under such a name, and that if the persons so described could sue at all they must come forward as individuals and show that they were entitled to represent the State (*c*).

General Notes.—*Suits by Foreign States in English Courts.*—As a general rule any foreign State, if duly recognised (*d*), is entitled to sue in the English Courts, or, indeed, in the Courts of any other State, in

(*z*) See also *Rep. of Costa Rica* v. *Erlanger* (L. R. 19 Eq. 33); and *Rep. of Peru* v. *Weguelin* (L. R. 7 C. P. 352; 20 Eq. 140).

(*a*) *Cf. Hullett* v. *King of Spain* (2 Bligh, N.S. at p. 63).

(*b*) *Cf. Holmes* v. *The Queen* (31 L. J. Ch. 58); *A.-G. of British Columbia* v. *A.-G. of Canada* (14 A. C. 295); *The Municipal Council of Sydney* v. *The Commonwealth* (1 C. L. R. at 231); *The King* v. *Sutton* (5 C. L. R. 789); and p. 45 *n* (*c*), *supra*.

(*c*) See p. 84 *n* (*e*), *supra*; and *The Republic of Mexico* v. *Arrangoiz* (11 Howard, Pr. Rep. 1; Scott, p. 170).

(*d*) As to the effect of non-recognition, see *The City of Berne* v. *The Bank of England* (9 Ves. Junr. 347).

relation to any matter that is within their competence. Such suits may, as has already been pointed out, be brought in the name either of the Sovereign or of the State itself, or in that of any other representative duly authorised. The rules on this subject are commonly represented as being applicable to foreign Sovereigns, but this is due to historical causes previously indicated (*e*); and they are in fact equally applicable to foreign States, whether proceeding in the name of the Sovereign or not. Reserving for later consideration the question of suits personal to the Sovereign (*f*), and confining ourselves to suits brought by or on behalf of States, it may be said that such proceedings will lie in relation to any matter connected with the public property or interest which gives rise to a claim for relief either as against individuals or corporations. Thus, in the case of *The Emperor of Austria* v. *Day and Others* (2 Giff. 628), it appeared that the defendants had manufactured in the United Kingdom a quantity of paper money on behalf of the Hungarian rebels. In a suit by the Emperor of Austria to restrain them from manufacturing any more or disposing of what they had already manufactured, it was held that the prerogative of every State with respect to its coinage was a great public right recognised and protected by the law of nations; that it was immaterial that the other defendant, Kossuth, for whom the notes were manufactured, contemplated the overthrow of the plaintiff Government, and only intended to use the notes after such overthrow; and that the injunction must therefore be granted (*g*). But the competence of municipal Courts, in such cases, will not extend to acts of State or disputes between States as international persons; for the reason that acts of sovereignty cannot be made the foundation either of civil rights or civil liabilities (*h*). Even where the suit does lie, moreover, the dignity of a foreign State or Sovereign, even where successful, is not to be disparaged by an award of costs (*i*).

Foreign States cannot generally be sued.—As a general rule foreign States are not liable to be sued either in an English Court or in the Courts of other States; for the reason that it would be a violation of the respect due to a foreign State to allow process in the municipal Courts to issue against it (*k*). "Considerations of comity and of the highest expediency," it has been said, "require that the conduct of States, whether in transactions with other States, or with individuals, whether their own citizens or foreign citizens, should not be called in question by the tribunals of another jurisdiction" (*l*). So, in *The Parlement Belge* (L. R. 5 P. D. 197) it was observed that, in view of the independence of every sovereign authority and of international comity, every State declined to exercise jurisdiction through its Courts over the person of any foreign Sovereign, or the public property of any

(*e*) *Supra*, pp. 79, 90.

(*f*) *Infra*, pp. 94-6.

(*g*) The rebel Government in this case, it will be observed, had not been recognised; otherwise the question would have lain outside the jurisdiction of a municipal Court.

(*h*) *S.S. for India* v. *Kamachee* (13 Moo. P. C. 22); *Elphinstone* v. *Bedreechund* (1 Knapp. 316); *Salaman* v. *The S.S. for India in Council* [1906] (1 K. B. 613); and *Buron* v. *Denman* (2 Ex. 167).

(*i*) *Emperor of Austria* v. *Day* (30 L. J. Ch. 690).

(*k*) *Per* James, L.J., in *Strousberg* v. *Costa Rica* (29 W. R. 125).

(*l*) *Underhill* v. *Hernandez* (26 U. S. App. 573).

foreign State (*m*). So, in *De Haber* v. *The Queen of Portugal* (17 Q. B. 171), where a suit was brought in the Mayor's Court against the Queen of Portugal for the recovery of a sum of money deposited by the plaintiff with a banker at Lisbon, which had been paid over by him to the Portuguese Government under a judicial decree—and it was sought in the course of the suit to attach a sum of money belonging to the Queen in the hands of an agent in London—a rule was obtained from the Court of Queen's Bench prohibiting the Mayor's Court from proceeding in the matter, on the ground that the defendant, being sued as a foreign potentate, was not amenable to the local jurisdiction. In *Vavasseur* v. *Krupp* (L. R. 9 Ch. D. 351) it was also held that the public property of a foreign State could not become subject to the local jurisdiction even though it might be tainted by the infringement of an English patent. Moreover, the sovereignty and independence of an alleged Sovereign or sovereign State are matters which the Court will take judicial notice of, or ascertain judicially for itself, and as to which evidence need not be offered by the parties (*n*). And every State will be deemed responsible under the law of nations for the action of its tribunal in this respect.

Exceptions to this Rule.—To this general rule there are in English law certain exceptions. The first of these exceptions occurs where the foreign State itself institutes proceedings or otherwise voluntarily accepts the jurisdiction. In such a case, the foreign State will not only be bound by the ordinary rules of procedure, but will lay itself open to any cross-proceedings that may be taken in mitigation of the relief claimed. So, in *Prioleau* v. *The United States of America* (L. R. 2 Eq. 659), it was held that the United States having commenced proceedings in the English Courts, and thus submitted themselves to the jurisdiction, the defendants in the original action were entitled to proceed for discovery, and that the original action must be stayed until discovery had been made (*o*). And the same rule will apply to a case of set-off or cross-claim arising out of the same transaction; such an exercise of jurisdiction being essential in order to enable the Court to do complete justice in the matter (*p*). But it will not apply to a counter-claim against a plaintiff State or Sovereign, in respect of some separate transaction, as regards which there has been no submission to the jurisdiction (*q*). Nor will a foreign State be deemed to have submitted to the jurisdiction merely by reason of his having appeared for the purpose of showing title or privilege. So, in *Vavasseur* v. *Krupp* (L. R. 9 Ch. D. 351), where it was sought to restrain the removal of certain shells on the ground of their having been manufactured in violation of an English patent, the Mikado of Japan was permitted to intervene for the purpose of showing that the shells

(*m*) *Infra*, p. 266.

(*n*) *Taylor* v. *Barclay* (2 Sim. 213). In English law this question will be deemed to be authoritatively determined by a certificate or certified statement on the part of a Secretary of State; *supra*, p. 44.

(*o*) See also *The King of Spain* v *Hullet* (1 Cl. & F. 332); *Emperor of Brazil* v. *Robinson* (5 Dowl. P. C. 522); and *Republic of Peru* v. *Weguelin* (L. R. 20 Eq. 140).

(*p*) *The Newbattle* (L. R. 10 P. D. 33).

(*q*) *South African Republic* v. *La Compagnie Franco-Belge, &c.* [1897] (2 Ch. 487; [1898] 1 Ch. 190).

were his property, and were, as such, exempt from the local jurisdiction; nor was such an intervention regarded as a submission to the jurisdiction. The second exception is more limited in its character, and occurs where a fund or other property in which a foreign State or Sovereign is interested, but in respect of which some equitable claim attaches, is found in the hands of some person over whom the Court of Chancery has undoubted jurisdiction. In such a case it has been held that the Court may proceed to administer the fund, even though a foreign State or Sovereign may be interested in it, if the latter, not being otherwise subject to the jurisdiction, should not think fit to appear or to submit to the jurisdiction (*r*). So, in *Gladstone* v. *Musurus Bey* (32 L. J. Ch. 155), where the plaintiffs had deposited certain securities with the Bank of England, in the name of the Turkish Ambassador, as security for the performance of a contract entered into with the Turkish Government, it was held, on the Turkish Government threatening to withdraw the securities without having fulfilled its part of the contract, that although the Court of Chancery could not make any order against the foreign State or its ambassador, unless it submitted to the jurisdiction, yet it might restrain the Bank from handing over a fund the right to which was in dispute. But in *Gladstone* v. *The Ottoman Bank* (1 H. & M. 505) it was held that after an absolute disposition of property by a foreign Government, even though this was alleged to be in derogation of the contractual rights of a third party, no proceedings would lie; for the reason, apparently, that this would have meant an interference with the acts of a foreign Sovereign done in the exercise of his sovereign power (*s*). It needs to be observed, however, that these rules, with respect to suits by and against foreign States, only represent the view of the English Courts in this matter, and that elsewhere both opinion and practice on this subject appear to vary (*t*). The right to exercise jurisdiction over immovable property owned by a foreign Sovereign will be considered later, in connection with the personal privileges and immunities of foreign Sovereigns (*u*).

PRIVILEGES OF SOVEREIGNS OR HEADS OF FOREIGN STATES.

MIGHELL v. THE SULTAN OF JOHORE.

[1894; 1 Q. B. 149.]

Case.] THIS was an action for breach of promise of marriage, brought by the plaintiff against the defendant, who was

(*r*) *Morgan* v. *Larivière* (L. R. 7 H. L. at 430); but the precise scope of this exception appears to be somewhat doubtful; see *Vavasseur* v. *Krupp* (*supra*).

(*s*) On this point and on the subject generally, see Foote, 159 and 147.

(*t*) As to the competence generally of national Courts, in matters of civil right not affecting the national sovereignty, where States are concerned, see Westlake, i. 241 *et seq.*; and in our own Courts *Lynch* v. *The Provisional Government of Paraguay* (L. R. 2 P. & D. 268).

(*u*) *Infra*, p. 97.

described in the writ as the "Sultan of the State and Territory of Johore, otherwise known as Albert Baker." It was alleged by the plaintiff that the defendant had been introduced to her as Albert Baker, and was generally known by that name; that he had represented himself as a private individual and as a subject of the Queen; and that he had made the promise alleged in that character. An order for substituted service having been made, it was now moved to set this aside and to stay all proceedings in the action, on the ground that the Court had no jurisdiction over the defendant. In the course of the proceedings a communication had been made by order of a Judge to the Colonial Office, and in reply a letter purporting to be written by direction of the Secretary of State for the Colonies had been received, informing the Judge that Johore was an independent State and territory in the Malay Peninsula, and that the defendant was the present Sovereign thereof; that the relations between the Sultan and her Majesty the Queen were relations of alliance, and not of suzerainty and dependence, and were regulated by treaty of 1885; and, finally, that the Sultan generally exercised without question the attributes of a Sovereign ruler. In the result an order for a stay of proceedings was made by the Divisional Court, and confirmed by the Court of Appeal. It was held, in effect: (1) that the Courts of this country had no jurisdiction over an independent foreign Sovereign unless he submitted to the jurisdiction, and that such submission cannot take place until the jurisdiction has been invoked; (2) that the fact of a foreign Sovereign entering into a contract in this country under an assumed name, and as a private individual, did not amount to a submission to the jurisdiction; and (3) that a certificate from the Foreign Office, or Colonial Office, as the case may be, was conclusive as to the status of a foreign Sovereign.

Judgment.] In the Court of Appeal Lord Esher, M.R., in his judgment, pointed out that it was not incumbent on or even desirable for the Court to make an independent investigation into the question of the status of a foreign Sovereign, and that the letter from the Secretary of State for the Colonies, on this subject, must be regarded as conclusive that the defendant was

an independent Sovereign. In the matter of personal exemption from the jurisdiction all Sovereigns were equal; and the independent Sovereign of the smallest State stood on the same footing as the monarch of the greatest. The whole question of the immunity of foreign Sovereigns had been carefully considered in the case of *The Parlement Belge* (L. R. 5 P. D. 197). In giving judgment in that case, he had himself pointed out, as the result of a careful consideration of the authorities, and a minute examination of the cases, that in virtue of the independence of every sovereign authority, and of that international comity which induces every State to respect the independence and dignity of every other sovereign State, no jurisdiction could be exercised through the Courts over the person of any Sovereign or ambassador of any other State, or over public property of any State which was destined to public use, or over the property of any ambassador; even though such Sovereign, ambassador, or property might be within the territory. And this rule was laid down without any qualifications. Of course it was open to a foreign Sovereign to submit to the jurisdiction; but the only time at which this could be done was at the time when the Court was about to be or was being asked to exercise jurisdiction, and not at any previous time. For this reason he thought that the Court had no jurisdiction to enter into any inquiry into the matters alleged by the plaintiff.

Apart from the privileges and immunities of foreign States, there are also certain privileges and immunities which attach, both under the English law and in other systems, to the persons of the Sovereigns or titular heads of foreign States; although, in consequence the personification of the State in its Sovereign, it is not always easy to draw clearly the line of demarcation between the two. Amongst these privileges and immunities the most important is the complete exemption of a foreign Sovereign from the local jurisdiction, whether civil or criminal, not merely in respect of acts done in his public or sovereign capacity, but also in respect of acts done in his private capacity, and within the territorial limits of another jurisdiction. This is clearly recognised in *Mighell* v. *The Sultan of Johore* (*supra*). In fact, this case, taken in conjunction with that of *The Parlement Belge* (L. R. 5 P. D. 197), which will be discussed hereafter (*a*), may be said to establish the complete immunity of a foreign Sovereign from the local jurisdiction, both in respect of person and

(*a*) *Infra*, p. 266.

property (*b*), and to dissipate some doubts which had been previously entertained on this subject (*c*). The same immunity would also probably be extended to the ruler of a semi-Sovereign State (*d*). The only cases in which the English Courts will assume jurisdiction over the person or property of a foreign Sovereign appear to be these: (1) Where he has initiated the proceedings or has voluntarily submitted to the jurisdiction,—in which case he will be subject to the jurisdiction to the same extent as has been previously indicated with respect to foreign States (*e*). (2) Where some property or fund, in which he is interested, but which is the subject of some equitable claim, is found in the hands of a private person or corporation over whom the Court has jurisdiction—in which case the property will be subject to the jurisdiction to the same extent as in the case of foreign States (*f*). (3) Where he is at the same time a subject of the Crown, and the suit in question relates to acts or transactions done in his private capacity, although even here there will be a presumption in favour of any act done by him having been done as Sovereign (*g*). (4) Where he has acquired immovable property within the territory, so far as relates to actions connected with such property. The last of these exceptions appears to be based on the grounds that the integrity of the national jurisdiction as regards the soil of the State is a principle too vital to admit of qualification (*h*); and that the foreign Sovereign by acquiring such property must be deemed to have waived the privilege to which he would otherwise have been entitled (*i*). On the other hand, a foreign Sovereign is entitled to sue in the English Courts not only in respect of his public rights and interest to the extent previously indicated in the case of foreign States (*k*), but also in respect of his private rights and property, and for injuries done to him as a private individual; although the practice has hitherto been not to award him costs even though successful (*l*). English law also makes special provision for the punishment of offences committed against foreign Sovereigns. Thus, at common law, every one is guilty of a misdemeanour who publishes any libel tending to expose any foreign prince or potentate to hatred or contempt, with intent to disturb the peace and friendship existing between the United Kingdom and the country to which such prince or potentate belongs; although this would not, of course, extend to fair criticism on matters of public interest (*m*). Foreign Sovereigns are also protected by virtue of the Offences against the Person Act, 1861, which makes it a misdemeanour to conspire to murder any person, whether a subject or not, and whether within the British dominions or not (*n*).

(*b*) Other than local land; *infra*.

(*c*) See Foote, Private Int. Law, 156.

(*d*) *The Charkieh* (4 A. & E. at p. 77).

(*e*) *Supra*, p. 93.

(*f*) *Supra*, p. 94.

(*g*) *The Duke of Brunswick* v. *The King of Hanover* (2 H. L. C. 1).

(*h*) Being at bottom a principle of self-preservation.

(*i*) See *The Charkieh* (4 A. & E. at p. 97; *Taylor* v. *Best* (14 C. B. 487. 523); and Foote, Private Int. Law, 159.

(*k*) *Supra*, p. 91.

(*l*) *Supra*, p. 92.

(*m*) *R.* v. *Vint* (27 Howell's St. Tr. 627); *R.* v. *Peltier* (28 Howell's St. Tr. 529).

(*n*) See *R.* v. *Most* (7 Q. B. D. 244).

GENERAL NOTES.—*Privileges accorded to Heads of States* (i) *when personally present in Foreign Countries.*—Every Sovereign, whilst travelling through or tarrying within the territory of another State, with the official knowledge of its Government, is entitled to certain ceremonial honours, which scarcely belong, however, to the domain of law. He is also entitled by common usage to the privileges of inviolability of person, and exterritoriality or complete exemption from the civil and criminal jurisdiction of the local Courts. Incidentally he is also exempt from the payment of customs duties and the visitation of customs officers; an immunity which is commonly extended even to articles destined for the use of the Sovereign, in their transit through foreign countries. On the analogy of ambassadors, the same privilege of exemption from the local jurisdiction would appear to extend to members of his family and suite who may accompany him. Even if he should travel incognito, it would seem that he is entitled to the same privileges if the fact of his identity is known; whilst, if not, then he is at liberty to claim them on declaring his identity (*o*). He is not entitled, however, to exercise in a foreign country a jurisdiction conceded him by his own law. At the same time, if he should abuse his privilege, it does not appear that there is any remedy available against him, except a request to leave, or, if need be, expulsion. The titular head of a non-monarchical State, such as the President of a republic, is, whilst in foreign countries, entitled to the same privileges as a Sovereign, in the same way that the ambassadors of such a State are entitled to full privileges of embassy; but in the case of a non-monarchical State such privileges would probably attach only so long as its representative was acting ostensibly in his official character. The same privileges also extend to a regent, who temporarily fills the place of the Sovereign (*p*).

(ii) *When not personally present.*—Apart, moreover, from his personal presence in a foreign country, the Sovereign or ruler of one State is, by common usage, entitled to certain rights and immunities which are usually conceded by other States. Amongst these some writers include the observance of those rules of ceremony and respect which commonly govern the intercourse of Sovereigns or rulers with each other; although these, as we have seen, are really a matter of comity rather than law. Apart from this, a foreign Sovereign is, as a general rule, entitled to proceed in the Courts of other States, either as representing his State, although only, of course, as regards matters within the competence of municipal tribunals; or in relation to his private rights and interests. On the other hand, acts done by him as Sovereign or ruler cannot be made the subject of proceedings before foreign tribunals; and all property belonging to him in his public character is equally exempt, although such exemption would not appear to extend in any case to land, or, according to the prevalent opinion, to movable and other property which he owns in a foreign country as a private person, and not in his capacity as Sovereign (*q*). Foreign

(*o*) *Per* Wills, J., in *Mighell* v. *Sultan of Johore* [1894] (1 Q. B. 149).

(*p*) On the subject generally, see Phillimore, ii. 135 *et seq.*; Hall, 180, 307; and Oppenheim, i. 530.

(*q*) See Phillimore, ii. 140; and Taylor, p. 230.

Sovereigns are also, as we have seen, sometimes the subject of special protection accorded them by the municipal law of other States.

STATE TERRITORY AND BOUNDARIES.

THE ALASKA BOUNDARY ARBITRATION, 1903.

[British and Foreign State Papers, vol. 12 (1824-25); vol. 57 (1866-67); vol. 84 (1891-92); vol. 86 (1893-94); vol. 96 (1902-1903) (*r*).]

The Subject-matter of the Controversy.] The territory of Alaska formerly belonged to Russia. Prior to 1825 disputes had arisen between Great Britain and Russia, in consequence of certain pretensions put forward by the latter under a Ukase of 1821, in virtue of which she claimed an exclusive maritime jurisdiction in respect of her American possessions (*s*), and also claimed to extend her settlements in a southerly direction along the coast. By a Convention of the 16th/28th of February, 1825, it was attempted to settle these disputes, in so far as they related to the boundary between the respective territories of the two countries in North America. By this Convention it was provided that the boundary should run—from the southernmost point of Prince of Wales Island, lying in par. 54° 40′ N. lat. and between the 131st and 133rd meridians W. long., along the Portland Channel to the point of the continent (*terre ferme*) at which it strikes the 56th par. N. lat.; thence following the summit of the mountains situated parallel to the coast, as far as the point of intersection of the 141st meridian, W. long.; and from that point along the 141st meridian, W. long., to the Frozen Ocean (Art. 3). At the same time it was provided that—whenever the summit of the mountains running parallel to the coast should prove to be at a distance of more than ten marine leagues from the ocean, then the boundary should be formed by a line parallel to the sinuosities of the coast, which should, however, never exceed ten marine leagues therefrom

(*r*) See also articles by J. B. Moore, "The Alaskan Boundary," N. A. Review, October, 1899; C. N. Gregory, Law Mag. & Rev., February, 1900; and T. Hodgins, Canadian Law Review, September, 1902.

(*s*) As to this, see p. 127, *infra*.

(Art. 4). No establishments were to be formed by either party within the territory assigned to the other; but British subjects were for ever to enjoy a right of navigating all rivers and streams crossing the line of demarcation on their way to the Pacific (Art. 6).

By a treaty signed on the 30th of March, 1867, and subsequently ratified by both parties, Russia, in consideration of a sum of $7,200,000, ceded to the United States all her territory and dominion on the continent of America and in the adjacent islands; the eastern boundary of the territory so ceded being the line of demarcation drawn by the Convention of 1825 between the British and Russian possessions, and the material parts of that Convention being also recited in the treaty. A formal transfer of the territory was made on the 18th of October, 1867. By this treaty the United States succeeded to all the rights of Russia under the Convention of 1825.

The actual boundary established by the Convention of 1825, however, was far from being clear; and the need of a proper delimitation was recognised both by Canada and the United States as early as 1872 (*t*). But no steps to this end appear to have been taken until July, 1892, when a Convention was made between Great Britain and the United States, providing for a joint survey of the territory adjacent to the supposed boundary line, between 54° 40′ N. lat., and the point at which it intersects the 141st meridian W. long., for the purpose of ascertaining the physical facts and data necessary to the delimitation of the boundary, in accordance with the treaty provisions. Under this Convention certain surveys were made and reports furnished; but without leading to any settlement. Meanwhile the discovery of the Yukon goldfield and the fact that, on the north, the Lynn Canal, with its inlets and the rivers flowing into them, constituted a kind of natural gateway to that district—and a realisation also of the strategic importance attaching to the control of the entrance to the Portland Channel, on the south—contributed to render an adjustment of the boundary imperative in the interests of both parties.

(*t*) President Grant's message to Congress, 2nd of December, 1872 (62 S. P., at 1262-63).

The chief points in controversy appear to have been (1) as to the identity of the Portland Channel referred to in the Convention, and the true line of boundary up to 56° N. lat.; and (2) as to the meaning of those provisions of the Convention which required the boundary to follow the summit of the mountains, or, if these lay at a distance of more than ten marine leagues from the coast, then a line parallel to the windings of the coast not more than ten marine leagues therefrom. On the former point, it was contended by the United States that the dividing line should enter the Portland Channel by the "Portland Inlet," or, as it is called in Vancouver's map, the "Observatory Inlet"; a construction which would have given the United States control of Kaunaghunut, Sitklan, Wales, and Pearse Islands. Great Britain, on the other hand, contended that it should follow the channel, running north of those islands, a construction which would have given the control of them to her. On the second point, the main contention of the United States was that, inasmuch as there was no continuous chain of mountains within the prescribed distance from the coast, it was necessary to fall back on the ten-league limit; that this meant that there was to be a continuous fringe or strip of coast, not exceeding ten marine leagues in width, separating British possessions from the bays, ports, inlets, havens, and waters of the ocean; and that in any case this fringe or strip should be measured, not from the shores of the ocean, but round the heads of the inlets. As against this Great Britain contended, in effect, that the summit of the mountains parallel to the coast meant the tops of the mountains nearest to the ocean; that there was no necessity for a continuous range; and that inasmuch as there were in fact mountains, from 3,000 to 5,000 feet high, within five or six miles of the coast for the entire distance, the boundary should be drawn by a straight line from the summit of one mountain to the summit of the next, and so on, until the agreed point of intersection was reached. With respect to the term "coast," Great Britain also contended that the words "coast" and "ocean" were used in the Convention indifferently, to express the shore from which the ten marine leagues were to be measured; and that this coast shore meant the ocean shore, and not the shores of the inlets with

which it might be indented. This view was alleged to be borne out by the provisions of Art. 6, which secured to British subjects the right of navigating all streams and rivers, showing that an unbroken or continuous land frontier on the part of Russia was not intended. The United States claim, however, was also based largely on actual user and acquiescence, and on presumptions arising from notoriety and the public exercise of acts of ownership and right within the territory claimed. It was alleged, for instance, that in most of the maps published, not only in Great Britain, Canada, Russia, and the United States, but also in other countries, the boundary shown was that claimed by the United States, and that in this way it had come to be generally understood that the region was Russian, and not British. It was further claimed that both Russia, and thereafter the United States, had exercised acts of sovereignty and dominion over various parts of the territory now claimed. In particular, it was alleged that during the latter period of the Russian dominion the Hudson Bay Company had held the coast on lease from the Russian-American Company; that after the cession in 1867 the Indians living at the heads of the inlets had been governed by United States officers; that the United States land laws had been extended over the territory, and their revenue laws enforced there; that foreign vessels had been prohibited from loading at Chilkat; and that a post office and astronomical station had been established at the head of the Lynn Canal.

Ultimately, by a Convention of the 24th of January, 1903, it was agreed to submit the matters in dispute to the arbitration of a tribunal consisting of six impartial jurists, three to be appointed by each Power. It was also agreed that the tribunal should take into consideration any action of the several Governments, or of their respective representatives, preliminary or subsequent to the conclusion of the treaties of 1825 and 1867, so far as the same tended to show the original and effective understanding of the parties, with respect to the limits of their several territorial jurisdictions under such treaties.

The Arbitration. | In pursuance of this arrangement, Great Britain appointed Baron Alverstone, L.C.J., Sir L. A. Jetté, Lieut.-Governor of Quebec, and Mr. Aylesworth, K.C.; whilst

the United States appointed the Hon. E. Root, Secretary of War, Senator Lodge, and the Hon. G. Turner (*u*). The arbitration was duly held, and an award made on the 20th of October, 1903.

The questions submitted to the arbitrators, and their findings thereon, were as follows:

1. What is intended as the point of the commencement of the (boundary) line? As to this the arbitrators found unanimously that the point of commencement was Cape Muzon.

2. What channel is the Portland Channel? As to this the arbitrators held unanimously that the Portland Channel was the channel which runs from about 55° 56′ N. lat. and passes to the north of Pearse and Wales Islands; and also—although on this point only by a majority—that after passing to the north by Wales Island the Portland Channel was the channel between Wales Island and Sitklan Island, now called Tongas Channel.

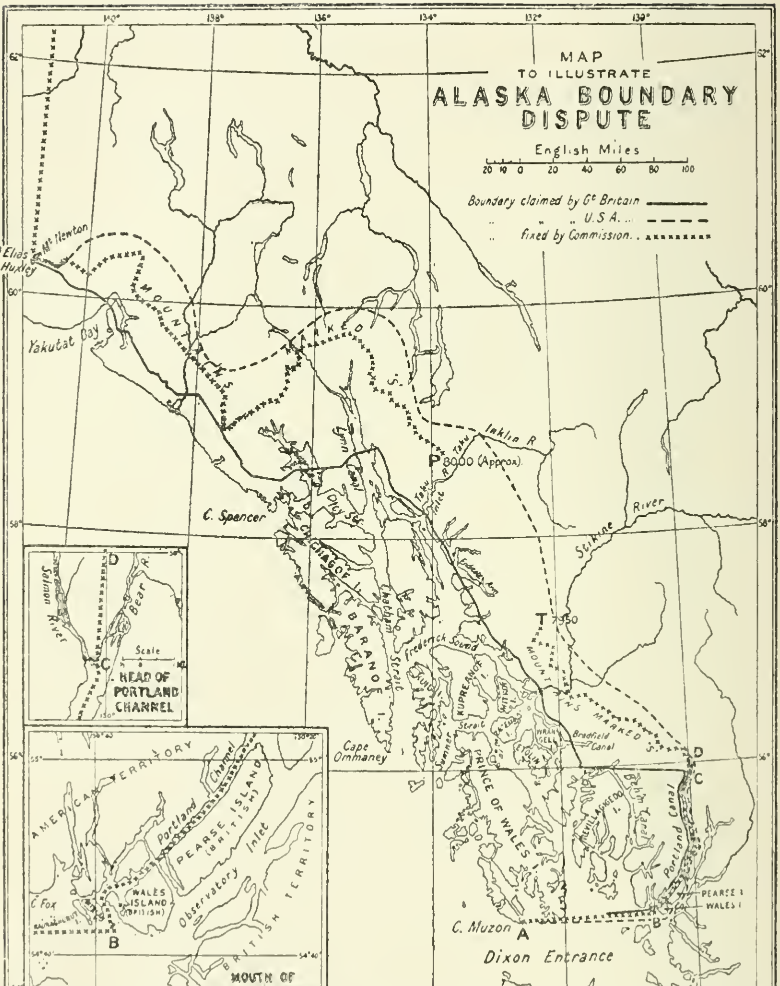
3. What course should the line take from the point of commencement to the entrance of the Portland Channel? As to this it was held, by a majority, that the course was that indicated on the accompanying map (*x*).

4. To what point on the 56th parallel is the line to be drawn from the head of the Portland Channel; and what course should it follow between these points? As to this it was held, by a majority, that the point to which the line was to be drawn from the head of the Portland Channel was a point on the 56th parallel, marked D on the accompanying map; and that the course which the line should follow was that drawn from C to D.

5. In extending the line of demarcation northward from the said point . . . was it the intention and meaning of the said Convention of 1825 that there should remain in the exclusive possession of Russia a continuous fringe or strip of coast on the mainland, not exceeding ten marine leagues in width, separating the British possessions from the bays, ports, inlets, havens, and waters of the ocean, and extending from the said point on the 56th parallel N. lat., northward to a point where such line of

(*u*) Some exception was taken by Canada to the American nominations, but Great Britain deemed it fruitless to urge these objections.

(*x*) See the line of crosses between points A and B at p. 104.



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demarcation intersected the 141st meridian W. long? This was answered in the affirmative, by a majority.

6. If the foregoing question should be in the negative, and in the event of the summit of such mountains proving to be in places more than ten marine leagues from the coast, should the width of the *lisière* which was to belong to Russia be measured (i) from the mainland on the coast of the ocean strictly so-called, along a line parallel thereto; or (ii) was it the intention and meaning of the said Convention that, where the mainland coast is indented by deep inlets forming part of the territorial waters of Russia, the width of the *lisière* was to be measured (a) from the line of the general direction of the mainland coast; or (b) from the line separating the waters of the ocean from the territorial waters of Russia; or (c) from the heads of the aforesaid inlets? In view of the answer to question 5, it was found unnecessary to deal with this question.

7. What (if any exist) are the mountains referred to as situated parallel to the coast; which mountains, when within ten marine leagues from the coast, are declared to form the eastern boundary? As to this it was held that the mountains marked S on the accompanying map are the mountains referred to so far as relates to the portion of the coast there indicated; but that between the points marked P on the north and T on the south, in the absence of further survey, the evidence was not sufficient to enable the tribunal to say what were the mountains parallel to the coast within the meaning of the treaty.

The effect of this award was to give the United States the larger part of the territory in question, although considerably less than had been claimed; and also to cut off Canada from the waters of the inlets.

The award was signed only by the United States commissioners and by Lord Alverstone.

The two Canadian commissioners refused to become parties to the award, on the ground, generally, that they did not regard the finding of the tribunal as having proceeded on any principles of a judicial character. More particularly, it was pointed out—(1) With respect to that part of the award which related to the Portland Channel—that this channel must either run north of

the islands, as claimed by Canada, or south, as claimed by the United States; that the line actually decided on had never even been suggested as possible in the course of the arguments used by counsel; and that the loss of Kaunaghunut and Sitklan Islands entirely destroyed the strategic value of Wales and Pearse Islands. (2) With respect to that part of the award which related to the interpretation of Art. 4—that inasmuch as it had been shown that there were mountains within the meaning of the terms used in the treaty, the only logical plan was to adopt as a boundary those mountains that lay in the immediate vicinity of the coast; and that the choice of the line actually decided on by the majority was a mere compromise between opposing and irreconcilable views.

Lord Alverstone, in his judgment said that, with respect to question 5, the treaty did not seem to him to contemplate the "mountain line" crossing inlets or bays of the sea (*y*); although, he added, that, if the terms of the treaty had entitled him to adopt the view presented by Great Britain, he would have found great difficulty in holding that anything had been done or omitted by or on behalf of that country that would have debarred her from claiming a strict fulfilment of the terms of the treaty.

The United States commissioners, in their judgment, with respect to question 5, gave the following reasons in support of the construction that the boundary should run round the heads of the inlets: (1) That for a period of sixty years after the treaty the official maps published by Russia, Great Britain, Canada, and the United States carried the line round the heads of the inlets, as did the cartographers of both those and other countries, in virtue of which it became a common understanding of mankind that the region was Russian, and it was on the basis of such an understanding that the United States acquired the territory from Russia; (2) that for more than sixty years after the treaty, Russia,

(*y*) It was this consideration, apparently, which prevented Lord Alverstone from deciding in favour of the line along the summits of the mountains fringing the sea, as claimed by Canada. Although Canada appears to have placed some reliance on Vancouver's maps, yet the charts published in 1798 and in 1799 or 1800 show a clearly defined range of mountains, which, as there represented, appear in every case to run round the heads of the inlets. Glacier Bay, however, is not shown; and at this point the mountains are depicted as crossing an area which is now known to be occupied by the bay.

and after her the United States, occupied, possessed, and governed the territory round the heads of the inlets without protest; whilst Great Britain neither exercised the rights nor discharged the duties of sovereignty within these limits, nor attempted, nor even suggested that she considered herself entitled, to do so. Under these circumstances, only the clearest case of mistake could warrant a change of construction after so long a period of acquiescence; and no such case of mistake had been made out before the tribunal.

It needs to be added that, by a Convention made between Great Britain and the United States, on the 21st of April, 1906 (*z*), provision was made for the appointment of a joint commission for the purpose of determining and marking by intervisible landmarks that portion of the boundary line which, under the Convention of 1825, had been defined as following the 141st meridian, from its point of intersection with a certain line drawn parallel to the coast to the Frozen Ocean.

This case serves to illustrate the nature of the difficulties that are likely to arise in the ascertainment of the boundaries of State territory, and the methods and principles appropriate to their settlement. It is true that the various issues submitted to the arbitrators turned strictly on the question of the interpretation and effect of the treaties of 1825 and 1867. But it was agreed, as a term of the reference, that the arbitrators should be at liberty to take into consideration the acts of the respective Governments, whether preliminary to or after the treaties in question. And this provision, although it purported to be merely an aid to interpretation, was in fact utilised—both in argument and apparently in the decision of some of the arbitrators—for the purpose of importing into the settlement of the controversy certain principles or presumptions in relation to the ownership of State territory, which appear to be of general application. These may be stated shortly as follows: (1) If a State claims territory as of right, its public acts must be such as to bear out its claim. This principle appears to have been admitted by both parties, by virtue of the agreement embodied in the Convention of 1903; and although adopted here only in aid of the construction of a particular treaty, it appears in fact to have a wider application, and to constitute an essential feature in the law of occupation. (2) Notoriety and reputation of ownership may, in cases of doubt, be taken into account in adjudicating on questions of title. This principle finds expression in the contention put forward on behalf of the United States and adopted by the American commissioners—that the fact of the boundary as claimed by the United

(*z*) Ratified 16th August, 1906; see Hertslet, Com. Tr. vol. xxiv. (1907)

States having been uniformly published in official and other maps created a presumption of title in favour of that country, or, as it was put, showed that the "practical" interpretation of the treaty was in favour of the United States. And even though the conclusion deduced from the facts in this particular case may not have been warranted, yet the principle itself appears to be sound, and to rest on the same grounds of reason and convenience as the doctrine of reputed ownership in municipal law. The United States, for instance, might be said to have purchased from Russia on the strength of her reputed ownership of the territory in question. Even in English law this doctrine, although now known as a part of the law of bankruptcy, is at bottom only a branch of the wider principle of estoppel. (3) Actual control and possession, when continued over a long period, will afford a presumption of ownership. This again finds expression both in the American contention and in one of the reasons given for their award by the American commissioners, viz., that inasmuch as for more than sixty years Russia, and, in succession to her, the United States, had without protest on the part of Great Britain possessed and governed the territory in question, only the clearest evidence of mistake could warrant a change of construction after so long a period of acquiescence. And this principle, again, although put forward in the present case only in aid of the construction of the treaty, is, as will be seen hereafter, really the foundation of the modern law of prescription (*a*).

GENERAL NOTES.—*State Property in Municipal and International Law.*—From the point of view of municipal law, the State, or, in monarchical States, the Sovereign on its behalf, is commonly invested with two kinds of proprietary right. In the first place, the State may, either in its own right as a juristic person, or through its Sovereign, hold property like any other person, and subject to the conditions of municipal law; either reserving to itself both the disposition and use of such property, as in the case of a public building used by the administration, or reserving the disposition but conceding a right of user to the public, as in the case of a State park or public reserve. In the second place, the State is invested with a right of "eminent domain," which is strictly not so much a right of property as a right of controlling all property found within its limits, even though otherwise vested in individuals or corporations, and disposing of the same in the interest of the community at large. But in international law, and in relation to other States, the State, as representing the organised community, is regarded not only as having a power of disposition over the whole of the national territory, but also as the representative owner of both the national territory and all other property found within its limits. And this conception appears to be both logical and convenient: logical for the reason that international law is strictly concerned only with the relation of States; and convenient for the reason that the State is, on this view, better able to secure the proprietary rights of its citizens as against other States, all questions of individual right and

(*a*) See p. 112, *infra*.

title being merged in that of the State to which the owners belong (*b*). And although in monarchical States the habit still obtains of attributing this international property to the Sovereign, this right, as has already been pointed out, really inheres in the State itself, considered as an international person (*c*).

The State Territory.—The territory of a State comprises "the whole area, whether of land or water, included within definite boundaries, as ascertained by occupation, prescription, or treaty; together with such inhabited or uninhabited lands as are considered to have become attendant on the ascertained territory through occupation or accretion" (*d*). It will also include such parts of the sea as are immediately adjacent to or attendant on such territory; these being known as "territorial waters" (*e*). It will also be presumed to include such adjacent islands as are either situated within a distance of three miles from the coast, or are otherwise to be regarded as natural appendages of the territory (*f*). The extent of the "territorial waters" of a State, and the right of "innocent passage" to which they are in some cases subject, will be considered hereafter. The progress recently made in the art of aerial navigation and the use of aircraft in war have opened up new questions as to the rights and obligations of a State with respect to the use of its "territorial air." By Art. 1 of the Air Navigation Convention, 1919, every State has "complete and exclusive sovereignty" in the air spaces above its territory and territorial waters (*g*).

The Boundaries of State Territory.—With respect to the boundaries of State territory, these may be ascertained by reference either to lines of latitude or longitude, or lines connecting natural or artificial points, or by reference to natural features, such as mountains, rivers, lakes, or seas (*h*). Where the boundary is constituted by a mountain range, the frontier or dividing line will be presumed to follow the water divide. If it consists of a river, then the dividing line will be presumed to follow the middle of the river, unless the river be navigable, in which case it will follow the middle of its deepest channel (*Thalweg*). But such rights are only presumptive rights, and are liable to be displaced by other evidence of title (*i*). Within these limits the territorial Power is presumed to have exclusive authority

(*b*) Hall, 46; but see also Westlake, i. 84.

(*c*) *Supra*, p. 79.

(*d*) Hall, 103.

(*e*) *Infra*, p. 135 *et seq.*

(*f*) *The Anna* (5 Rob. 373); Westlake, i. 116 *et seq.*

(*g*) See Bellot, Sovereignty of The Air, Inter, Law Notes, December, 1918; Hazeltine, Development of International Air Law, Report of the 29th Conference of the International Law Association, 1920. The importance of this question in time of war will be considered hereafter, in connection with the subjects of war and neutrality.

(*h*) Thus by the treaty of 1783 the boundary between the United States and British North America was drawn through the middle of Lakes Ontario, Erie, and Huron.

(*i*) Hall, 124; Taylor, p. 298 *et seq.*; and, for an interesting case on river boundaries, *Buttenuth* v. *St. Louis Bridge Co.* (123 Ill. 535; Scott, p. 121; *Island of Timor Case*, Scott's Hague Reports, p. 354.

and jurisdiction (*k*). The title to such territory may be based either on occupation, prescription, conquest, accretion, or cession.

Interests falling short of Ownership.—In addition to territory of which it is internationally owner, a State may also acquire, either over the territory of other States or over areas not yet appropriated by any civilised Power, certain rights which fall short of ownership. Of these the more important examples are the acquisition of a usufruct by lease; the acquisition of a temporary or provisional right of occupation by conquest or convention; the acquisition of rights in the nature of international servitudes, by convention or prescription; and the acquisition of certain conventional rights, by the establishment of "protectorates" or "spheres of influence" (*l*); all of which will be considered hereafter.

Occupation.—Territory not belonging to any civilised State may be acquired by occupation. The importance of occupation as a present method of acquisition has necessarily decreased in proportion to the gradual absorption by civilised States of all available areas; but questions as to its validity or effect still arise between States in relation to past acts of occupation. The conditions under which a valid title may be acquired by occupation would seem in the main to be two: (1) There must be some formal act of appropriation on behalf of the occupying State, either done by its authority or subsequently adopted by it, and either publicly notified or done under the circumstances reasonably sufficient to bring it under the notice of other States (*m*). (2) Such act of appropriation must subsequently be followed by actual settlement and by the establishment of an effective control by the occupant over the area in question. The original act of appropriation will in itself confer an inchoate title; but unless followed within reasonable time by actual settlement and control, the occupation will not be regarded as effective, or as sufficient to exclude the claims of other States. Nor will the mere fact of discovery, without actual appropriation and settlement, now confer any title to territory (*n*). As regards territory adjacent to the coasts of the continent of Africa, however, the earlier customary law has now been replaced by conventional rules. By the declaration adopted by the parties to the Berlin Conference, 1885 (*o*), it was agreed, in effect: (1) that any signatory Power occupying territory or establishing a protectorate on the coasts of the African continent should expressly notify this fact to other signatories, with a view to enabling them to make good any claims of their own; and (2) that it should be regarded as incumbent on any signatory Power to ensure the establishment of its authority in any region occupied by it, sufficient to protect existing rights, "and, as the case might be, freedom of trade and transit under the conditions agreed upon" (*p*). Hence, within these limits, there must now be express

(*k*) As to the exceptions to this principle, see pp. 232, 258, *infra*.

(*l*) As to the precise nature of these interests, see pp. 115, 116, *infra*.

(*m*) *The Fama* (5 Rob. 106).

(*n*) As to the earlier history of discovery as a ground of title, see Westlake, i. 99; and as to the effect still attributable to discovery and appropriation, see Hall, 104.

(*o*) *Supra*, p. 12; Hall, 116.

(*p*) General Act, Berlin Conference, 1885, Arts. 34 and 35. For a discussion as to the effect of these provisions, and especially as to their effect on native rights, see Westlake, i. 105.

notification, and seemingly also a sufficient identification of the area claimed, as well as a sufficient establishment not merely of a general control, but of administrative authority on the part of the occupying State (*q*) Although these rules are strictly applicable only to territory on the coast, there seems a disposition to extend them beyond the limits indicated, and it is not improbable that they may gradually become a part of the general customary law, or be made generally applicable by express agreement (*r*).

Area affected by Occupation.—With respect to the precise extent of territory acquired by an occupation admittedly valid, there has naturally been a disposition by occupants to extend this to the utmost limit; and in aid of such pretensions a number of artificial rules have been put forward both by the text-writers and by States. So, it has been contended that a valid occupation of any extensive portion of the sea-coast will carry a title to all interior country drained by rivers emptying into the sea within such line of coast, as far as the water-shed (*s*); or even that a valid occupation of the coast will carry all "back country" to which the coast gives access (*t*). Again, it has been contended that where there has been an occupation of territory by one State and an occupation of contiguous territory by another, then the boundary should be determined by a line drawn midway between the last posts on either side (*u*). In truth, however, and in so far as the matter can be stated concisely, it would seem that there is only one governing rule, and that is that the area of occupation depends on effective control; whilst the question of the effectiveness and the range of such control would appear to depend largely on the special circumstances of each particular case. Hence, in determining the area affected by occupation, some regard must be had to the question of the local configuration of the country, including its geographical unity (*x*), the question of access and means of communication, the question of the character and extent of the existing population, and the requirements of security; although it does not appear possible to formulate any precise rules on the subject (*y*). But in view of modern conditions, disputes on this subject will probably become less frequent in the future.

Abandonment of Occupied Territory.—If territory once occupied is abandoned, it will again become open to occupation by other States. At the same time, if there has once been a definitive appropriation, the title accruing therefrom will not only be capable of being kept alive by an exercise of authority, less effectual than that required to establish an original claim; but even if there should be a temporary withdrawal, or even if the exercise of all authority should be tem-

(*q*) The obligation to ensure the maintenance of authority is, it will be noticed, strictly only applied to the case of occupation; but in fact it would seem to apply also to protectorates.

(*r*) Hall, 117; Oppenheim, i. 386.

(*s*) But see Hall, 106.

(*t*) For an examination of the doctrine of *hinterland*, Westlake, i. 114.

(*u*) Taylor, 131; Hall, 108.

(*x*) A single act of occupation, for instance, would suffice for an island of moderate dimensions.

(*y*) On the subject generally, Westlake, i. 111; Hall, 106; Oppenheim, i. 386.

porarily relinquished, the territory will be deemed to be open to resumption or recovery within a reasonable time, having regard to the circumstances of the withdrawal (*z*).

Prescription.—Another mode of acquiring State territory is prescription. This is a principle both of international and municipal law, in virtue of which a title is presumed to be acquired by long possession and user. It applies, moreover, not only to the acquisition of territory, but also to other rights; and rests on the necessity of promoting stability in international affairs, and of checking unnecessary disturbance, and excluding stale claims. Its recognition as a legal principle does not, of course, exclude political changes or the operation of other titles, including title by conquest or secession. It merely means that in international as in municipal law rights may be acquired or affirmed by long user and acquiescence, although capable, like other rights, of being abrogated or displaced (*a*). In this character prescription appears to have the sanction both of international usage and of judicial authority. Thus, in *The Direct United States Cable Co.* v. *The Anglo-American Telegraph Co.* (L. R. 2 App. Cas. 394) it was stated by the Privy Council that inasmuch as Great Britain had in fact long exercised dominion over Conception Bay in Newfoundland, and inasmuch as this had been acquiesced in by other nations, so as to show an exclusive occupation by that Power, that bay must be deemed to have become by prescription a part of the territory of Great Britain. Again, in the treaty of 1897, by which the boundary dispute between Great Britain and Venezuela was referred to arbitration, it was laid down as a rule for the guidance of the arbitrators (1) that an adverse holding for fifty years should confer a good title; and (2) that if the territory claimed by one Power should be found to be occupied by citizens of another, then such effect should be attributed to this occupation as reason and justice, or the rules of international law, or the circumstances of the case, might, in the opinion of the arbitrators, require (*b*). At the same time, the term required in order to establish a title by prescription appears to be altogether undefined. Some writers suggest that possession or user must have existed from time immemorial; others only that it should have existed for a reasonable time; others that a period of fifty years should be fixed by international arrangement. So far, it is not possible to state the rule more definitely than that possession or user must have continued for a reasonable time, having regard to the longer life of nations, the nature of the right claimed, and the circumstances attending it in each particular case. And the same considerations would probably attach to the application of the principle of desuetude in international affairs (*c*).

Other Modes of Acquisition.—Other modes of acquiring territory comprise cession, conquest, and accretion. A cession of territory may take place by voluntary arrangement, and, in this case, either by way of sale, gift, or exchange. So in 1867 Alaska was sold by Russia to

(*z*) Hall, 118, where the cases of Santa Lucia and Delagoa Bay are discussed.

(*a*) For an interesting note on this aspect of the subject, Hall, 122 *n*.

(*b*) For a short account of this arbitration, Hall, 114.

(*c*) On the subject generally, Hall, 120; Westlake, i. 92.

the United States; in 1890 Heligoland was ceded by Great Britain to Germany; and in 1899 the Caroline Islands were sold by Spain to Germany. Or a cession may be made as the result of constraint, imposed by war; the title in such case being referable to cession, and not to conquest. So in 1866 Venetia was ceded by Austria to France nominally as a gift, but really as the outcome of war and for transfer to Italy; and in 1871 Alsace and Lorraine were ceded by France to Germany, and re-ceded by Germany to France in 1919. The consequences of cession have already been described (*d*). The subject of title by conquest will be considered later (*e*). Accretion is a title borrowed from the Roman law; and applies where new land is formed by the action of water either impinging on existing territory or so adjacent thereto as to constitute a natural appendage (*f*).

Leases and Pledges of Territory.—The lease or cession in usufruct of State territory for a term of years is apparently a modern device, and has been applied mainly, although not exclusively, to the territory of China. Thus, in 1898 the port of Kiaochau was ceded by China to Germany for a term of ninety-nine years, together with a surrounding tract and some important concessions in the adjacent territory. Again, in 1898 Port Arthur and Talienwan (Dalny) were ceded in usufruct by China to Russia for a term of twenty-five years; although as the result of the Russo-Japanese War, and by the Treaty of Portsmouth, 1905, both these areas have now been transferred to Japan, the consent of China having been accorded by the Treaty of Pekin, 1905. In 1898, again, Wei-hai-wei, together with a small strip of the island of Hongkong, was ceded by China to Great Britain, for so long a period as Port Arthur should remain in the possession of Russia; whilst China at the same time undertook not to lease or cede any part of the Yang-tse-kiang region to other Powers, as well as to discharge certain other obligations with respect to the control of the customs, the opening up of new treaty ports, and the opening up of the inland waters of China. In the same year China also granted to France a lease of a bay on the south coast of China; and at the same time agreed not to alienate to any other Power any of the territories bordering on Tonquin (*g*). As to the effect of such international leases, it would seem strictly that, whilst conferring rights of user and enjoyment on the lessee, yet the territory remains subject to the sovereignty of the lessor, and subject also to any prior obligations specifically attaching thereto. The reservation of sovereignty, moreover, might also be said to imply the obligation on the part of the lessee not to use the territory to the prejudice of the lessor. But as a matter of fact such transactions are for the most part only alienations in disguise; this particular form being adopted for the most part with a view to sparing the susceptibilities of the ceding State (*h*). Apart from the leasing of State

(*d*) *Supra*, p. 75.

(*e*) *Infra*, vol. ii.

(*f*) See *The Anna* (5 Rob. 373); and as to the effect of accretion or avulsion as regards river boundaries, see *Cooley* v. *Golden* (52 Missouri App. 52; Scott, p. 129); and generally, Hall, 123.

(*g*) Other instances will be found in Westlake, i. 133; whilst for an interesting controversy arising out of a proposed lease in perpetuity, see Hall, 91 *n*.

(*h*) On the subject generally see Westlake, i. 133.

territory, there are also cases to be found where one State has hypothecated a part of its territory to another State as security for the payment of a debt; but the only case in which such a lien over State territory would now be likely to arise would be the case where one belligerent continued in occupation of territory belonging to the other belligerent after the conclusion of peace, as security for the payment of an indemnity, of which the occupation of the left bank of the Rhine and bridge-heads by the Allied and Associated Powers is an example (*i*).

Servitudes and Restrictive Covenants.—Apart from the grant of ownership or possession, one State may grant to another certain rights over or in relation to its territory, which confer on the grantee a strictly defined right of user, or impose on the grantor some definite restraint on user in favour of the grantee. Such rights, when they are in their nature real as distinct from personal, and of such a kind as would on the principles previously indicated be binding on the successor in cases of cession or annexation (*k*), are commonly styled international servitudes (*l*). Hall, indeed, is of opinion that such rights, being merely the result of compact, cannot be regarded as servitudes, and that the only instance of an international servitude of any importance is the right of innocent passage (*m*). But, apart from the question whether the right of innocent passage should not itself be regarded as a natural or inherent right rather than as a servitude, there seems no reason, having regard to the fact that such grants are within the competence of a State and do create real rights (*n*), why they should not be regarded as servitudes. But whether the term "servitude" be appropriate or not, rights of this kind are both admissible on principle and existent in fact. So, one State may concede to another a right of transit, for various purposes, through its territory; although a concession of a right of passage for troops in time of war would probably not now be regarded as permissible, or as consistent with neutrality in the event of war (*o*). Thus, by a treaty entered into in 1891 between Great Britain and Portugal it was agreed (*inter alia*) that there should be freedom of passage for the subjects and goods of both parties across the Zambesi and through certain specified areas. In 1899, during the South African War, Great Britain, by virtue of this treaty, claimed a right of passage over Portuguese territory for the British Colonial forces that had been landed at Beira; and this was in fact conceded by Portugal. But, apart from the question of whether the grant of an overland passage from Beira to the territory of the South African

(*i*) For cases of seizure or hypothecation of customs revenue to satisfy international claims, see pp. 351, 353, *infra*.

(*k*) *Supra*, p. 75.

(*l*) Such rights must be distinguished from those fundamental restrictions on the user of State territory which accrue not from treaty or convention, but under the law of nations itself; such as restrictions which forbid the use of State territory in aid of one belligerent as against another in the course of a war in which the territorial Power professes to be neutral.

(*m*) Hall, 166; and *infra*, p. 153.

(*n*) The treaty or convention, in international law, availing equally for the creation of *jura in rem* as *jura in personam*, p. 339, *infra*.

(*o*) See note (*l*), *supra*.

Republic was within the terms of the treaty, there can be little doubt that if the result of the war had been other than it was, reparation would have been exacted from Portugal, as for a breach of neutrality. So again, one State may concede to another a right of fishery, either exclusive or concurrent, within its territorial waters. Thus, on the cession of Newfoundland by France to Great Britain in 1713, certain rights of fishery, and other rights incidental thereto, were conceded to France, along certain parts of the coast; and these rights were exercised until surrendered under the stipulations of the Anglo-French agreement of 1904 (*p*). Again, by treaties of 1783 and 1818, certain rights of fishery in the territorial waters adjoining the coasts of British North America were conceded to, or, as the United States contended, reserved by, the United States (*q*). Somewhat analogous are the restrictive covenants occasionally entered into, whereby one State agrees, in favour of some other State, either not to dispose of or not to fortify certain parts of its territory. So, as has been already pointed out, China in 1898 agreed with Great Britain not to cede or lease any part of the Yang-tse-kiang region to any other Power; whilst in the same year she also agreed with France not to alienate to any other Power any of the territories bordering on Tonquin (*r*).

Protectorates.—What has been aptly called a "colonial protectorate" (*s*) is a form of control, falling short of full sovereignty, assumed by a civilised State over the territory of an uncivilised or semi-civilised community. The territory comprised in such a "protectorate" differs from territory acquired by occupation or annexation, because it does not strictly form an integral part of the territory of the protecting Power; whilst the native inhabitants, although entitled to protection, do not strictly become its subjects. On the other hand, such a protectorate differs from the "State protectorate" already described, because it is not exercised over a State or organised community, but only over territory occupied by barbarous or civilised tribes; and also because it is generally only a prelude to ultimate absorption. At the same time, it is not always easy to draw the line between the two. In the event of the protecting Power being involved in war, the protected territory would probably be regarded as hostile by the other belligerent; whilst in the event of a war between two other Powers it would probably be regarded as entailing the same obligations as those which usually attach to neutral territory proper. Such a protectorate is commonly established by compact with the chiefs of the tribes inhabiting the region in question; but it may be assumed without any such agreement; although in either case its assumption ought to be brought to the notice of other Powers. Its effect is to debar other States from either acquiring settlements, or entering into political relations with the native tribes, within the protected territory. Although such protectorates are not within the express provisions of Art. 35 of the General Act of the Berlin Conference, 1885 (*t*), yet their establishment would seem to entail the

(*p*) *Infra*, p. 166.
(*q*) *Infra*, pp. 158 *et seq.*
(*r*) *Supra*, p. 113.
(*s*) See Westlake, i. 119.
(*t*) *Supra*, p. 110.

responsibility of providing a reasonable measure of domestic control, and a reasonable amount of security (*u*) as regards the persons and property of subjects of other States lawfully entering such territory. Such control is in some cases exercised directly by the protecting Power; and in other cases through the agency of a chartered company. Great Britain has now established a great variety of these protectorates (*x*), of which the more important are the East Africa Protectorate, British Central Africa, Uganda, Somaliland, Swaziland, Pondoland, Northern and Southern Nigeria, North-Western, North-Eastern, and Southern Rhodesia (*y*), Brunei, Sarawak, North Borneo (*z*), and Zanzibar. France has also established protectorates over the French Somali coast, and the territories of Senegambia and the Niger. The system of internal administration adopted in colonial protectorates differs greatly. French protectorates appear to be scarcely distinguishable from ordinary colonies, and differ little in their system of administration, jurisdiction being assumed over foreigners and nationals alike (*a*). Even in British protectorates the internal administration varies greatly. In some, legislative and judicial powers have been assumed by Order in Council (*b*) in varying degrees, such powers being exercised either directly by the Crown or sometimes through the medium of a chartered company (*c*); in some cases this jurisdiction is expressly extended to British subjects, natives, and foreigners alike (*d*); whilst in other cases its application to foreigners appears to have been left undetermined (*e*). In others, the internal administration is left almost entirely in the hands of the native or local authority; the protecting Power being represented only by a Commissioner or Consul-General, whilst jurisdiction, in cases where British subjects are concerned, is exercised by consular courts (*f*).

"*Spheres of Influence*" (*g*).—A sphere of influence, so far as it can be said to possess a definite meaning, indicates a region, generally inhabited by races of inferior civilisation, over which a State seeks, by compact with some other State or States that might otherwise compete with it, to secure to itself an exclusive right of making future acquisitions of territory (*h*), and, generally, also, the direction and control of the native inhabitants. Such compacts are intended to guard against future conflicts that might otherwise arise; and are

(*u*) Reasonable, that is, having regard to the situation of the country and the condition of the inhabitants.

(*x*) A classified list will be found in Ridge's Constitutional Law, p. 382.

(*y*) This is administered by the British South Africa Company.

(*z*) This is administered by the North Borneo Company.

(*a*) Hall, 128 *n*.

(*b*) *Infra*, p. 257.

(*c*) As in East Africa; and in Southern and North-Eastern Rhodesia respectively.

(*d*) As in British East Africa and North-Western Rhodesia.

(*e*) As in British Central Africa.

(*f*) As in the case of Zanzibar. On the subject generally, Hall, Foreign Jurisdiction, 211; Westlake, i. 119; Taylor, 270.

(*g*) This is the nomenclature usually adopted; although it would really seem that what are here called "spheres of influence" might, more appropriately, be styled "spheres of interest"; and that what are hereafter called "spheres of interest" might, more appropriately, be styled "spheres of influence."

(*h*) Whether by annexation or by the establishment of protectorates; Hall, Foreign Jurisdiction, 228.

usually the result of a bargain under which some special areas of interest are allotted as between the respective parties to the arrangement. Such spheres of influence were established: (1) As between Great Britain and Germany, (a) with respect to various parts of the African continent, by agreements made in 1885, 1886, 1890, and 1901 (*i*);—(b) with respect to New Guinea, by an agreement made in 1885 (*k*);—and (c) with respect to the Western Pacific, by a declaration of 1886 (*l*). (2) As between Great Britain and France, with respect to certain parts of Africa, by declaration and agreements made in 1890, 1891, and 1898 (*m*). (3) As between Great Britain and Portugal, with respect to certain parts of the African continent, by agreements made in 1890, 1891, 1893, and 1896 (*n*). (4) As between Great Britain and Italy, with respect to certain parts of East Africa, by protocols of 1891 and 1894 (*o*). (5) As between Great Britain and the Congo Free State, with respect to certain parts of East and Central Africa, by an agreement of 1894 (*p*). (6) As between Great Britain and Russia, with respect to the region of the Pamirs, by an agreement made in 1895 (*q*). But such arrangements confer no territorial rights and impose no responsibility on the State in whose favour they are created, in relation to non-contracting Powers; and although considerations of comity or fear may induce the latter to respect such arrangements, yet this is a matter of policy, and not of law. Nor can such compacts, even if acquiesced in by other States, give rise to any prescriptive right (*r*).

"*Spheres of Interest.*"—Somewhat different as regards their objects are those agreements which allocate certain areas already occupied by States more or less civilised as spheres of influence or interest between Powers, having already interests adjacent thereto; although the line between these and the former is sometimes difficult to draw. Such agreements now exist: (1) As between Great Britain and France, (a) with respect to Siam, by a declaration made in 1896 (*s*); and (b) with respect to Egypt and Morocco, by an agreement of 1904 (*t*).

(*i*) These relate, *inter alia*, to the coast of Guinea, the coast between Natal and Delagoa Bay, East Africa, South-West Africa, and the region between Lakes Nyassa and Tanganyika; see Brit. and For. State Papers, vol. 76, p. 772; vol. 77, pp. 1049, 1130; vol. 82, p. 35; and vol. 95, p. 78. By the Peace Treaty of Versailles, 1919, Germany renounced in favour of the Allied and Associated Powers all her rights and titles over her oversea possessions. (Articles 119-127).

(*k*) Brit. and For. State Papers, vol. 76, p. 66.

(*l*) *Ibid.* vol. 77, p. 42; and as to an alteration in 1904 under a convention and declaration of 1899, see Hertslet, Com. Treaties, vol. 21, p. 1178; vol. 24, p. 474.

(*m*) These relate to North Africa, the Upper Niger, and the region east of the Niger; see Brit. and For. State Papers, vol. 82, p. 89; vol. 83, p. 43; vol. 91, pp. 38 and 55.

(*n*) These relate to the Zambesi and Eastern and Central Africa; Brit. and For. State Papers, vol. 82, p. 337; vol. 83, p. 27; vol. 85, p. 65; vol. 88, p. 5.

(*o*) Brit. and For. State Papers, vol. 83, p. 19; vol. 86, p. 55.

(*p*) *Ibid.* vol. 86, p. 19.

(*q*) *Ibid.* vol. 87, p. 15.

(*r*) On the subject generally, Hall, 130; Westlake, i. 139; Taylor, 271.

(*s*) Brit. and For. State Papers, vol. 88, p. 13; Hertslet, Com. Treaties, vol. 24, p. 391.

(*t*) British Parl. Papers, 1905, ciii. 265.

(2) As between Great Britain and Russia, (a) with respect to certain parts of China, by an agreement made in 1899 (*u*); and (b) with respect to Persia, by a convention of 1907, which defines the British sphere of interest as being to the east of a line beginning on the Afghan border and ending at Bander Abbas (Art. 2). But such arrangements, again, are merely political, and involve no legal consequences other than those arising out of the compact.

The Occupation and Administration by One State of Territory belonging to Another.—Occasionally, too, we find territory which is subject to the joint sovereignty or *condominium* of two or more Powers. So, under a Convention of 1899, the Soudan has been recognised as being subject to the *condominium* of Great Britain and Egypt (*x*). There are also cases in which territory, while remaining nominally subject to the sovereignty and dominion of one State, is nevertheless occupied and administered by another. Thus, in 1878 the island of Cyprus was assigned by Turkey to Great Britain, to be occupied and administered by the latter Power, subject to certain reservations in favour of the Sultan, to the payment of £92,800 out of the net revenue (*y*), and to the formal sovereignty of Turkey. Again, after 1878 the Turkish provinces of Bosnia and Herzegovina were for some time occupied and administered by Austria-Hungary, subject to the sovereignty of Turkey (*z*); but in 1908 this arrangement was repudiated, and the provinces formally annexed by the former Power. By an agreement concluded in February, 1909, Turkey agreed to renounce her rights over these provinces in consideration of the payment of an indemnity, the recovery and control over Novi Bazar, and certain other concessions on the part of Austria-Hungary. The annexation was also recognised by Great Britain, France, Germany, Italy, and Russia. By a tripartite arrangement subsequently made between Turkey, Bulgaria, and Russia, it was agreed that Bulgaria should pay to Russia a sum of £3,280,000 in satisfaction of various Turkish claims (including her liability on account of the Turkish debt), and that Russia should thereupon cancel a portion (£T.5,250,000) of the debt owing to her by Turkey, in respect of the war indemnity of 1878. By the Peace Treaty of St. Germain-en-Laye, of September 10, 1919, Austria renounced all rights and title over these territories in favour of the Serb-Croat-Slovene State (*a*). The international effect of these anomalous forms of control has already been indicated (*b*). By international arrangement, also, the maintenance of internal peace and order in one country is sometimes committed to the Government of another country, but without any right of occupation. Thus, as the result of the Algeciras Conference, 1906, at which twelve States were represented (including both Great Britain and the United States, although the latter Power did not vote), it was agreed that for five years France should officer the police of four, and Spain of two, of the ports of Morocco; that Spain and

(*u*) Including the basin of the Yangtse river; see Hertslet, Com. Treaties, vol. 21, p. 798.

(*x*) *Supra*, p. 12.

(*y*) Holland, European Concert, 354.

(*z*) Both these cases are fully discussed in Westlake, i. 135.

(*a*) Treaty Ser. No. 11 (1919) [Cmd. 400].

(*b*) *Supra*, pp. 56-61.

France together should officer the police of Tangier and Casablanca, subject to an inspector to be appointed by a third Power; but that the police officers so appointed should be responsible both to the Sultan and to the Diplomatic Corps. Other articles relate to the control of the State Bank, the prohibition of contraband, and the opening up of the ports to other States.

THE NAVIGABLE RIVERS OF A STATE; INTER-STATE RIVERS.

CONTROVERSY BETWEEN GREAT BRITAIN AND THE UNITED STATES OF AMERICA WITH RESPECT TO THE NAVIGATION OF THE RIVER ST. LAWRENCE.

[1826; Phillimore, i. 242 *et seq.*; Wharton, Digest, i. § 30.]

Controversy.] The river St. Lawrence has a course of some 750 miles, extending from Lake Ontario to the Atlantic Ocean. The northern shores, both of the river and of the lake from which it issues, are wholly within the territory of Great Britain. The southern shores of the lake, together with the southern shores of the river up to a certain point at which the northern boundary of the United States impinges on the river (lat. 45° N.) are within the territory of the latter country; whilst the southern shores of the remainder of the river, together with the mouth, are within the territory of Great Britain. In 1826 the United States of America put forward a claim to the free navigation of the river throughout its whole course, including those portions which are wholly within the territory of Great Britain. On behalf of this claim it was urged, in effect, that there was a natural right on the part of the inhabitants of the upper banks of a navigable river that they should have free communication with the sea. The arguments on this point were much the same as those which had been previously urged in the negotiations with Spain respecting the navigation of the Mississippi. Here it had been said that, even though the lower portions of that river were within the exclusive control of another State, yet there was a right on the part of upper riparian dwellers to "innocent passage" through the lower portions of the river for the purpose of reaching the

sea; and that even though this right had been called an "imperfect right," yet it was nevertheless a right, the denial of which would give a title to redress (*c*). It was also pointed out that Great Britain had herself put forward a similar claim with respect to the navigation of the Mississippi when she had occupied the position of an upper riparian State. Stress was also laid on the importance of the claim as affording to the great and growing population inhabiting the banks on the south side of the river and lakes their only natural outlet to the ocean. It was finally pointed out that the claim was greatly strengthened by the fact that this right of navigation had, prior to the separation from the Mother Country, been the property of all British subjects inhabiting the continent, and had been wrested from France by the common exertions of the Mother Country and her colonies in the war of 1756. The claim, moreover, whilst necessary to the United States, was not one which was likely to prove injurious to Great Britain.

To this contention Great Britain replied, in effect, that such a claim was not warranted either by the principles or practice of the law of nations. The liberty of passage by one nation through the dominions of another was, according to the most eminent writers on international law, a qualified and occasional exception to the paramount rights of property. It was, at the most, only an "imperfect right." The fact that such a right had been conceded by treaty, as regards certain of the great European rivers, in itself went to show that such a right was not a natural right, but one that required to be established by convention. It was further pointed out that such a right of passage, once conceded, must hold good, not only for the purposes of trade in time of peace, but also for hostile purposes in time of war. Finally, it was urged that the United States could not consistently with principle put forward such a claim without being prepared to grant reciprocal rights, in favour of British subjects, to the navigation of the Mississippi and the Hudson, to which access might be had from Canada by land carriage or by canal.

To this argument the United States replied that the St. Lawrence river ought really to be regarded as a "strait" con-

(*c*) Wheaton (Boyd), pp. 299 and 300.

necting the ocean with the great inland lakes, the shores of which were inhabited alike by subjects of the United States and Great Britain, and that such a natural channel ought to be equally available for passage by both. There was, moreover, a clear distinction between passage over land and passage over water, for the reason that water passage involved no detriment or inconvenience to the country to which the shores belonged, whilst land passage might be fraught with both. The United States would not shrink from applying the same principle to American rivers, in the event of any connection being effected between them and Upper Canada similar to that which existed between the United States and the St. Lawrence. At the same time the navigation of a river flowing wholly through the territory of one State could not be regarded as governed by the same principles as a river which flowed through the territory of two or more different States. Finally, it was contended that the fact that the free navigation of rivers had been made a matter of convention did not disprove that such a right of navigation was in itself a natural right, which had been restored to its proper position by treaty.

Settlement.] The controversy was provisionally settled by the reciprocity treaty of 1854, which, in effect, conceded to the citizens and inhabitants of the United States a right of navigating the river St. Lawrence and the canals of Canada as a means of communication between the Great Lakes and the Atlantic Ocean, subject to the same tolls and assessments as those exacted from British subjects. A similar right of navigation was conferred on British subjects with respect to Lake Michigan, together with the use of the State canals. But this arrangement was made terminable on notice, and was in fact terminated by the United States, in 1866, under a resolution of Congress adopted in 1865. The matter was, however, finally settled by the Treaty of Washington, 1871. This treaty, which is still in force, provides that the navigation of the river St. Lawrence, ascending and descending from the 45th parallel of North latitude, where it ceases to form the boundary between the two countries, from, to, and into the sea, shall for ever remain free and open for the purposes of commerce to the citizens of the United States, subject

to any laws and regulations of Great Britain or of the Dominion of Canada not inconsistent with such privilege of free navigation. The treaty concedes similar rights to British subjects with respect to the St. Clair Flats Canal, and also provides that the navigation of the rivers Yukon, Porcupine, and Stikine shall be free to the subjects and citizens of both Powers. Each of the contracting Powers also agrees to use its influence to secure an extension of this principle. At the same time no general right of free navigation is conceded.

The respective contentions of the parties to this controvery serve to illustrate the divergent opinions which prevailed at the time, and which to some extent still prevail, as to whether there exists at international law, and apart from treaty, a right of innocent passage on the part of co-riparians over the waters of a navigable river which flows through two or more States. Omitting minor arguments, the main contention of the United States was that there is in such cases a natural right of passage; that such a right gains in strength when the waters in question afford the only means of access to the ocean of a large and growing population; and that, although such right may be styled an "imperfect right," it is nevertheless one a denial of which will give a title to redress. This contention was scarcely in keeping which the state of international usage at the time; although undoubtedly usage has since advanced in the direction of the American contention. Nor is there even now any agreement as to what is meant by an "imperfect right." Great Britain, on the other hand, appealed to the stricter principle that the rivers of a State, so far as they are wholly within its borders, constitute a part of the national territory; that a right of passage over such territory can only be claimed by agreement; and that the very fact of such a right being frequently conceded by treaty shows that there is no such natural right. The latter argument is cogent, but not under all circumstances conclusive. On the one hand, although it is no doubt true that a right may be regulated by treaty without having its origin in treaty, yet the fact that such a right wherever it exists is found to rest on treaty certainly affords a strong presumption that there is either no such right apart from treaty, or that it is of too vague and shadowy a nature to be made effective. On the other hand, it must be remembered that a perpetual succession of treaties may be said to generate new usage, which will then become a source of rights independent of treaty (*d*). It is very doubtful, however, whether that stage could fairly be said to have been reached with respect to the navigation of inter-State rivers, at the time of the controversy; and there is some divergence of opinion as to whether it can be said to have been reached even now (*e*). Much difference of opinion also exists as to what precisely is meant by an

(*d*) *Supra*, p. 7. (*e*) *Infra*, p. 126.

"imperfect right." This term is commonly applied to some claim to an advantage purporting to rest on natural justice (*f*), but which is really based rather on comity than law, and which, if violated, would scarcely warrant a resort to force, or, indeed, to any other mode of redress than bare retorsion (*g*). Other writers, however, incline to regard it as a claim which is essentially legal in its nature; but which, by reason of its extremely general character, requires to be regulated and defined by treaty; although a total denial of it would give a *legal* title to redress (*gg*). Another example of this class of rights is said to be afforded by the right of a State to the extradition of its criminals by another State, which although commonly regulated by treaty is said to subsist apart from treaty—a right, however, which is by no means invariably recognised (*h*). The difficulty, of course, lies in recognising as a "legal" right what is after all only a claim to a conventional concession, as to the terms of and restrictions on which—the right being admittedly imperfect—the contracting parties may reasonably be supposed and allowed to differ. Such a right, moreover, in so far as it can be said to subsist in relation to rivers, is, it is submitted, not a natural or original right, but the outcome of modern usage, and especially of the usage of the nineteenth century, by which the more important rivers were opened to navigation—although in varying degrees—by means of treaty and convention.

General Notes.—*The Ownership and Use of Navigable Rivers.*—Apart from convention, the principles which govern the ownership and use of navigable rivers appear to be these: (1) Where a navigable river lies wholly within the borders of one State, then it will form part of the territory, and be subject to the exclusive control of the territorial Power; although in comity, or sometimes by convention, a right of navigation is commonly conceded to other States, for the purposes of access as distinct from local trading. So the United States admits foreign vessels to the waters of the Mississippi, but does not concede this as a matter of right (*i*). (2) Where a navigable river constitutes the boundary between two States, each will be deemed to have dominion and jurisdiction over the river within its own borders, the line of demarcation being presumed to run through the middle of the deepest channel (*k*), subject, however, to a common right of user and navigation over the whole river (*l*). On principle, it would seem that this right extends also to foreign vessels for the purposes of access to either riparian State (*m*). (3) Where a navigable river passes through the territory of two or more States, then each State will be deemed to have both dominion and jurisdiction over those parts of the river that lie wholly within its territory; and in principle, and for the reasons

(*f*) Meaning, presumably, that sense of fairness and reasonableness which may be said to be the common property of civilised mankind.

(*g*) *Infra*, p. 359.

(*gg*) See Westlake, i. 153.

(*h*) *Infra*, p. 249.

(*i*) Hall, 140.

(*k*) As to the rule of the *Thalweg*, see Westlake, i. 141.

(*l*) For a judicial recognition of this principle see *The Twee Gebroeders* (3 C. Rob. 336); *The Apollon* (9 Wheat. 362); and *Handly's Lessee* v. *Anthony* (5 Wheat. 374; Scott, 116).

(*m*) Unless forbidden by the latter.

mentioned below, this would seem to carry with it a right to prohibit their navigation by vessels belonging to other States and their subjects. But, as will be seen hereafter, this right is now subject to two qualifications. In the first place, a right of navigation in such cases is now commonly conceded by treaty—almost invariably as regards riparian States, and frequently also as regards other States. In the second place, it would seem that, apart from treaty, although in virtue of usage generated by treaty, there is, in such cases, probably an "imperfect right" of navigation over waters otherwise territorial; although it is, as we shall see, somewhat difficult to determine the precise character and extent of this right. Meanwhile it will be desirable to glance briefly at the various treaties which have been made on this subject; both for the purpose of ascertaining the position of particular rivers, the navigation of which purports to be regulated by treaty—and also for the purpose of arriving at some general conclusion as to how far the rules that would otherwise apply can be said to have been modified by new usage originating in treaty.

The Right of Navigation as affected by Treaty.—Strictly, and apart from treaty, it would seem, as has already been suggested, that any State is entitled either to prohibit or to regulate the use of all rivers or parts of rivers that lie wholly within its territory; this being a necessary deduction from the fundamental principle of territorial sovereignty, which must be deemed to apply except in so far as it can be shown to be qualified or limited by some definite and generally accepted usage (*n*). It was from this principle that international law started; and for a long time current usage, despite some conventional relaxations, conformed thereto (*o*). But during the nineteenth century considerations of policy and convenience led to many mitigations in the exercise of this strict right; with the result that most of the more important navigable rivers have now come to be opened up by treaty (*p*).

The Opening up of the European Rivers.—By the Final Act of the Congress of Vienna, 1815 (*q*), it was agreed that the navigation of the rivers separating or traversing the different States should be free from the point at which each river became navigable to the point of its discharge into the sea, subject, however, to reasonable and uniform navigation dues, which were to be such as not to discourage commerce, and which, once fixed, were not to be altered save by agreement of the riparian States (Art. 111). The right conceded was also subject to regulations of police, which were, however, to be uniform for all and as favourable as possible to the commerce of all nations (Art. 109). Special regulations were further provided with respect to the navigation of the Rhine, the Scheldt, the Meuse, and certain other rivers; whilst for the rest it was left to the various States concerned to give effect to these principles by arrangement between themselves (*r*). At the same time it does not appear that it was intended to assert a general right of free navigation; or even to extend the conventional

(*n*) Such as exists with respect to the right of passage over the littoral sea and certain kinds of straits; *infra*, p. 143.

(*o*) Hall, 138.

(*p*) Taylor, 282.

(*q*) Annexe 16.

(*r*) Phill. i. 229.

right to the case of rivers wholly within the territory of one State (*s*). In the result, however, by a series of conventions made with respect to particular rivers, most of the European rivers, including the Rhine, the Scheldt, the Elbe, the Vistula, the Dniester, the Pruth, the Po, the Douro, and the Danube, have now been opened up to navigation, in all cases as between the riparian States, and for the most part, or in effect, also to the commerce of non-riparian States (*t*).

The Rhine.—The free navigation of the Rhine was provided for by the Treaty of Paris, 1814, and also by special articles annexed to the Final Act of the Congress of Vienna, 1815. The actual exercise of this right was subsequently obstructed by a claim on the part of Holland to impose tolls on vessels navigating the lower channels giving access to the sea. This claim was based on the ground that these channels were really artificial waterways, and not a part of the river; and also on the ground that the waterway below Gorcum, including the mouth of the Meuse, really constituted an arm of the sea (*u*). After protracted negotiations this question was finally settled by a convention concluded at Mayence in 1831 between the various riparian States, by which the river was declared to be free from the point at which it becomes navigable into the sea (*bis in die See*), including its two principal outlets in the territory of Holland (*x*). But the freedom for non-riparian States was only theoretical. In consequence of the view expressed by the Congress of Paris, 1856, that the right of all merchantmen to free navigation on international rivers was part of "European Public Law," this right was conceded by the Convention of Mannheim, 1868. This concession was, however, whittled down by regulations imposing restrictions practically excluding non-riparian States. By the Peace Treaty, 1919 (*y*), pending a general convention, the Convention of Mannheim remains in force, subject to the provisions of the Treaty, whereby "vessels of all nations and their cargoes shall have the same rights and privileges as those which are granted to vessels belonging to the Rhine navigation and to their cargoes." The obnoxious restrictions are abolished. These provisions of the Treaty also apply to the Moselle.

The Danube.—By the Treaty of Paris, 1856, it was agreed between the contracting parties (*z*) that the principles established by the Congress of Vienna with respect to the navigation of European rivers should for the future be applied to the navigation of the Danube; and that this arrangement should be regarded as forming part of the public law of Europe. The river was to be free from all tolls and imposts other than those provided for by treaty, but subject to reasonable regulations of quarantine and police necessary for the safety of the States separated or traversed by the river; provision was made for the appointment of a European commission to carry out and maintain the works necessary to navigation, with power to levy tolls for the purpose of meeting the expenses of the works; as well as for the appointment

(*s*) Taylor, 283; but see Westlake, i. 157.

(*t*) On the subject generally, see Westlake, i. 142; Taylor, 282.

(*u*) See Wheaton (Boyd), 295.

(*x*) *Ibid.* p. 297.

(*y*) Arts. 354-362. See Kaeckenbeck's International Rivers, 62-71.

(*z*) These included Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey.

of a riverain commission to superintend navigation (Arts. 15 to 19). In 1868 the works and establishment of the European commission were declared to be neutralised. By the Treaty of London, 1871, some of the stipulations of the earlier treaty were revised; but otherwise the existing system, including the reservation of the right of Turkey, as territorial Power, to send warships into the river, was maintained (*a*). During the Russo-Turkish War of 1877 the free navigation of the Danube was for some time impeded by the operations of the belligerents; but in the discussion which ensued it appears to have been admitted that the existing international arrangements did not imply any absolute neutralisation of the waterway, or, indeed, any further obligation on the part of the belligerents than that of respecting the works and establishment of the commission, and of restricting freedom of navigation as little and of restoring it as speedily as possible. By the Treaty of Berlin, 1878, however, all existing fortresses on the river from the Iron Gates downwards were required to be razed, and no new ones were to be erected and within the same limits no vessels of war, except certain light vessels for police and customs purposes, were to be allowed to navigate the river (Arts. 52 to 57). The powers of the European commission have been continued from time to time by other treaties (*b*). By the Peace Treaty, 1919, the Danube from Velm; the Elbe from its confluence with the Vltava; the Vltava from Prague; the Oder from its confluence with the Oppa; the Niemen from Godno; and the Rhine-Danube navigable waterway when constructed—are declared international rivers. On these waterways the national property and flags of all Powers are accorded perfect equality of treatment (*c*).

The Opening up of Non-European Rivers.—In North America the free navigation of the rivers of Alaska was conceded as between Great Britain and the United States by a treaty of 1871 (*d*); and that of the St. Lawrence by treaties of 1854 and 1871 (*e*). In South America the waters of the Amazon and certain other rivers were opened to the navigation of all States, riparian and non-riparian, by a decree of 1867. The internal waters of Uruguay were similarly opened to all vessels by a decree of 1853. The main waters of the United States of La Plata were opened to navigation by certain treaties of 1853 and 1867; which, although made with particular States, yet inured to the benefit of other States, so far as related to oversea trade, although not for the purposes of local traffic (*f*). In Africa the navigation of the Congo, the Niger, and their tributaries was declared to be free and open to all nations by the Final Act of the Berlin Conference of 1884-85; all differential dues being forbidden, and a special international commission being appointed to supervise their navigation (*g*). This Act has been repealed by the Convention of St. Germain (*h*), whereby complete freedom to all nations has been re-created and new rules, according to the original or acceding members the full benefit

(*a*) Arts. 4 to 7. Certain new regulations were also made in 1875; Phillimore, i. 233.
(*b*) In 1883 and 1904.
(*c*) Articles 331-353.
(*d*) *Supra*, p. 122.
(*e*) *Supra*, p. 121.
(*f*) Hall, 140; Taylor, 286.
(*g*) *Supra*, p. 12; and Westlake, i. 155.
(*h*) Treaty Ser. No. 18, (1919) C3, 477.

in practice of all the privileges conferred by the Final Act. In Asia, the opening up of the Yang-tse-kiang river by China to foreign vessels has also been conceded by treaty, subject, however, to certain conditions. This was originally conceded to British merchant vessels in 1862, but was gradually extended to those of other States, and was in 1898 made general, subject to goods being landed and shipped at certain specified ports (*hh*).

General Conclusions with respect to Navigation of Rivers.—Thus we see that the practice of nations, so far as evidenced by convention, has during the last century been almost uniformly favourable to the right of free navigation. But although the fact that this right has been commonly conceded by treaty serves for the most part to remove any difficulty as to the actual position of rivers that are the subject of treaty stipulations, yet the practice on this subject is not by any means uniform, and it is not easy to determine how far the earlier rules that would otherwise apply have been affected or modified by new usage generated by treaty. Nevertheless the following conclusions appear to be warranted: (1) So far as relates to the right of navigation on the part of co-riparian States, the practice of States is perhaps sufficiently uniform to warrant the assertion of a right apart from treaty; although this right is at best only an "imperfect right," and is even now not universally conceded. So, in 1906, the navigation of the Lower Nile was closed by Egypt to the passage of steamers for ports of the Congo Free State, situated on the Upper Nile; nor does the legality of this proceeding appear to have been questioned. (2) Such a right, moreover, whether resting on convention or usage, is certainly subject to such regulations as may be necessary to the safety or convenience of the territorial Power, so long as they are not inconsistent with free navigation. (3) So far as relates to the right of navigation on the part of non-riparian States, this, although often conceded by treaty, cannot probably be claimed as a right grounded on usage, except under cover of the rights of the riparian States themselves. (4) So far as relates to rivers wholly within the territory of one State, the right of navigation, although often conceded by treaty, and sometimes extorted as against minor Powers, is yet strictly only a matter of grace or comity (*i*).

THE FREEDOM OF THE SEA.

THE BEHRING SEA ARBITRATION, 1893.

[British and Foreign State Papers, vol. 9 (1821-22); vol. 12 (1824-25); vol. 57 (1866-67); vol. 79 (1887-88); vols. 81-90 (1888-89 to 1897-98); *La Ninfa* (75 Fed. 513; Scott. p. 443); and two articles by T. B. Browning, L. Q. R., April and October, 1891.]

Controversy.] THE territory of Alaska is a promontory situated on the extreme north-west of the continent of North America,

(*hh*) Hall, 139.

(*i*) On the subject generally, Hall, 141; Westlake, i. 157.

and projecting in a south-westerly direction for about 500 miles into the Pacific Ocean. Beyond its extreme points lies the Aleutian Archipelago, a series of islets extending for a considerable distance further into the Pacific. Above these lies the Behring Sea, and still farther north lie the Behring Straits.

Both the peninsula of Alaska and the Aleutian Archipelago formerly belonged to Russia. In 1821 a Ukase was issued by the Czar, purporting to reserve to Russian subjects the pursuits of commerce, whaling, fishery, and all other industry, on all islands, ports, and gulfs, from the Behring Straits along the American coast as far as 51° N. lat., and also from the Aleutian Islands to the eastern coast of Siberia, and along the coast of Asia as far as 45° 50′ N. lat., all foreign vessels being prohibited from approaching within 100 Italian miles of these limits under pain of confiscation. This claim to maritime dominion and jurisdiction over the open sea was at once objected to both by the United States and Great Britain. Mr. Adams, the United States Secretary of State, in particular, expressed his surprise at the attempt to exclude American citizens "from the shore beyond the ordinary distance (of three miles from low-water mark) to which the territorial jurisdiction extends", (*k*), and refused altogether to admit these pretensions (*l*). As the result of these protests, Russia ultimately agreed, by conventions entered into with the United States in 1824, and with Great Britain in 1825, to abandon these claims, and not to prevent the citizens and subjects of the United States and Great Britain from navigating or fishing in any part of the Pacific Ocean; whilst as between Great Britain and Russia certain limits of settlement and lines of demarcation of boundary were also agreed upon (*m*).

By a treaty made in 1867 Russia ceded to the United States, in consideration of a money payment, all her dominions on the continent of America, including the territory of Alaska and the adjacent islands, and all attendant rights therein. The territory was thereupon constituted a federal territory of the United States, and became subject to the dominion and jurisdiction of the latter Power. The main value of the territory, at this time, consisted

(*k*) 25th of February, 1822.
(*l*) 22nd of July, 1823.
(*m*) As to these, see Alaska Boundary Arbitration, p. 99, *supra*.

in its being the chief seat of the fur-seal fishing industry. In 1870 a small but powerful syndicate, known as the Alaska Commercial Company, acquired from the United States Government a lease of the islands of St. Paul and St. George, on certain terms, mainly with a view to the carrying on of the fur-seal fishery. The same company appears subsequently to have extended its operations and control to other islands, and also to the mainland of Alaska. Meanwhile the seal fishery had begun to attract the attention of the Canadians, and Canadian vessels now began to engage in it. The method followed, in most cases, was to intercept and kill the seals in their passage across the Behring Sea. These operations, although they involved a wasteful slaughter of seals, took place at a distance greatly beyond three miles from the American shore; and occurring as they did outside waters commonly regarded as territorial, and on the open sea, were not, according to the ordinary rules of international law, subject to the municipal regulations or jurisdiction of any foreign State. But they necessarily conflicted with the interests of the Alaska Company, which throughout the whole of these proceedings showed itself to be possessed of powerful influence at Washington. Hence an Act of Congress—s. 1956 of the revised statutes—was passed, providing, in effect, that no person should kill any fur-seal, or other fur-bearing animal, without authorisation, "within Alaska territory or the waters thereof." At the instigation of the Alaska Company, and purporting to act under the authority of this provision, the United States authorities, in 1886, seized three Canadian vessels, whilst at a distance of seventy miles from the shore, and proceeded against the vessels and their crews, in the District Court at Sitka, for having been guilty of a contravention of the United States law (*n*). On the intervention of Great Britain, and after much delay, orders were issued by the United States Government for the release of these vessels and

(*n*) These trials were, it is said, conducted in most irregular fashion. The juries were composed of dependants of the Alaska Company, evidence was improperly excluded, opportunity for cross-examination was refused; demurrers were overruled without argument; and every obstacle thrown in the way of an appeal to the Supreme Court; whilst the crews themselves were also subjected to the harshest treatment. It is instructive to compare the terms of the United States protest in *Cutting's Case* (*infra*, p. 228) with the treatment accorded to these crews.

their crews, although this relief was given for the most part under circumstances which rendered it futile (*o*). In 1887 other seizures were made, which gave rise to a further protest on the part of the British Government. In 1889 a new Act of Congress was passed, providing that the previous enactment—s. 1956—should be deemed to include and apply to "all the dominion of the United States in the waters of Behring Sea," and that it should be the duty of the President to issue a proclamation "warning all persons against entering said waters for the purpose of violating the provisions of said section" (*p*). Such a proclamation was accordingly issued in March, 1889, with the result that in July the seizures of British vessels were renewed. In reply to protests of the British Government, the United States Secretary of State contended, amongst other things, that the law of the open sea and the liberty it conferred could not be perverted to justify acts immoral in themselves (such as the taking of the seals); that the seal fishery had been under the exclusive control of Russia, to whose rights the United States had now succeeded; that the taking of seals in the open sea tended to their extinction (*q*); that the freedom of navigation and fishery conceded by Russia in 1825 "in the Pacific Ocean" did not include the Behring Sea; that the prohibition to approach within 100 Italian miles had been left unimpaired, and had been acquiesced in by Great Britain, and that this jurisdictional right had now become vested in the United States (*r*). In support of the United States claim to the 100-mile restriction, Mr. Blaine referred to a British Act passed after the confinement of Napoleon at St. Helena, forbidding ships of any nationality from hovering within eight leagues of the coast, and also to exterritorial legislation under the Federal Council of Australasia Act, 1885. In reply, Great Britain contended that seals were animals *feræ naturæ*; that their pursuit on the open sea could not be regarded as immoral; that in any case the seizure of

(*o*) For the reason that it took place only after great delay, at a time when the sentences had been for the most part completed, and when the vessels had become useless. The men discharged were without funds or friends; some begged their way back, others died after suffering great hardship.

(*p*) As to the history of this section, Scott, 444.

(*q*) 22nd of January, 1890 (82 S. P. 202).

(*r*) 30th of June and 17th of December, 1890 (82 S. P. 257; 83 S. P. 309).

vessels on the high seas, in time of peace, was justified only in cases of piracy or by special international agreement; that the fact that competition in seal fishing would impair the value of the monopoly of the United States lessees did not justify the United States in forcibly depriving other nations of a share in the industry; and, finally, that Great Britain had categorically denied the claims of Russia, under the Ukase of 1821, immediately on its appearance. In 1890, after several fruitless attempts at amicable settlement, Great Britain took up a firm stand and intimated that any further seizures would be resisted by force (*s*). In consequence of this the Government of the United States abstained from making any further seizures, although it refused to give any diplomatic assurance that no further seizures would be made. In 1891 a *modus vivendi* was arranged with a view to the whole question being submitted to arbitration, and this arrangement was subsequently renewed from time to time down to May, 1894 (*t*). Meanwhile, as the result of further negotiation, a treaty was ultimately signed at Washington on the 29th of February, 1892, providing for a reference of the questions in issue between the two countries to a tribunal consisting of seven arbitrators, two to be appointed by Great Britain, two by the United States, whilst France, Sweden-Norway, and Italy were to be requested to appoint one each. The award was to embrace a distinct decision on each of the points hereinafter mentioned. If under the award it should appear that the concurrence of Great Britain was necessary to the establishment of regulations for the protection of the seal fishery, then the arbitrators were to determine what concurrent regulations should be made; whilst the contracting parties also agreed to co-operate in procuring the adhesion of other Powers to such regulations. The parties being unable to agree upon a reference which should include a determination of the question of the liability of each for injuries alleged to have been sustained by the other party or its citizens, it was agreed that each should be at liberty to submit to the arbitrators any questions of fact, and to ask for a finding thereon, the question

(*s*) 14th of June, 1890 (82 S. P. at 275).

(*t*) These arrangements, so far as Great Britain was concerned, were carried into effect by virtue of the Seal Fishery (Behring Sea) Acts, 1891 and 1893, and certain Orders in Council issued thereunder.

of liability on the facts so found being left as a subject for further negotiation.

The Arbitration and Subsequent Proceedings.] The arbitrators appointed were Lord Hannen and Sir John Thompson, Minister of Justice and Attorney-General of Canada, on the part of Great Britain; Mr. Justice Harlan and Senator J. T. Morgan, on the part of the United States; Senator Baron de Courcel, by France; Senator the Marquis Visconti Venosta, by Italy; and M. Gregors Gram, Minister of State, by Sweden-Norway. The arbitrators met at Paris in 1893, and made their award on the 15th of August in that year. The questions submitted for decision, and the finding of the arbitrators thereon, were respectively as follows:

1. What exclusive jurisdiction in the sea known as the Behring Sea, and what exclusive rights in the seal fisheries therein, did Russia assert and exercise prior and up to the time of the cession of Alaska to the United States?

As to this it was decided, in effect, that, although Russia had claimed extensive jurisdiction by the Ukase of 1821, yet in the course of the negotiations which led to the treaties of 1824 and 1825 she admitted that her jurisdiction in the Behring Sea should be restricted to the reach of cannon-shot from the shore; and that from that time down to the cession of Alaska she never asserted or exercised in fact any exclusive jurisdiction in the Behring Sea, or in the seal fisheries, beyond the ordinary limit of territorial waters.

2. How far were these claims of jurisdiction as to the seal fisheries recognised and conceded by Great Britain?

As to this it was found that Great Britain did not recognise or concede any claim upon the part of Russia to exclusive jurisdiction outside the ordinary territorial waters.

3. Was the body of water now known as the Behring Sea included in the phrase "Pacific Ocean" as used in the treaty of 1825 between Great Britain and Russia; and what rights, if any, in the Behring Sea were held and exclusively exercised by Russia after the said treaty?

As to this it was held that the Behring Sea was included in the phrase "Pacific Ocean" as used in the treaty of 1825; but (by a majority) that no exclusive rights of jurisdiction thereover, or

exclusive rights as to the seal fisheries, were held or exercised thereafter by Russia, beyond the ordinary limit of territorial waters.

4. Did all the rights of Russia as to jurisdiction and as to the seal fisheries in the Behring Sea, east of the water boundary, in the treaty between the United States and Russia of the 30th of March, 1867, pass unimpaired to the United States under that treaty?

As to this it was decided that all the rights of Russia did so pass.

5. Has the United States any right, and, if so, what right, of protection or property in the fur-seals frequenting the islands of the United States in the Behring Sea, when such seals are found outside the ordinary three-mile limit?

As to this it was found, by a majority, that the United States had no right of protection or property in the fur-seals when found outside the ordinary three-mile limit.

The concurrence of Great Britain being therefore necessary to the regulation of the fishery, the tribunal proceeded to draw up a set of regulations, to be enforced by both parties, for the protection of the fur-seal industry. These included: (1) The absolute prohibition of all sealing within a zone of sixty geographical miles around the Pribyloff Islands. (2) The establishment of a close season extending from the 1st of May to the 31st of July in each year, in that part of the Pacific Ocean, including the Behring Sea, which is situated north of 35° N. lat., and east of 180° W. long., till it strikes the water boundary described in Art. 1 of the treaty of 1867, following that line up to the Behring Straits. (3) The adoption of a rule requiring that, during the open season, only sailing vessels should be employed in seal fishing, each vessel being required to have a special licence and to carry a distinguishing flag. (4) The prohibition of the use of nets, firearms, and explosives, saving that shot-guns might be allowed outside the Behring Sea during the open season. These regulations were further to be submitted to a new examination every five years. The regulations, as prescribed by the arbitrators, were subsequently given effect to by Great Britain, by the Behring Sea Award Act, 1894; and by the United States, by an Act of Congress of the 6th of April, 1894.

The arbitrators also found as authentic a statement of facts submitted by Great Britain, showing that between 1886 and 1894 there had been fourteen seizures of British sealing vessels, made at distances ranging from 15 to 115 miles from the coast, that one such vessel had been arrested in Neale Bay, and that two others had been arrested and three ordered out.

It now remained only to settle the question of damages. After some ineffectual efforts it was finally agreed, under a convention, signed at Washington on the 8th of February, 1896, that all claims on account of injuries sustained by persons on whose behalf Great Britain was entitled to claim compensation from the United States, arising either under the treaty, the award, or the findings of fact, together with certain other specified claims, should be referred for determination to two legal commissioners, one to be appointed by each party; any amount awarded to be paid to Great Britain within six months. Such commissioners were afterwards duly appointed; and on the 17th of December, 1897, made an award under which the damage sustained by Great Britain was assessed at $464,000; and that amount, together with interest at 6 per cent., ordered to be paid by the United States.

These regulations for the protection of seals proved quite ineffectual; and accordingly by the Convention of Washington, 1911, seal fishing within a defined area, including the Behring and Kamschatka Seas and the Seas of Okhotsk and Japan, outside territorial waters was prohibited.

In the Behring Sea arbitration the questions submitted for decision, although largely questions of fact or interpretation, were really directed towards a larger issue, viz., whether the waters of the Behring Sea, which, according to all recognised standards, constituted a part of the open sea, could, under the special circumstances of the case, or for certain special purposes, be said to be subject to the sovereignty, the jurisdiction, or the municipal regulations of the United States. It was, in fact, a new effort made by a great Power, under special conditions, and at the instance of a powerful corporation, to challenge the freedom of the open sea. This attempt was, on the findings of the tribunal, happily defeated. At the same time, the defeat was mitigated greatly, from the point of view of the United States, by the obligations imposed by the arbitrators with respect to the future protection of the seal-fishing industry. These gave to the United States in fact, and by virtue of combined treaty and municipal regulation, many of those privileges which that country had previously

assumed to extort as a right. The restrictions imposed by the regulations are, however, only incumbent on the citizens or subjects of the contracting parties. Each Power, indeed, binds itself to attempt to secure the adhesion of other Powers to these regulations; but so far only one Power, Italy, appears to have assented.

A somewhat similar controversy between Great Britain and Russia, arising out of the seizure by the latter, in the North Pacific, in 1892, of certain British sealing vessels, was also settled by an agreement; whereby Great Britain undertook to prohibit sealing by British subjects within a zone of ten marine miles following the sinuosities of the Russian coasts, and also within a zone of thirty marine miles from the shore of certain islands; Russia, on her part, agreeing to limit her catch upon or around these islands to 30,000 skins for the year. These arrangements were given effect to by the Seal Fishery (North Pacific) Act, 1893, now 1895, and certain Orders in Council made thereunder.

The Commonwealth of Australia Constitution Act, 1900, s. 51, sub-s. 10, confers on the Federal Parliament a right to legislate as regards fisheries in Australian waters beyond territorial limits. The meaning of this provision is not altogether clear. If, as is probable, it is merely intended to confer a right of regulating the fisheries outside territorial waters in relation to British vessels and subjects, then it would seem to constitute a perfectly valid authority for such an extension of the domestic law; but under no circumstances can it be regarded as conferring a right to interfere with the vessels and subjects of other nations outside the limits of territorial waters, in derogation of what we have seen to be a fundamental principle of the law of nations (*u*).

GENERAL NOTES.—*The Doctrine of the Freedom of the Sea, and its Qualifications.*—It is now generally admitted that the "high sea" cannot be either appropriated or made subject to the sovereignty or jurisdiction of any State. The term "high sea," however, is sometimes used to mean "the sea below low-water mark"; and sometimes "the open sea outside the limits of waters commonly recognised as territorial." Using the term in the former and wider sense, we find that the doctrine of the "freedom of the sea" is subject to two sets of qualifications. In the first place, certain parts of the sea adjacent to or attendant on the territory of a State, and for this reason commonly styled "territorial waters," are subject alike to the sovereignty and jurisdiction of the territorial Power. Such waters comprise: (1) the littoral or marginal sea, extending as far as three miles from low-water mark; (2) inlets, exhibiting a well-marked configuration, as gulfs or bays; (3) straits not exceeding six miles in breadth; and (4) inland seas. In the second place, for the purpose, in some cases, of obviating that condition of lawlessness which would otherwise arise, or, in other cases, of enabling the due enforcement of belligerent rights, every State is entitled to exercise a jurisdiction,—which may be styled perhaps "personal" or "quasi-territorial," according to the nature of the case,—on the high seas: (1) over all vessels belonging or purporting to

(*u*) As to the question of the pearl fisheries in Ceylon and the Persian Gulf, see p. 167, *infra*.

belong to it and flying its flag, whether public or private, together with those on board; (2) over pirates, as being the common enemies of mankind; (3) over private vessels belonging to other States which have committed some violation of its municipal law and have been pursued on to the high seas (*x*); (4) over vessels belonging to other States which are reasonably believed to be engaged in an attempt to infringe its sovereignty or safety; and (5) other vessels belonging to other States, in cases where such a right has been conceded by treaty. Finally, (6) in time of war a belligerent is entitled to exercise a right of visit and search, together with such further jurisdiction as may be warranted, over the private vessels of neutrals, for the purpose of preventing or punishing certain violations of neutral duty, such as the carriage of contraband, the breach of blockade, and acts of unneutral service. All these cases will be considered hereafter, in connection with the topics to which they respectively belong. Apart from these cases, moreover, the use of the open sea by the vessels of all States is also subject to the observance of certain rules of navigation, which are primarily rules of municipal law, but which have now for the most part been rendered uniform as between the principal maritime States (*y*).

TERRITORIAL WATERS:

(i) THE LITTORAL SEA.

THE QUEEN v. KEYN.

[1876; L. R. 2 Exch. Div. 63.]

Case.] THE prisoner, Ferdinand Keyn, was indicted at the Central Criminal Court for the manslaughter of Jessie Dorcas Young. The deceased, in February, 1876, was a passenger on board the British steamer "Strathclyde," on a voyage from London to Bombay. When off Dover the "Strathclyde" was run into by the "Franconia," a German vessel under the command of the prisoner, a German subject. The "Strathclyde" was sunk, and the deceased, together with several others of the passengers and crew, were drowned. The point at which the collision occurred was 1 9-10ths miles from Dover Pier-head, and within 2 1-7th miles from Dover beach. The "Franconia" having put into an English port, Keyn was arrested, and sub-

(*x*) But as to this, see p. 175, *infra*; and Taylor, 295. (*y*) See Oppenheim, i. 425.

sequently brought to trial. At the trial it was alleged and found that the collision was due to the negligence of the prisoner as captain of the "Franconia," and he was accordingly found guilty of manslaughter; but the question whether the Court had jurisdiction to try the case was reserved for determination by the Court for the consideration of Crown Cases Reserved.

The legality of the conviction was contested on the ground that the accused was a foreigner commanding a foreign vessel on a voyage from one foreign port to another; that the offence was committed on the high seas; and that the accused was consequently not amenable to the jurisdiction of the English Courts. It appeared that criminal jurisdiction at common law was originally distributed between two tribunals, the Courts of Oyer and Terminer taking cognisance of offences committed within the body of a county, and the Court of the Lord High Admiral of those committed on the sea. Each Court claimed concurrent jurisdiction over offences committed on rivers or arms of the sea within the body of a county. By 15 Rich. II. c. 3, the Admiral's jurisdiction was limited to cases of death or mayhem "done in great ships being and hovering in the main stream of great rivers, only beneath the bridges of the same rivers nigh unto the sea"; this, however, being in addition to his jurisdiction over "a thing done upon the sea." By 28 Hen. VIII. c. 15, all treasons and felonies committed in or upon the sea, or in any haven, creek, river, or place where the Admiral had jurisdiction, were to be tried in such shires and places as might be limited in the King's commission, which for this purpose was to be in like form as for offences committed on land. The result of this statute was to transfer jurisdiction in such cases from the Lord High Admiral to the Commissioners of Oyer and Terminer, amongst whom was included the Judge of the Admiralty Court, and to make such offences triable by ordinary process. By 39 Geo. III. c. 37, the provisions of 28 Hen. VIII. c. 15, were extended to all offences committed on the high seas, out of the body of any county. Ultimately, by 4 & 5 Will. IV. c. 36, and by 7 & 8 Vict. c. 2, this jurisdiction was vested in the Central Criminal Court and the Judges of Assize. In this manner offences originally within the Admiral's jurisdiction became triable by the ordinary law of the

land and before the ordinary Courts. This being so, the question in the present case was whether the jurisdiction originally vested in the Admiral, and now vested in the Central Criminal Court and the Judges of Assize, included jurisdiction over an offence committed by a foreigner, on board a foreign vessel, within three miles of the English shore. It was decided, by a majority of the Court for the Consideration of Crown Cases Reserved, that, according to the law of England, no such jurisdiction existed, and that the conviction accordingly could not be sustained.

Summary of Judgments.] On the argument of this question, the Court, by a majority—including Cockburn, C.J., Kelly, C.B., Bramwell, L.J., Lush and Field, JJ., Sir R. Phillimore, and Pollock, B.—held that prior to 28 Hen. VIII. c. 15, the Admiral had no jurisdiction to try offences by foreigners on board foreign ships, whether within or without the limit of three miles from the shore of England, and that 28 Hen. VIII. c. 15, and subsequent statutes only transferred to other Courts such jurisdiction as had formerly been vested in the Admiral. Kelly, C.B., and Sir R. Phillimore came to the same conclusion on the further ground that at international law the power of a nation over the sea within three miles of its coast existed only for certain limited purposes, namely, for the defence and security of the adjacent territory; and that Parliament could not consistently with these principles have intended to apply English criminal law within those limits.

The judgment of the majority was dissented from by Lord Coleridge, C.J., Brett and Amphlett, L.JJ., and Grove, Denman, and Lindley, JJ., on the ground that the sea within three miles of the coast constituted part of the territory of England; that the English criminal law extended over those limits; and that the Admiral had formerly jurisdiction to try offences there committed, although on foreign ships. Coleridge, C.J., and Denman, J., also uphold the jurisdiction of the Court on the further ground that the prisoner's ship having run into a British ship and sunk it and so caused the deceased's death, the offence must be deemed to have been committed on board a British ship.

Judgment of Cockburn, L.C.J.] In his judgment the Lord Chief Justice stated, in effect (*z*), that, as a general rule, and in

(*z*) At p. 159 *et seq.*

default of express enactment, a person could not be made amenable to the criminal law of England, unless the offence complained of was committed either in British territory, or on board a British vessel. Hence the offence in the present case would not be subject to the jurisdiction of the Court, unless it was to be regarded as having been committed within British territory, by reason of its having taken place within the three-mile limit; or unless it was to be regarded as having been committed on board a British vessel, by reason of the death of the deceased having taken place there.

With respect to the three-mile limit, a certain jurisdiction had no doubt originally been claimed by the Crown over the narrow seas; but this had long since been abandoned, and could not now be brought in aid of what was virtually another doctrine. The latter doctrine was no doubt commonly put forward by the text-writers; but a careful examination of the writings of English, American, and Continental publicists showed that there was no consensus of opinion either as to local extent, or as to the nature of such jurisdiction. Some writers contended for a limit of three miles; others for a space covered by the range of cannon-shot. Some claimed for the territorial Power an absolute dominion; others a dominion subject to a *jus in re aliena*, or right of passage, on the part of other nations; others, again, denied any dominion, whilst asserting a more or less extensive jurisdiction—some for the purposes of safety and police, others for the enforcement of revenue laws and rights of fishery, whilst others drew a distinction between the case of a commorant and a passing vessel. Moreover, even if the opinions of such writers had been unanimous instead of altogether divergent, their opinions could not make law apart from the assent of civilised nations; whilst even if such assent could be proved, it was very doubtful if such a principle as that now contended for, amounting as it did to a new law, could be applied by the Courts without the sanction of an Act of Parliament.

The question being, then, not one of theoretical opinion, but of fact, what evidence, either in the shape of treaties or usage, was there of such a principle? There was certainly no treaty which conferred such a jurisdiction over passing vessels; and although there were treaties which recognised a jurisdiction within this

limit, as regards the enforcement of rules of neutrality and exclusive rights of fishery, this was apparently only a matter of mutual concession and convention. So, also, certain usages were found to exist in relation to navigation, fishery, and neutrality laws, yet there appeared to be no usage warranting the application of the general law of the local State to foreigners on the littoral sea. It was quite possible that if such a law were expressly adopted it would be acquiesced in by other nations, and would then be attributable to acquiescence. Such a law would in any case be enforceable by the municipal Courts. An examination of the statutes relating to foreigners within the three-mile zone showed that, when Parliament meant to include foreigners for any purpose within its legislation, it had done so in express terms. But for the present purpose there was no such legislation, and in default thereof the Courts were not at liberty to apply the local criminal law to foreigners within the three-mile zone.

With respect to the contention that the offence must be deemed to have been committed within the jurisdiction, by reason of the death having taken place on board a British ship, he was of opinion that, if the defendant had purposely run into the "Strathclyde," then it might have been held that the killing of the deceased took place on board that ship; but when the death arose, as in the present case, only from the negligent navigation of the ship occasioning the mischief, he did not see how such act of negligence could be said to have occurred, either actually or constructively, on the ship on which the death took place.

Judgment of Lord Coleridge, C.J.] This learned Judge, in dissenting from the opinion of the majority (*a*), pointed out that if the offence was committed "within the realm," then there was jurisdiction to try it; and on the facts it was, in his opinion, committed upon English territory. The proposition contended for by the defence was that for an act of violence committed by a foreigner upon an English subject, within a few feet of low-water mark, the foreigner, unless on board a British ship, could not be tried. But by a consensus of writers, without one single authority to the contrary, some portion of the coast waters of a country was considered as part of its territory. And this was established as

(*a*) At p. 151 *et seq.*

clearly as any proposition of international law could be. There was, it was true, as between sovereign States no common law-giver; and no tribunal had power to bind them by its decrees, or to coerce them if they transgressed. But the law of nations was a collection of usages which civilised States had agreed to observe in their dealings with each other (*b*). Whether a particular usage had or had not been agreed to was really a matter of evidence. Treaties and acts of State were but evidence of the agreement of nations, and did not in this country at least *per se* bind the tribunals. Neither, certainly, did a consensus of jurists. Nevertheless, all this went to furnish evidence of the agreement of nations on international points; and on such points, when they arose, the English Courts gave effect to such agreement, as a part of English law. When they found a number of men of education, of many different nations, most of them uninterested in maintaining any particular thesis on the matter in question, agreeing generally for nearly three centuries in the proposition that the territory of a maritime country extended beyond low-water mark, he himself could hardly conceive stronger evidence that the territory of a maritime country did so extend. The learned Judge also expressed the opinion that, on the question of jurisdiction, this view was also borne out by judgments of eminent Judges such as Sir Edward Coke, Lord Stowell, Dr. Lushington, and others; and, further, that even Parliament had, in certain instances, legislated on the basis of the principle that the realm did not end with low-water mark (*c*).

The decision of the majority of the Court in *Reg.* v. *Keyn* was based on considerations peculiar to English municipal law rather than on international law. So far as the question immediately in issue was concerned, the conclusion arrived at was speedily corrected by the passing of the Territorial Waters Jurisdiction Act, 1878, which in its preamble declares that the jurisdiction of the Crown "extends, and has always extended over the open seas adjacent to the coasts of the United Kingdom and of all other parts of her Majesty's dominions, to such a distance as is necessary for the defence and security of such dominions" (*d*). Nevertheless, the judgment of Cockburn, L.C.J., is still noteworthy, both as embodying a critical examination of the

(*b*) At p. 154.
(*c*) *Infra*, p. 143, note (*m*).
(*d*) 41 & 42 Vict. c. 73.

doctrine of sovereignty over the littoral sea; and as illustrating the attitude taken up by the English Courts towards rules of international law which, although commonly predicated by the text-writers on a basis of usage, yet lack the confirmation of treaty, statute, or judicial decision. The judgment of Lord Coleridge is, however, equally noteworthy as adopting a view which is at once more liberal, and more in conformity with the practice of other States (*e*). By the Territorial Waters Jurisdiction Act, 1878, it is enacted that an offence committed by any person within territorial waters shall be an offence within the Admiral's jurisdiction, although committed on a foreign ship. But proceedings under the Act against a foreigner, other than preliminary proceedings, are not to be instituted in the United Kingdom, except with the consent of a Secretary of State, and on his certificate that the institution of proceedings is expedient; or, in the colonies, except with the consent of the Governor, and on a similar certificate. It is provided, however, that the Act shall not affect any rightful jurisdiction under the law of nations, or conferred by statute or by existing law, in relation to foreign ships or persons on board them or the trial of any act of piracy (*f*). "Territorial waters" are defined as such parts of the sea adjacent to the coast of the United Kingdom or other part of British dominions as are deemed by international law to be within the territorial sovereignty of the Crown; and, for the purposes of offences under the Act, any part of the open sea within one marine league of the coast, measured from low-water mark (*g*). This Act serves to bring the English law, so far as relates to the exercise of criminal jurisdiction, into harmony with the common usage of nations; but it does not appear to touch on the question of jurisdiction for civil purposes; whilst a study of its provisions discloses many latent difficulties (*h*). As the law now stands, it would seem that there are three classes of waters adjacent to the coast which are subject to the territorial jurisdiction for different purposes and to a different extent: (1) First, there are some waters which are even at common law regarded as an integral part of the realm, and which are therefore "territorial waters" proper. These comprise both (a) waters that lie between high- and low-water mark, over which the common law and the Admiralty have alternate jurisdiction—*i.e.*, the former as the sea ebbs, the latter as it covers the dry land; and (b) waters that lie *infra fauces terræ*, which are also deemed to be part of the adjoining county, as in the case of the Bristol Channel (*i*). (2) Next, there are waters which are commonly although not very accurately styled "territorial," which do not strictly form part of the realm, but which are subject to the local jurisdiction for some purposes by statute. Thus, by the Territorial Waters Jurisdiction Act, already described, a criminal jurisdiction may now, under certain conditions, be exercised over foreigners within three miles from low-water mark (*k*). Within the same limits, in accordance with the common usage of nations, both the

(*e*) As to the value of juristic opinion, see *supra*, p. 7 *et seq.*

(*f*) Ss. 5 and 6.

(*g*) S. 7.

(*h*) For a criticism of these provisions, see Piggott, Nationality, i. 37, and ii. 193.

(*i*) See *R.* v. *Cunningham* (28 L. J. M. C. 66).

(*k*) S. 7.

Foreign Office, the Colonial Office, the Admiralty, the Board of Trade, and the Ministry of Agriculture appear to claim jurisdiction for administrative purposes; although this is not expressly conferred by statute (*l*). It was also suggested by Lord Coleridge that even at common law the ownership of the soil underlying the marginal sea is vested in the Crown (*m*). There are also other statutes in which the three-mile limit is adopted as a test of jurisdiction for various purposes (*n*). The three-mile zone is also commonly recognised as defining that territorial limit outside which the enactments of the Legislatures of British colonies and dependencies will not be operative, except under the authority of some Imperial statute (*o*). The laws passed for the preservation of neutrality are also made binding, both on subjects and foreigners alike, within "adjacent territorial waters" (*p*). (3) Finally, there are waters known as the "exclusive fishery limits of the British Islands," within which the right of excluding or regulating fishing vessels is assumed by Parliament. These waters are defined by the Sea Fisheries Act, 1883, as that portion of the seas surrounding the British Islands within which her Majesty's subjects have by international law the exclusive right of fishing; and, when such limits are defined by any convention made with any foreign State, then the portion so defined (*q*). The question of extra-territorial legislation generally, and the question of the right of arrest outside the three-mile limit for offences against municipal law, will be considered hereafter (*r*).

General Notes. *The Littoral or Marginal Sea.*—Notwithstanding some divergence of opinion and practice with respect to its precise nature and extent, there appears to be no doubt that a certain strip of the marginal sea and its underlying soil are to be regarded as included in the territory of the adjacent State; and as being subject to its sovereignty and jurisdiction; save only for that right of innocent passage which belongs to the vessels of other nations (*s*). Such an extension of territory may be justified in principle, on the ground that such a zone is susceptible of appropriation and effective control from the adjacent shore, and that such appropriation is necessary for the

(*l*) *Infra*, p. 147.

(*m*) See *Reg.* v. *Keyn* (2 Exch. D. at 155); and 20 & 21 Vict. c. 109, s. 2.

(*n*) See 30 & 31 Vict. c. 101, s. 53, as regards public health; 39 & 40 Vict. c. 36, s. 134, as regards customs clearances; the Fisheries (Dynamite) Act, 1877, as regards the regulation of fishery; and the Merchant Shipping Act, 1894, s. 688, as regards foreign ships causing damage.

(*o*) See *Macleod* v. *The A.-G. of N.S.W.* ([1891] A. C. 455).

(*p*) See Foreign Enlistment Act, 1870, s. 2.

(*q*) See 46 & 47 Vict. c. 22, s. 28; and as to other sea fishery legislation, Piggott, Nationality, ii. 280 *et seq.*

(*r*) *Infra*, pp. 175, 227, 240. As to the exercise of a jurisdiction over foreign vessels after arrival in port for offences committed on the high seas, see *P. & O. Co.* v. *Kingston* ([1903] A. C. 471); and Customs Consolidation Act, 1876, s. 53. As to the Hovering Laws, now repealed, see Phill. i. 275; although the offence of "hovering at sea" still exists under the Customs law; see Customs Consolidation Act, 1876, ss. 179, 180, 181; also 50 & 51 Vict. c. 7, and 53 & 54 Vict. c. 56.

(*s*) *Supra*, p. 114; *infra*, p. 153; Oppenheim, vol. i. 333-4.

purposes of safety and defence (*t*). It has also the sanction of usage, in so far as within this zone States do in fact enforce their own municipal law, with respect to navigation, customs, and quarantine, and occasionally in restraint of the carrying on by foreigners of the coasting trade; that they do in fact enforce an exclusive right of fishery and prohibit hostilities or captures as between foreign belligerents; and that most States also claim to exercise, in certain contingencies, a criminal jurisdiction over foreign subjects. The limit of this zone is also commonly recognised as extending to three miles from low-water mark; although some States claim a wider range of jurisdiction generally (*u*); whilst other States assert a wider range of jurisdiction for particular purposes (*x*). With respect to the exercise of criminal jurisdiction over persons on board passing vessels, this would probably be limited to the case of acts causing damage to the territorial Power or its subjects (*y*). With respect to the claim to exercise jurisdiction even beyond the three-mile zone, for certain purposes, such as the enforcement of their revenue laws and the observance of quarantine regulations, such a practice, although it may be acquiesced in by other States as a matter of comity, can scarcely be said to have the sanction of general usage (*z*). It may, indeed, be that the present limit, in view of modern conditions, needs to be extended (*a*); but however desirable such an extension of territorial rights may be for some purposes, it must, until ratified by common usage or international agreement, be regarded as inadmissible, and as an infringement of the principle of the freedom of the sea.

(ii) GULFS, BAYS, AND INLAND SEAS.

THE DIRECT UNITED STATES CABLE CO., LTD., v. THE ANGLO-AMERICAN TELEGRAPH CO., LTD.

[1877; L. R. 2 App. Cas. 394.]

Case.] THIS was an appeal from an order of the Supreme Court of Newfoundland, whereby the Direct Company (the appellants) had been put under an injunction prohibiting them from infringing certain exclusive rights granted to the Anglo-American Company (the respondents) or their predecessors in title, under an Act of the

(*t*) See the award in the *Costa Rica Packet Case*, p. 279.

(*u*) Such as Spain and Norway.

(*x*) As for revenue and quarantine purposes; see Piggott, Nationality, ii. 54, where this extension is justified as being defensive.

(*y*) Hall, 214.

(*z*) Taylor, 295; but for a contrary view see Oppenheim, i. 340; and on the subject generally, Hall, 215; and Westlake, i. 183.

(*a*) See the resolutions of the Institute of International Law, 1894; Westlake, i. 185.

Newfoundland Legislature. It appeared that the appellants had brought and laid a telegraph cable to a buoy lying within Conception Bay on the east coast of Newfoundland. The buoy was laid more than three miles from the shore of the bay, but at the same time more than thirty miles within the bay. The bay is well marked; the distance between the two promontories at its entrance being rather more than twenty miles, and the distance between these promontories and the head of the bay being respectively forty and fifty miles, whilst the average width of the bay is about fifteen miles. In laying the cable care had been taken not to come, at any point, within three miles of the shore; and so no question arose similar to that which arose in *The Queen* v. *Keyn* (*b*). The question in the case was as to the territorial dominion over a bay of the configuration and dimensions above described. If, according to the true construction of the local Act, it was the intention of the Newfoundland Legislature to prohibit the use of "any part of its territory" by any other persons than the respondents for the purposes of telegraphic communication; and if the Newfoundland Legislature had been duly invested with such rights of legislation by the Imperial Parliament, then the respondents were entitled to a continuance of the injunction, subject always to the bay constituting a part of such territory. In the result the bay was held to be within British territory, and the appeal was dismissed.

Judgment.] The judgment of the Privy Council was delivered by Lord Blackburn. It was held that on the true construction of the Act in question it was the intention of the Newfoundland Legislature to prohibit the use of "any part of the territory" by any other persons than the respondents for the purposes of telegraphic communication, whether within the island or as a means of transit between places outside its territory. It was further held that, by 35 & 36 Vict. c. 45, the Imperial Parliament had conferred upon the Legislature of Newfoundland the right to legislate with regard to such territory. The only question, therefore, that remained was whether the bay could be regarded as part of the local territory. With respect to this, it was observed that the English common law authority on the subject was slender and

(*b*) *Supra*, p. 136.

vague. Sir Edward Coke and Sir Matthew Hale had both recognised the principle that branches of the sea "might" be regarded as within the body of the adjoining country, where a man may reasonably "discerne" between shores. But this test was very indefinite; nor had the doctrine been applied to any particular place. In one case, however, *Reg.* v. *Cunningham* (Bell's Cr. C. 86), it had become necessary to determine whether a particular spot in the Bristol Channel, on which three foreigners on board a foreign ship had committed a crime, was within the county of Glamorgan, the indictment having charged the offence as having been committed within that county. In that case the Court for the Consideration of Crown Cases Reserved, after full discussion, had proceeded on the principle that the whole of that inland sea between the counties of Glamorgan and Somerset was to be considered as within the counties by the shores of which its several parts were respectively bounded. The case also showed that usage, and the manner in which a branch of the sea had been treated in practice, were material in determining whether it was to be regarded as part of the adjoining territory or not.

Passing from the common law to the law of nations, Lord Blackburn observed that there was a universal agreement that harbours, estuaries, and land-locked bays belonged to the territory of the nation possessing the shores around them; but no agreement had been come to as to what constituted a "bay" for this purpose. Some writers had suggested defensibility from the shore as the test; some, a width of one cannon-shot from shore to shore, or three miles; some, a cannon-shot from each shore, or six miles; some, an arbitrary distance of ten miles. All these tests would exclude Conception Bay from the territory of Newfoundland; but equally would they have excluded from the territory of Great Britain that part of the Bristol Channel which in *Reg* v. *Cunningham* was held by an English Court to be part of the county of Glamorgan. The text-writers did not, therefore, appear to agree; and the general question as to what configuration was necessary in order to constitute a bay a part of the adjoining territory did not appear ever to have been the subject of any judicial determination.

In the present case, however, it was not necessary to lay down

any general rule, inasmuch as it appeared that the British Government had, in point of fact, long exercised dominion over this bay, and that the British claim had been acquiesced in by other nations, so as to show that the bay had for a long time been exclusively occupied by Great Britain. After referring to illustrations of this exercise of dominion and acquiescence, it was held that, in the view of a British tribunal, this was conclusive to show that the bay had become by prescription part of the exclusive territory of Great Britain.

It will be seen that the question whether the whole of Conception Bay was within the territory and jurisdiction of Newfoundland was considered both in the light of English law and of international law. The Privy Council, indeed, refused to make any pronouncement on the general question as to when a gulf or bay is to be considered a part of the territory of the adjacent State; but it did decide that, both under the English law and by international law, the fact of a State having for a long period exercised dominion over such a body of water, and the fact of this claim having been acquiesced in by other nations, would serve to make it part of the national territory. The claim to exercise criminal jurisdiction within waters that lie *intra fauces terræ*, and the allowance of this in *Reg.* v. *Cunningham*, have already been referred to (*c*). The British official practice appears also to be to claim and exercise an administrative jurisdiction over "the waters of all bays the entrance to which is not more than six miles in width, and of which the entire land boundary lies within British territory"; and this even in relation to the subjects of foreign States. As a result of the conviction of the captain of the Norwegian fishing vessel for fishing in the prohibited area of the Moray Firth, it was provided by the Trawling in Prohibited Areas Protection Act, 1909 (9 Edw. 7, c. 8), that no prosecution should be brought for the exercise of prohibited fishing methods outside the three miles limit. See *Mortensen* v. *Peters* (1906) (14 S. L. T. 227; 8 F. 93; 43 S. L. R. 872).

General Notes.—*Sovereignty and Jurisdiction over Gulfs and Bays.*—Gulfs and bays running into the territory of a single State are also commonly regarded as "territorial waters," and hence as subject to the sovereignty and jurisdiction of the territorial Power. It is universally admitted that this is so, if the width of a gulf or bay at its point of actual junction with the open sea does not exceed six miles. Many writers, however, extend this to ten miles; and the practice of some States, such as France and Germany, accords with this view. Other States claim as their "territorial waters" bays and gulfs whose entrance largely exceeds this limit. Thus, as we have seen, Conception Bay, with an entrance twenty miles wide, was held to be a part of

(*c*) *Supra*, p. 142.

British territory, and Hudson Bay, with an entrance of fifty miles, is also claimed as territorial water by Great Britain. So, too, the United States include in their "territorial waters" Chesapeake Bay, the entrance to which is twelve miles from headland to headland; Delaware Bay, which is eighteen miles wide; and Cape Cod Bay, which is thirty-two miles wide; as well as other inlets of a similar kind (*d*). France, for special reasons, claims the Bay of Cancale, the entrance to which is seventeen miles in width (*e*). Norway claims the Varanger Fiord, with an entrance of thirty-two miles, as territorial waters. Such claims would probably be admitted by other States, subject to the body of water in question exhibiting a well-marked configuration as a gulf or bay; and perhaps subject also to such claims being confirmed by prescription and acquiescence. But it would not extend to a long curvature of the coast with an open face; or to claims such as those formerly made by the Crown in England as regards the "King's Chambers" (*f*); or to a claim such as that put forward by the United States in the Behring Sea controversy (*g*). So far as such bodies of water are rightly regarded as territorial, they will be subject alike to the sovereignty and jurisdiction of the territorial Power, to the same extent and for the same purposes as those already indicated in the case of the littoral or marginal sea. But the waters of gulfs or bays do not appear to be subject to a right of innocent passage on the part of foreign vessels; although they may be used by such vessels for the purposes of access to the State itself or for the purposes of refuge (*h*).

Inland Seas not directly communicating with the Ocean.—When an inland sea or a lake—for the name matters little—possesses no navigable outlet, other than a river outlet, to the ocean, it will be deemed to form a part of the territory of the State within which it lies, and to be subject to its exclusive sovereignty and jurisdiction. Or, if the sea or lake is bounded by the territory of more than one State, then the line of demarcation will be drawn through the middle; although the whole water, if navigable, will be subject to a common right of navigation on the part of all riparian States (*i*). But in such cases the respective rights of the riparian States are frequently regulated by convention. Thus, the navigation of the Caspian Sea, which lies within the borders of Russia and Persia, was regulated by treaty under which the merchantmen of each were admitted to *cabotage* on their respective coasts (*k*). Again, in the case of Lakes Ontario, Huron, and Erie, which are really inland seas, lying within the borders of Canada and the United States, the maintenance by the riparian Powers of armed vessels within these waters is, by a convention of 1817 (*l*), restricted to certain small vessels, limited as to size and armament,

(*d*) See *The Alleganean* (Scott, 143) and other cases there cited, especially at p. 153 *n*; and the case of *The Grange* (1 Op. Att.-Gen. 32).

(*e*) Hall, 157 *n*.

(*f*) These were portions of the sea comprised within lines drawn between promontories along the coast; see Taylor, 278.

(*g*) *Supra*, p. 129.

(*h*) See Hall, 198 *n*; and, on the question of prescription, Piggott, Nationality, i. 16 and 18; Oppenheim, i. 346.

(*i*) For a judicial recognition of these principles, see *U.S.* v. *Rodgers* (150 U. S. 249; Scott, p. 132).

(*k*) See Phill. i. 54; and Oppenheim, i. 324 and 748.

(*l*) Ratified in 1818.

which are required for police purposes (*m*). Such bodies of water, although they do not constitute a part of the high seas, in the sense of the open waters of the ocean, are yet considered part of the high seas, in the sense of being unenclosed waters which constitute a free highway for the people residing on their borders; and they have for this reason been held to be subject to the Admiralty jurisdiction (*n*).

Inland Seas directly communicating with the Ocean.—When a body of inland water, whatever its extent, and whether called a sea or bay or by any other name, communicates directly with the ocean, then the question of whether it falls within the category of "territorial waters" would seem to depend primarily on whether it is by its local configuration appurtenant to the land; and possibly also on whether it is bounded by the territory of more than one State. The former is probably the dominant consideration. With respect to the latter one can only say that the territorial claim would be greatly strengthened if the body of water in question were wholly enclosed within the borders of one State. As in the case of gulfs and bays, considerable weight would also probably attach to the question of long user and acquiescence (*o*).

The Baltic Sea.—But such a claim can never rightly be applied to the case of a sea which is for all practical purposes a continuation of the open sea, even though it may happen to be accessible through a comparatively narrow strait. For this reason the Baltic Sea, notwithstanding some occasional pretensions to that effect on the part of the Northern Powers (*p*), cannot rightly be considered as a closed or inland sea. And this appears to have been implicitly admitted as between the Powers that were parties to the Treaty of Copenhagen, 1857, and other treaties consequent thereon (*q*).

The Black Sea.—The Black Sea was formerly wholly enclosed by the territory of Turkey, and was for this reason regarded as subject to the dominion of the Ottoman Empire. Notwithstanding the subsequent acquisition of large portions of its coast by other States, such as Russia, Roumania, and Bulgaria, this sea has so far retained traces of its former character that "the ancient rule of the Ottoman Empire" that both the sea, and the straits giving access to it, should be regarded as closed to vessels of war, although open to merchant vessels since 1874, has been preserved by a variety of treaties made between Turkey and other European Powers (*r*). The most important of these is the Treaty of Paris, 1856, by which the Black Sea was neutralised, and declared open to the merchant vessels of all States, but interdicted to vessels of war, with the exception of certain light armed vessels required for the purposes of police under a convention between Russia and Turkey; whilst Russia also agreed to maintain no naval arsenals on the coast. By the Treaty of London, 1871, however, Russia was

(*m*) See Taylor, 443.

(*n*) See *The Genesee Chief* v. *Fitzhugh* (12 How. 443) as to prize jurisdiction; and *U.S.* v. *Rodgers* (150 U. S. 249) as to criminal jurisdiction.

(*o*) *Supra*, p. 147.

(*p*) Especially on the occasion of the First Armed Neutrality, 1780; see Westlake, i. 196; Wheaton (Boyd), 280.

(*q*) *Infra*, p. 152.

(*r*) See Westlake, i. 194; Taylor, 120 *n*; Wheaton (Boyd), 278.

allowed to maintain war vessels on the Black Sea, and to establish naval arsenals on its coasts; although the principle of the closure of the Straits to vessels of war was still preserved, subject to a right on the part of the Sultan to open them in time of peace to the ships of war of friendly or allied Powers, in case this should be necessary in order to secure the observance of the subsisting provisions of the Treaty of Paris (*s*).

Hudson Bay.—The case of Hudson Bay is also peculiar. It is a vast body of water embracing an area of 580,000 square miles; and although the entrance is fifty miles in width, it lies wholly within the territory of Canada, and further exhibits a well-marked configuration as an inland sea or closed sea. The bay was originally discovered by Henry Hudson, in 1610. In 1667 the Hudson Bay Company was formed; and in 1670 this company secured a royal charter granting to it the freehold of the bay and surrounding country, together with exclusive rights of trading; as well as the right of administration and of exercising a civil and criminal jurisdiction within the territory. These rights were temporarily invaded by the French, but were restored in 1713. The treaty of 1818, which conferred on the inhabitants of the United States the liberty, in common with British subjects, "to take fish of every kind . . . on the coast of Labrador, to and through the Straits of Belle Isle, and thence northward indefinitely along the coast," was expressly stated to be "without prejudice" to any of the rights of the Hudson Bay Company. In 1870, in consequence of the dissatisfaction provoked by the company's rule amongst the inhabitants of the settled districts, its territory was purchased and taken over by the Canadian Government; the company, however, retaining the privilege of trading, as well as the ownership of certain areas and tracts reserved or granted to it. In this way the sovereignty of the territory, under the Crown, became vested in the Dominion of Canada; and in virtue thereof Canada now claims sovereign rights not only over Hudson Bay, but also over all the waters and lands to the west of the entrance to Hudson Strait. This claim rests on the original discovery of this region by British seamen; its occupation by the Hudson Bay Company; the recognition of the title of that company by France in 1713, and by the United States in 1818; finally, on the acquisition of the company's interest by Canada in 1870. The bay is, however, much frequented by American whalers; and although the issue has not so far been directly raised, the United States Government is indisposed to acquiesce in any claim by Canada to exclusive sovereignty and dominion over the entire bay. This denial appears to rest on the following grounds: (1) that Hudson Bay does not constitute a territorial water, and that Canada has therefore no territorial rights outside the three-mile limit; (2) that the treaty of 1818, amongst other things, conferred expressly on United States fishermen a right of fishing in British territorial waters lying north of the Straits of Belle Isle (*t*), and that it could not have been intended to excise from

(*s*) *Infra*, p. 337; Taylor, 124; Phillipson & Buxton, 121-9.

(*t*) "Along the coast of Labrador and northward indefinitely from the Straits of Belle Isle." For a more detailed account of the provisions of this treaty, see p. 159, *infra*.

this grant all the waters west of the Hudson Strait; (3) that any special rights recognised by the treaty of 1818 as inherent in the Hudson Bay Company must be deemed to have become extinct on its supersession by Canada in 1870; (4) that even if such rights can be deemed to have devolved on Canada, they would not serve to exclude other States beyond the ordinary three-mile limit; and, finally, (5) that even if Canada should be able to substantiate her claims in all these respects, yet the uninterrupted pursuit of the whale fishery by the American fishermen for a long period affords a substantial moral, even if not a legal, claim for its continuance (*u*).

(iii) STRAITS AND WATERWAYS, NATURAL AND ARTIFICIAL.

CONTROVERSY BETWEEN DENMARK AND OTHER POWERS WITH RESPECT TO THE SOUND DUES, 1857.

[Wharton, Digest, i. § 29; Phillimore, i. 254; Wheaton, § 183.]

Controversy.] From very early times Denmark had claimed both dominion and sovereignty over the waters of the Great Belt, the Little Belt, and the Sound, which connect the Kattegat and the Baltic, and divide Denmark from Sweden; the Sound being at one point only three miles wide. Denmark also claimed a right to levy tolls on all vessels passing through these straits, this claim being founded in part on the ground that Denmark had originally owned both sides of the strait, and had, on the subsequent cession of the province of Scandia to Sweden, expressly reserved her rights in the matter; and in part on the ground that Denmark maintained buoys, lights, and other necessary aids to navigation. This claim, which was sanctioned by prescription, and affirmed by numerous treaties made between Denmark and other maritime Powers, was for a long time acquiesced in by the other States; but in course of time both the collection of the dues and the detention and delay of the vessels which this occasioned became a source of complaint on the part of other States. And this discontent appears to have gained in strength with the increasing

(*u*) For a full narrative, and an examination of the respective contentions, see an article by P. J. McGrath, Fortnightly Review, January, 1908.

tendency, both in opinion and practice, to regard the right of free passage through all waters constituting channels of communication between parts of the open sea as an inherent right under the law of nations. The United States, in particular, questioned the legality of these exactions, claiming that they constituted a violation of the now recognised principle of freedom of navigation; and alleging that if they were acquiesced in at the entrance to the Baltic, then they might well be demanded at the Straits of Gibraltar, or the Straits of Messina, or the Dardanelles. The issue was thus one between a prescriptive claim long acquiesced in, on the one hand, and the more recently established principle of free communication between parts of the open sea, on the other.

Settlement of the Controversy.] In the result this controversy, as between Denmark and the chief maritime Powers of Europe, was settled by the Treaty of Copenhagen of 1857; whereby it was agreed—although without any explicit recognition of the right to levy such dues in the past—that Denmark should discontinue the levy of these tolls for the future; but should continue to maintain and renew all necessary buoys and lighthouses; and should also superintend the pilotage of the straits, although without making pilotage compulsory, and at the same charges for foreign as for Danish vessels. A fixed rate of transit duties on goods was provided for. The other Powers, on their part, agreed, in consideration of this undertaking, to pay to Denmark an indemnity of thirty millions of rig-dollars; such amount being assessed between the contracting parties in certain proportions (*x*). Similar conventions were subsequently made with other European Powers, such as Spain and Portugal, which had not been parties to the principal treaty. The Government of the United States refused to be a party to the principal treaty, both because this was thought to involve a recognition of Denmark's previous claim, and also because it did not care to involve itself in a question of purely European politics; but by a subsequent convention of 1858 it was arranged that the passage of the Sound and Belts should be made free also to American vessels, on the payment of a sum of £79,757, in consideration of Den-

(*x*) £3,000,000, of which £1,125,206 was paid by Great Britain.

mark undertaking to maintain the necessary adjuncts of navigation.

The right of innocent passage through waters otherwise territorial, such as straits connecting parts of the open sea, includes a right of passage untrammelled by any toll or exaction on the part of the territorial Power. Hence even if Denmark had preserved her rights as riparian owner on both sides of the Sound, as she purported to have done, this, in itself, would not have warranted her in imposing tolls on, or in otherwise hindering, the passage of vessels belonging to other States. On the other hand, in such cases, prescriptive rights, and especially those which date back to a time prior to the formation of modern international law, cannot justly be ignored. And the controversy was therefore settled on lines which, whilst vindicating the dominant modern principle, yet made due provision for the satisfaction of claims sanctioned by long usage and acquiescence. The relinquishment of the Danish claim may be said to mark the final establishment of the principle of free navigation, as regards territorial waters constituting a necessary channel of communication between parts of the open sea.

General Notes.—*Sovereignty and Jurisdiction over Straits.*—In spite of some divergence of opinion, the principle governing the territoriality of straits appears to be the same as that which governs the littoral sea. Hence, whether a strait is bounded on both sides by the territory of the same State, or is bounded on one side by the territory of one State and on the other by that of some other State or States, the adjacent Power or Powers, as the case may be, will be entitled, subject to the limitation mentioned hereafter, to treat as "territorial waters" and to exercise all consequent rights of sovereignty and jurisdiction over such parts of the strait as lie within three miles from the low-water mark (*y*).

The Right of Innocent Passage.—But even though, on this principle, the whole strait should become a part of the territorial waters of the adjacent State, yet if it constitutes a natural waterway, or a necessary or convenient channel of communication between different parts of the high sea, it will, like the littoral sea, be subject to a right of innocent passage on the part of vessels belonging to other States. This right, whether in relation to the littoral sea or straits, would seem to extend to all vessels, public as well as private; and to apply at all times, whether of peace or war (*z*). Hall, indeed, doubts whether a right of innocent passage extends to foreign war vessels; but the errand of such vessels is frequently peaceful, and such right is in fact never denied to them in time of peace; although it would not justify such a vessel, in time of war, in taking up her station in territorial waters without the consent of the territorial Power, or in using such waters

(*y*) As to the nature of such rights, see p. 143, *supra*.

(*z*) Except, of course, to hostile vessels in time of war.

for the purpose of aggression. During the Russo-Japanese War Sweden-Norway entirely closed a number of ports and fjords to the entry of belligerent warships. (*a*).

The Dardanelles and the Bosphorus.—These territorial straits, connecting the Black Sea and the Mediterranean, occupy a special position; and, owing to historical causes, are subject to special regulations, which form a part of the public law of Europe (*b*). By the Treaty of Paris and the Straits Convention of 1856, between Great Britain, France, Austria, Prussia, Russia, Sardinia, and Turkey, affirming certain earlier treaties to the same effect, it was provided that the navigation of these straits should be free to foreign merchantmen, but that foreign war vessels should be excluded, subject to certain minor exceptions. By the Treaty of London, 1871, however, it was declared that the Porte should be at liberty to open these straits to the war vessels of friendly and allied Powers, for the purpose, if necessary, of enforcing the stipulations of the prior treaty (*c*). The action of Russia, in 1904, during the Russo-Japanese War, in passing the "Smolensk" and "Petersburg" through the straits under the merchant flag, and subsequently employing them, under the names of the "Rion" and the "Dnieper," as armed cruisers, and in restraint of neutral trade, led to serious disputes between that country and Great Britain, on the ground (*inter alia*) that this was a violation of the Treaty of Paris and Straits Convention (*d*). The navigation of the straits, including the Dardanelles and the Sea of Marmora is now governed by Articles 37—61 of the Treaty of Sèvres, 1920. These waters are to be "open both in peace and war, to every vessel of commerce or of war and to military and commercial aircraft without distinction of flag," and are to be subject to the control of an international commission, possessing its own flag, budget and organisation" (*e*).

Artificial Waterways.—Artificial waterways, on the other hand, are not subject to those rules which govern the use of straits or natural waterways; and no right of "innocent passage" exists with regard to them. Except where regulated by international convention, as in the case of the Suez, Panama, and Kiel Canals, such waterways are subject to the exclusive control of the State within whose territory they lie; and that State may either prohibit or regulate their use by vessels belonging to other States, as it may deem expedient. Such is the case with the Corinth Canal, which connects the Gulf of Corinth with the Gulf of Ægina. Nevertheless, in the case of certain interoceanic canals, the importance of the waterway as a part of the highway of nations has led to their regulation by international convention; and such agreements, although they are liable to modification and do not yet embrace all civilised States, may nevertheless be said to rank with those great "international settlements" already described (*f*). Such is the case with the Suez, Panama, and Kiel Canals.

(*a*) See Hall, 163; and Westlake, i. 192.

(*b*) *Supra*, p. 149.

(*c*) *Supra*, p. 149. As to the controversy which preceded this arrangement, *infra*, p. 334; Westlake, i. 195.

(*d*) As to the other aspects and issue of this controversy, see *infra*, vol. ii.

(*e*) Treaty Series No. 11 (1920) [Cmd. 964].

(*f*) *Supra*, p. 12.

Interoceanic Canals; (i) *The Suez Canal.*—The Suez Canal was originally constructed and is still owned by a French company, under a concession from the Khedive of Egypt; and was opened for traffic in 1867. In 1875 the British Government purchased the Khedive's shares, and both the British Government and British shipping interests are now represented on the governing body. The canal thus occupies a peculiar position. It is an artificial waterway; it lies wholly within Egyptian territory, Egypt being herself nominally a tributary State of Turkey, but is really in the occupation of Great Britain; it is owned by a French company, the British Government being, however, the largest shareholder, and the largest proportion of the vessels using it being British; whilst, finally, it constitutes an international waterway of vital importance to the commerce of the world. In 1882, in the course of the British operations in Egypt, the canal was occupied by Great Britain, and traffic for a short time suspended. In 1885 the principal European Powers agreed to appoint a commission for the purpose of drawing up a convention for the establishment of the free navigation of the canal. The commission was appointed and drew up a scheme, but it was only after protracted negotiations that an agreement was arrived at. Ultimately, a convention, which is commonly known as the Suez Canal Convention, was made between Great Britain, France, Germany, Austria, Italy, Spain, the Netherlands, and Turkey, and ratified at Constantinople in December, 1888. The rules which it embodies are in substance as follows: (1) The canal is to be open to all vessels at all times, whether of peace or war, and is never to be blockaded. (2) No permanent fortifications are to be erected in the canal. (3) No acts of hostility are permitted within the limits of the canal or its ports of access, or within three miles therefrom. (4) War vessels belonging to a belligerent shall not be at liberty whilst using the canal to embark or disembark troops (*g*), or to revictual or take in stores, or to stay in the canal or its ports of access for more than twenty-four hours, save in case of necessity or as thereinafter provided, and the same provisions are to apply to their prizes. (5) In case vessels belonging to different belligerents find themselves in the canal or ports of access at the same time, then twenty-four hours shall elapse between the departure of any vessel belonging to one belligerent and that of any vessel belonging to the other. (6) No men-of-war shall be stationed inside the canal, although each Power, not being a belligerent, may station two men-of-war in the ports of Suez or Port Said. The Egyptian Government was charged with taking the necessary steps to carry out these provisions; appealing to Turkey, and through Turkey to the signatory Powers, in case of need. The territorial rights of Turkey are expressly reserved by the convention, as are also the sovereign rights both of the Sultan and Khedive, except in so far as they are expressly affected by the terms of the agreement (*h*).

(*g*) It was subsequently agreed, however, that this provision should not apply to the landing of invalids at the hospitals of Suez and Port Said.

(*h*) As to certain reservations made by Great Britain on the signing of this convention, in relation to its effect on the British occupation; and as to the effect on these of the Anglo-French agreement of 1904, see Westlake, i. 328.

On December 18, 1914, a British Protectorate was proclaimed over Egypt, and by Art. 152 of the Treaty of Peace, 1919, the rights of the Sultan under the Convention of 1888 were transferred to Great Britain.

(ii) *The Panama Canal.*—In 1880 M. de Lesseps, having obtained the necessary concessions, formed a company for the purpose of constructing a ship canal through the isthmus of Panama, between the Atlantic and Pacific Oceans. The canal was commenced in 1881, and its construction proceeded with for some time; but in consequence of the insolvency of the company its operations were suspended in 1889, and subsequently abandoned. In 1890 an extension of time was granted by the Government of Colombia to the liquidators of the Panama Canal Company, with a view to the reconstitution of that company and the renewal of the work; but without any practical result. Meanwhile, amongst other projects, one was formed for the construction of the canal by the United States Government; and in 1903, after much negotiation, that Government undertook to purchase all the rights and property of the Panama Canal Company for an agreed sum, subject to the conclusion of a treaty with the United Republic of Columbia for the acquisition of the necessary concessions. Such a treaty was provisionally concluded in 1903, and was in fact ratified by the United States Senate, although it failed to secure the approval of the Congress of the United Republic. On the 3rd of November, 1903, however, Panama, one of the member States of the United Republic, seceded and declared its independence. The United States thereupon intervened, nominally for the purpose of protecting the railway; and thereafter, despite the protests of the Colombian Government, refused to allow the troops of the latter Power to land. On the 6th of November the revolutionary Government of Panama was recognised by the United States as a *de facto* Government; and on the 18th of November a new canal treaty on the lines of that previously proposed to the United Republic, but enlarging somewhat the jurisdiction conceded to the United States, was provisionally concluded. After the adoption of a constitution by the new State, this treaty was duly ratified on its behalf; and was also ratified by the United States Senate (*i*).

Treaty between the United States and Panama (*k*).—Briefly, the purport of the new canal treaty, known as the Hay-Varilla Treaty, was as follows: (1) Panama ceded to the United States a strip of territory, five miles in width, on each side of the proposed canal, and also such other land as might be necessary to the construction and maintenance of the canal, together with the sovereignty over all such lands, and maritime jurisdiction over a space of three marine leagues from each end of the canal. (2) The concession also carried a right to fortify and police the terminal towns of Colon and Panama, subject to their municipal autonomy not being interfered with, so long

(*i*) The facts appear to be that the Government of Colombia having held out for unreasonable terms, the United States arranged for the setting up of a new State, which was more amenable to American influences and favourable to American interests.

(*k*) Brit. and For. State Papers, vol. 96, p. 553. Ratifications exchanged at Washington, 26th of February, 1904.

as order was preserved. (3) Panama also granted to the United States the use of all navigable waters outside the canal zone, so far as might be necessary or convenient for the construction, maintenance, or sanitation of the canal, as well as a perpetual monopoly of any existing system of communication across the isthmus of Panama. (4) In consideration of this concession, the United States undertook to guarantee the independence of the State of Panama; and also to pay $10,000,000 in cash, as well as an annuity of $250,000, commencing nine years after the ratification of the treaty. Subsequently Congress also passed an Act making due provision for the government of the canal zone.

Treaty between Great Britain and the United States, 1901.—Meanwhile another obstacle to the construction and control of the proposed canal by the United States had arisen under the provisions of the Clayton-Bulwer Treaty of 1850. By this treaty, which had been entered into between Great Britain and the United States in anticipation of the construction of a ship canal through the same isthmus, it had been agreed, *inter alia*, that neither Power should "exercise any exclusive control over such ship canal," or "erect or maintain any fortifications commanding the same" (*l*). After much negotiation, however, the provisions of this treaty were eventually superseded by a new treaty of the 18th of November, 1901, known as the Hay-Pauncefote Treaty, which was subsequently duly ratified by both parties. By this treaty, it was agreed that the canal should be constructed under the auspices of the Government of the United States; that that Government should also have the exclusive right of regulating and managing the canal (Art. 2.); but that the canal should be neutralised, the rules adopted as the basis for its neutralisation (*m*) being very similar to those embodied in the Suez Canal Convention of 1888. The rules by which the navigation of the canal, when constructed, was to be governed are, in substance, as follows: (1) The canal is to be free and open to the vessels of commerce and of war of all nations on equal terms, and on just and equitable conditions. (2) The canal shall never be blockaded, or hostilities committed therein, although it is to remain subject to the necessary police powers on the part of the United States. (3) Belligerent war vessels shall not be allowed, whilst using the canal, to take in supplies (except in case of necessity) or munitions of war, or to embark or disembark troops, and shall be required to pass through the canal with the least possible delay in accordance with the regulations in force, the same provisions being applicable to prizes. (4) These provisions are also to apply to waters adjacent to the canal within three miles of either end. (5) Belligerent war vessels shall not tarry in such waters beyond twenty-four hours (except in case of distress), but a war vessel belonging to a belligerent shall not depart within twenty-four hours of the departure of a war vessel belonging to another. (6) All works and buildings connected with the canal are to enjoy complete immunity from attack in time of war (Art. 4, sub-ss. 1-6). It is also stipulated that no change of territorial sovereignty or in the international relation of the countries

(*l*) For an account of the controversy which arose in connection with this treaty, see Lawrence, Essays on International Law, No. 3.

(*m*) As to the applicability of this term, see Westlake, i. 330 *n*.

traversed by the canal shall affect its neutralisation or the obligations of the parties under the treaty (Art. 4). Although these rules strictly only apply as between Great Britain and the United States, yet in effect the advantages of the treaty are extended to other States; whilst its obligations as regards neutralisation of the canal will probably, in view of the naval strength of the two Powers, the recognised paramountcy of the United States in matters affecting the American continent, and the equitable character of the rules themselves, come to be regarded as a part of the conventional law of nations.

The Kiel Canal.—By Articles 380-86 of the Treaty of Versailles, 1919, the Kiel Canal and its approaches are to be "free and open to the vessels of commerce and war of all nations at peace with Germany on terms of entire equality." Charges may only be levied for maintenance, improvement or expenses incurred in the interests of navigation. Germany is made responsible for any obstacle or danger to navigation and for the maintenance of good navigable conditions. She is not to undertake any works of a nature to impede them. In case of violation, or disputes as to the interpretation, of these Articles any party may appeal to the League of Nations, and for the settlement of small questions a local authority is to be set up at Kiel by Germany.

RIGHTS OF FISHERY.

BRITISH-AMERICAN FISHERIES DISPUTES, 1815—1907.

[British and Foreign State Papers, vol. 6 (1818-19); vol. 79 (1887-88); vol. 83 (1890-91); Parl. Papers, U.S., No. 1, 1906; and Parl. Papers, Newfoundland, 1907 (*n*).]

The Treaty of 1783.] By the treaty of 1783, which recognised the independence of the United States, Great Britain conceded to the inhabitants of the former country a right to take fish of every kind on the Grand Bank and other banks of Newfoundland; and also on the coasts of Newfoundland, in the Gulf of St. Lawrence, and on the coasts, bays and creeks of other British possessions in North America; together with a right to land for the purpose of drying their nets and curing fish in the unsettled bays, harbours, and creeks of Nova Scotia, the Magdalen Islands, and Labrador, so long as the same should remain unsettled.

(*n*) See also "The Newfoundland Fishery Dispute," by P. T. McGrath, N. A. Review, vol. 183, p. 1134; and "The Fishery Concessions to the United States in Canada and Newfoundland," by the Hon. T. Hodgins, Contemporary Review, June, 1907.

The Effect of the War of 1812.] After the war of 1812 a dispute arose as to whether the privileges conceded by the Treaty of 1783 had been abrogated by the war. On the part of the United States, it was contended that the effect of that treaty had been, not to confer any new rights or privileges, but only to confirm and regulate those rights which had been enjoyed by inhabitants of the United States before the separation of the two countries; and that such rights were in the nature of real rights, and consequently not affected by the subsequent outbreak of war, any more than the recognition of independence itself. On the part of Great Britain it was contended that the claim of one State to occupy any part of the territory or fish in the territorial waters of another State could not rest on any other foundation than convention. Nor could she assent to the proposition that such a treaty could not be abrogated by subsequent war; or that the present case constituted any exception to the general effect of war on treaties, more especially in view of the fact that the rights conferred by the treaty had in themselves all the features of temporary concessions. Nor did it follow, even if some stipulations of a treaty were irrevocable, that the whole of its provisions were so.

The Treaty of 1818.] After much correspondence between the two Governments, the orders given to the British commissioners to prohibit the exercise of such rights by inhabitants of the United States were suspended, with a view to the arrangement of a new treaty. As the result of these negotiations a new treaty was entered into in 1818 between the two countries, whereby perpetual fishing rights were conceded to the United States on the basis of contract (*o*). More particularly it was provided: (1) that the inhabitants of the United States should have, for ever, in common with British subjects, the liberty to take fish of every kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau Islands, and on the western and northern coasts from Cape Ray to the Quirpon Islands; on the shores of the Magdalen Islands; and also on the coasts, bays, harbours, and creeks from Mount Joly, on the southern coast of Labrador, to and through the Straits of Belle Isle, and thence northward indefinitely along the coast; but

(*o*) See Hall, 95.

without prejudice to any of the exclusive rights of the Hudson Bay Company; (2) that the United States fishermen should also have for ever liberty to land for the purpose of drying and curing fish, in any of the unsettled bays, harbours, and creeks of the southern part of the coast of Newfoundland above described, and of the coast of Labrador, but not after the same were settled, except by previous agreement with the inhabitants, proprietors, and possessors of the ground; whilst (3) the United States renounced for ever the right to take, dry, or cure fish on or within three marine miles of any of the coasts, bays, creeks, or harbours of the British dominions in America not included within the above limits; although they were to be allowed to enter for shelter, repairs, purchasing wood, and obtaining water, but not for any other purpose, and subject in any case to such restrictions as might be necessary to prevent them from exceeding or abusing this privilege (*p*). In 1819, by 59 Geo. 3, c. 38, the Crown was empowered by Order in Council to issue such regulations and directions as might be deemed necessary for carrying this convention into effect, notwithstanding any Act, law, custom, or usage to the contrary.

Subsequent Treaties and their Rescission.] In 1849, at the instance of Canada, negotiations were commenced between Great Britain and the United States, with a view to conceding to the inhabitants of the United States further rights of fishery, in return for reciprocity of trade with Canada in all natural productions. In the result, by the reciprocity treaty of 1854, the whole matter was readjusted on the basis of a mutual concession of certain rights of fishery, without restriction as to distance from the shore—to the inhabitants of the United States, along the coasts of Canada, Nova Scotia, New Brunswick, Prince Edward Island, and adjacent islands—and to British subjects, along the

(*p*) It was subsequently held by a Commission appointed to adjudicate on certain claims arising between the two countries, in the case of the schooner "Washington," which had been seized and declared forfeit for fishing in the Bay of Fundy, although at a distance of ten miles from the shore, that that bay, which is over 60 miles wide and about 140 miles long, and which is as to one of its headlands within United States territory, did not constitute a territorial bay or water within the meaning of the exclusive clause of the treaty, but must be considered an open arm of the sea; see Scott, 153; and Taylor, 297.

eastern coasts of the United States north of 36° N. lat.; certain kinds of fishery, such as salmon and river fishery, being, however, in both cases expressly excepted. This treaty, which was terminable, was brought to an end by the action of the United States in 1866 (*q*), with the result that the parties were thrown back on the treaty of 1818. The matter was for a time regulated anew by the Treaty of Washington, 1871, by which reciprocal rights of fishing were conceded very much on the lines of, and within the limits prescribed by, the previous treaty of 1854; save for the substitution, as regards the privileges of British fishermen, of 39° for 36° N. lat. Inasmuch as the privileges conceded to the United States were alleged to be greater than those conceded to Great Britain, provision was made for the appointment of a Commission to inquire into this matter and to settle the amount of compensation, if any, which might be due in respect of this alleged want of mutuality of consideration; with the result that a Commission sitting at Halifax, in 1877, awarded to Great Britain a sum of $5,500,000. The Treaty of Washington, which was also made terminable at any time after ten years, subject to two years' previous notice by either party, was brought to an end by the action of the United States in 1885 (*r*); with the result that both parties were again relegated to their rights under the treaty of 1818. The strict enforcement of the provisions of this treaty by the Canadian Government gave rise to much friction; and with a view to abating this, and as the result of a conference held at Washington in 1887, the terms of a new treaty were provisionally agreed upon. By this it was provided, *inter alia*, that a mixed Commission should be appointed for the purpose of ascertaining and determining those waters of Canada and Newfoundland over which the United States Government had renounced any claim; whilst it was also agreed that the marine league, within which exclusive rights of fishery usually belong to the territorial Power, should be measured from low-water mark, or, in the case of bays and gulfs not more than ten miles across, by a straight line drawn from headland to headland. This treaty, however, fell through, owing to the refusal of the United States Senate to ratify it. Another treaty, known

(*q*) *Supra*, p. 121.

(*r*) By notice given, 1883.

as the Chamberlain-Bayard Treaty, was provisionally entered into in 1888, but failed to secure the ratification of the United States Senate, with the result that the relations of the parties still continue to be governed by the provisions of the treaty of 1818.

Controversy between United States and Newfoundland.] Meanwhile difficulties and disputes had arisen between Newfoundland, which had been endowed with responsible Government in 1855, and the United States, with respect to the exercise in Newfoundland waters of the fishing rights conceded to American fishermen by the treaty of 1818, and especially as to how far the latter were bound by regulations affecting the local fishermen; and in these disputes Great Britain now found herself involved. A settlement was provisionally arranged by a treaty made in 1890, known as the Bond-Blaine Convention; but the final ratification of this convention was withheld by Great Britain at the instance of Canada. In 1893 a Foreign Fishing Vessels Act was passed by the Newfoundland Legislature, which prohibited such vessels from purchasing bait or other supplies on or within the three-mile limit, except on the issue of a licence and on payment of a prescribed charge; from engaging men in any port or part of the coast; and from entering such waters for any purpose not authorised by convention or statute (*s*), under penalty of seizure and confiscation. In 1902, as the result of fresh negotiations between Newfoundland and the United States, the terms of a treaty known as the Bond-Hay Treaty were provisionally agreed upon; but this treaty was virtually rejected (*t*) by the United States Senate. Thereupon the Newfoundland Legislature in 1905 passed a new Foreign Fishing Vessels Act, in which the provisions of the former Act were repeated, with the omission of the sections authorising the issue of licences. Finding that this was evaded by the United States fishermen, who engaged local crews just outside the three-mile limit, a new Act, the Foreign Fishing Vessels Act, 1906, was passed, prohibiting local fishermen from leaving the territory for the purpose of serving on foreign vessels, and also prohibiting

(*s*) Treaty rights being thus expressly saved.

(*t*) "Amended to death."

the latter, under penalty of fine and confiscation, from employing local fishermen, being British subjects, for the purposes of their fishery in colonial waters; although this Act was only to come into operation upon proclamation that it had been approved and confirmed by the Crown in council. Upon the protest of the United States against this legislation, the British Government intervened; and in October, 1906, a *modus vivendi* was arranged between the British and American Governments, under which, for the ensuing season, the American fishermen were allowed to engage local fishermen outside the three-mile limit, and also to use purse seines (a practice forbidden by the local regulations) in local waters; but were required to pay light dues, to abstain from fishing on Sundays, and to report at Customs-houses when possible; the British Government undertaking to suspend the Act of 1906, and to limit the operation of the Act of 1905, in accordance with these arrangements —a proceeding which gave rise to much dissatisfaction on the part of Newfoundland.

In June, 1907, in view of the approach of the fishing season, negotiations were renewed, with the result that in July the United States proposed "a reference of pending questions under the treaty of 1818 to arbitration before The Hague Tribunal," and an *ad interim* renewal of the existing *modus vivendi*. The former proposal was found to be acceptable both to Newfoundland and to Canada, which were consulted by Great Britain during the course of the negotiations; but the proposed renewal of the *modus vivendi* was objected to by Newfoundland as unjustifiable and unnecessary, and any modification of the domestic law by local authority was refused. Notwithstanding this objection, the United States proposals were ultimately accepted by Great Britain, subject only, as regards the *modus vivendi*, to an abrogation of the right of the United States fishermen to use purse seines. In order to give effect to this arrangement, and with the object of displacing the local laws in so far as they might be inconsistent therewith, an Order in Council was issued on the 9th of September, 1907, under the authority of 59 Geo. 3, c. 38 (*u*). This Order directed that

(*u*) *Supra*, p. 160.

none of the local provisions, relating to the boarding and bringing into port of foreign fishing vessels offending against the local law, should apply to vessels used by the inhabitants of the United States in pursuance of any rights conferred by the treaty of 1818; and also forbade the arrest or seizure of such vessels, save with the consent of the senior naval officer on the Newfoundland station. Newfoundland protested against the proceeding; but the Order in Council was nevertheless proclaimed in Newfoundland on the 24th of September, 1907. In August, 1908, however, another *modus vivendi* was concluded, and this having been accepted by Newfoundland, the Order in Council was revoked. In February, 1909, the terms of reference of the dispute to The Hague Tribunal were agreed, and the dispute settled by the award of the Permanent Court of Arbitration in 1910, which refused to recognise the conception of State servitudes. The recommendations contained in the award were with certain modifications embodied in a Treaty signed July 20, 1912 (*x*).

This controversy, although settled, serves, in the various phases through which it has passed, to illustrate several important principles. (1) In the first place, the British contention, that the claim of one State to occupy or use any part of the territory or to fish in the territorial waters of another cannot rest on any other foundation than conventional stipulation, may be said to have been affirmed—and the American contention, that on the separation of one State from another State the inhabitants of the former retain all local rights previously enjoyed in the territory of the latter, may be said to have been refuted—by the arrangement of 1818, under which such rights were accepted by the United States on the basis of contract (*y*). (2) The terms of the proposed arrangement of 1887 also convey a useful indication as to the limits of the marginal sea within which a State may be said to possess exclusive fishing rights, and their mode of ascertainment. (3) The contention of the United States, that where a right, in the nature of a right of fishery, has once been conceded by treaty by one State to another, such a right, even though suspended by a subsequent outbreak of war, will nevertheless revive without express stipulation on the restoration of peace, would appear to depend for its validity on whether the treaty in question was intended to set up a permanent state of things or not (*z*). (4) The question as to how

(*x*) Scott's Hague Court Reports, 195-225.

(*y*) See Hall, 96, note 2.

(*z*) See *infra*, vol. ii., *sub nom.* "Effect of War on Treaties."

far a State whose subjects are invested by treaty with rights of fishery within the territorial waters of another State are bound by the municipal regulations of the latter is still unsettled. As to this the British Government contends that such a right is not a right to a free, but only to a regulated fishery; to be exercised "in common with" subjects of the territorial Power, and subject to the like regulations (*a*). The contention that a State, in such a case, is only bound by regulations existing at the time of the treaty appears to be altogether untenable, for the reason that conditions suitable at one time may become inadequate or wholly unsuitable at another. In the same way, a claim to veto the making of new regulations would appear to be altogether inconsistent with the true nature of the concession; which was essentially a grant of the right to share in privileges primarily belonging to the subjects of the territorial Power, and not a surrender of the entire interest of the grantor, involving a partial abrogation of sovereignty. It is, moreover, an accepted rule that a treaty should be construed, so far as possible, in such a way as to give due effect to the fundamental legal rights of a State, including the right of regulating all matters occurring on its own territory or territorial waters, except where this right has been expressly resigned. For these reasons, it would seem that the territorial Power in such a case must be deemed to retain its power of making all reasonable and suitable regulations; and that both the grantee State and its subjects will be bound thereby. But in order that such regulations may be "reasonable" they must have been made in the interest of the proper working of the fishery, and not for the purpose of putting the grantee State or its subjects at a disadvantage, or limiting the actual enjoyment of the rights conferred by the treaty (*b*). (5) Finally, there is the question as to the position of one State, where its rights, whether arising under treaty or not, are prejudiced or infringed by the action of a constituent part or dependency of another State, acting within its powers under the local constitution. A general answer to this question will be attempted hereafter (*c*). But in the particular controversy now under consideration it would seem that the United States Government had by its previous action, in connection with the treaties of 1854, 1874, and possibly even by the unratified compacts of 1874 and 1887, in which it assented to provisions that could only be carried into effect by the intervention of the Colonial Legislature, committed itself to an acknowledgment of the authority of the Colonial Legislature, in a way that precluded it from subsequently questioning the competency of Newfoundland to intervene, even though it might question the validity of its regulations on other grounds (*d*).

General Notes.—*The Right of Fishing in Territorial Waters.*—Every State has an exclusive right to the enjoyment of the fisheries,

(*a*) Sir E. Grey to Mr. Whitelaw Reid, 2nd of February, 1906. A similar position appears to have been taken up by Mr. Evarts in connection with the Fortune Bay disturbances of 1878; see Mr. Hodgins' article in Contemporary Review, June, 1907.

(*b*) See also Hall, p. 347.

(*c*) *Infra*, p. 231.

(*d*) See article by Mr. Hodgins in Cont. Review, June, 1907, above referred to.

and the appropriation of other products of the sea, within the limits of its "territorial waters"; and such rights are in fact commonly reserved to the subjects of the territorial Power (*e*). As regards bays, this right is sometimes said to be limited to bays not exceeding six miles in width, of which the entire land boundary forms part of the territory of one State, which appears to be the view adopted by the British Foreign Office and other administrative departments (*f*). But on principle it would seem to extend to all waters that are in fact regarded as "territorial," whether they fall within the common rule, or are so treated by virtue of prescription and acquiescence (*g*). Nevertheless, rights of fishery within these limits are occasionally conceded to the inhabitants of other States; the right in such cases being sometimes concurrent and sometimes exclusive. Thus, concurrent rights of fishery within certain limits were, as we have seen, mutually conceded as between Great Britain and the United States, under the treaty of 1854. Again, in 1713 a concession of exclusive rights, although seemingly only as regards certain kinds of fishery, was made by Great Britain to France, in the waters adjacent to certain parts of the coasts of Newfoundland.

The Newfoundland Fishery Dispute between Great Britain and France.—By the Treaty of Utrecht, 1713, by which the British sovereignty over Newfoundland was finally recognised by France, liberty was reserved to the French to catch fish, and also to land for the purpose of drying and curing fish, along the coasts of Newfoundland, between certain points indicated by the treaty; this concession having been confirmed by the Treaty of Paris, 1763, whilst the territorial limits were somewhat modified by the subsequent Treaty of Versailles of 1783. By a declaration, moreover, accompanying the latter treaty, the British Government undertook to prevent its subjects from interrupting by their competition the fishery rights so conceded, and also to cause any fixed settlements which had been or might be formed within the French limits, known as the "French shore," to be removed. After the concession of responsible government to Newfoundland in 1855 various disputes arose; more especially as to whether the concession applied to all kinds of fishery, including the lobster fishery, or only to the cod fishery; also as to whether the undertaking accompanying the treaty of 1783 extended to the prohibition of all settlement and industries within the prescribed limits or only to such as were reasonably calculated to interfere with the fishery rights granted to the French; and, finally, as to whether the French rights of fishery extended to the waters of the rivers and lakes. After much negotiation, a *modus vivendi* between Great Britain and France was arrived at in 1890; although this gave great umbrage to the colony, and led to much local friction. Ultimately, by the Anglo-French Convention of 1904 (*h*), France renounced the exclusive rights conceded by the

(*e*) As to the British fisheries legislation and the limits within which it applies, see p. 143, *supra*.

(*f*) See answers to questions in Parliament on the *Moray Firth Case* on February 21, 1907; but see also p. 161, *supra*.

(*g*) *Supra*, p. 147; but not to extensions of the marginal zone, *supra*, p. 135.

(*h*) Confirmed so far as relates to British subjects by the Anglo-French Convention Act, 1904.

Treaty of Utrecht and subsequent treaties; but retained the right of fishing on a footing of equality with British subjects in the territorial waters (*i*) of Newfoundland passing by the north between Cape St. John and Cape Ray, during the ordinary fishing season, with a right to enter any port or harbour, and to obtain supplies on the same conditions as the inhabitants of Newfoundland, subject to the local regulations. In consideration of this Great Britain agreed to pay an indemnity in respect of any loss thereby occasioned to French fishermen; the amount of such indemnity to be determined by arbitration.

The Right of Fishing on the High Seas.—The right of fishing on the high seas is open to all; each State having jurisdiction only over its own subjects and own vessels. Nevertheless, in the common interest, provision is sometimes made by international convention for the mutual enforcement of certain restrictions and police regulations, in the case of fishing grounds frequented by fishermen of various nationalities. So, by the North Sea Fisheries Conventions of 1882 and 1889, the Powers abutting on the North Sea adopted a variety of regulations designed to secure the maintenance of peace and order amongst vessels engaged in fishing in the North Sea outside territorial waters; whilst by the conventions of 1887, 1893 and 1894, the sale of spirituous liquors is also prohibited (*k*). Moreover, by municipal law, the engagement by the subjects of one State in fisheries outside the territorial limits is sometimes subjected to certain restrictions. Thus, as has already been pointed out, the award of the arbitrators in the Behring Sea controversy of 1893 imposed on the parties the duty of enforcing certain restrictions and regulations on their subjects and citizens, as regards the seal fisheries in the Behring Sea; an obligation which has now, so far as British subjects are concerned, been given effect to by the Behring Sea Award Act, 1894. At the same time, it would seem that the claim to exercise jurisdiction and control even over foreigners, in relation to fisheries outside territorial limits, has not been wholly abandoned. The provisions in this respect of the Commonwealth of Australia Constitution Act, s. 51, sub-s. 10, have already been noticed (*l*). A similar extra-territorial jurisdiction has also been asserted with respect to the pearl fisheries of Ceylon and in the Persian Gulf (*m*). But, in general and except where sanctioned by convention and in relation to the subjects of the signatory Powers, it would seem doubtful whether any such jurisdiction can be validly claimed or exercised, even by prescription. Special interests in such cases must be deemed to be subordinate to that larger interest which is involved in the preservation of the freedom of the sea, and the common right to its products.

(*i*) Other than the mouths of rivers, beyond a straight line drawn between the extremities of the two banks.

(*k*) For a more detailed account of this and other conventions, see Oppenheim, i. 442-4; and Lawrence, p. 182. As to British municipal legislation on this subject, see the Sea Fisheries Acts of 1868 and 1883. See also Articles 273 and 285 of the Peace Treaty, 1919.

(*l*) *Supra*, p. 135.

(*m*) But see Westlake, i. 186.

EXTRA-TERRITORIAL ACTION—SELF-PROTECTION.

THE CASE OF THE "CAROLINE."

[1843; Parl. Papers, vol. lxi.; Wharton, Digest, i. § 50.]

Case.] IN 1838, during the Fenian raids on Canada, a body of insurgents having armed and organised in American territory, and having occupied a small island on the American side of the Niagara river, proceeded to make preparations for a descent on British territory, by means of a small steamer called the "Caroline." Thereupon the officer in command of the British forces determined on attacking the "Caroline." At the time when the attack was proposed it was expected that the vessel would be found moored in British territory, near Navy Island, in the Niagara river; but after the expedition had started it was found that she had altered her usual moorings, and had shifted to the United States side of the river. Notwithstanding this, the attack was made; with the result that the vessel was boarded, and after a short resistance sent down the Niagara.

The United States Government, in complaining of this violation of its territory, called on the British Government to show a necessity for self-defence, instant, overwhelming;—leaving no choice of means and no time for deliberation;—and also that nothing was done in excess of the requirements of self-defence. In the negotiations which ensued Great Britain complained that a hostile expedition had been permitted by the United States Government to organise on American territory without any effort being made to suppress it; and that American citizens had supported the seditious movements directed against the safety of Canada. The United States Government, on the other hand, complained that the attack on the "Caroline" was not such as was warranted by the necessity of self-defence; that it was made upon a passenger ship at night; that it was an invasion of United States territory; and that though the case had been brought to the notice of the British Secretary for Foreign Affairs, unnecessary delay had taken place in the communication of his

decision in the matter. The negotiations lasted over five years, but the matter was in the end settled amicably. The British Government expressed its regret for what had occurred, and also that an apology had not been made at the time. At the same time, so far as related to the violation of the United States territory, it maintained (1) that there was no choice of means, for the reason that the American Government had already shown itself powerless in the matter; (2) that there was no time for deliberation, for the reason that invasion was imminent; and (3) that nothing had been done in excess of what the necessities of the occasion required, for the reason that the British forces had confined their action to the cutting adrift of the vessel, and so depriving the invaders of their means of access. The United States Government ultimately accepted these explanations.

There are cases in which even the violation of the territory of another State may be excused, on the grounds of necessity and self-defence. But for this it must be shown that injury of a very grave character was threatened; that there was no other means of avoiding it; and that nothing was done in excess of the requirements of self-preservation. In the case of *The Caroline*, the Government of the United States virtually admitted the existence of this principle; but called on Great Britain to show that such instant and overwhelming necessity as would alone excuse the violation of the territory of another State existed. The British argument was all the more effective, for the reason that the United States Government was itself in fault in allowing such enterprises against the safety of Canada to be undertaken on American soil (*n*). Another instance in which the same principle was relied on occurred in 1817, when the United States Government took upon itself the destruction of a band of buccaneers who, under pretence of being engaged in rebellion against the Spanish Government, had established themselves on Amelia Island, in Florida, then belonging to Spain, and thence made depredations on the commerce and adjoining territory of the United States (*o*).

General Notes.—*The Alleged Right of Self-preservation.*—Although it may be true that "in the last resort almost the whole of the duties of States are subordinated to the right of self-preservation," yet it would seem that this so-called right cannot, generally, and in so

(*n*) As to the grave breaches of international duty of which the United States Government was guilty in 1838, and again in 1866, see Hall, 221 *n*.

(*o*) See Wharton, Digest, i. 222.

far as it relates to the preservation of the national existence, be made the foundation of legal rules. As Westlake insists, self-preservation is limited by justice. There are some acts a State must not commit even for its preservation from destruction (*p*). It is a fact of international life which has to be reckoned with, and by which all international rules are conditioned or limited; but, like intervention (*q*), of which it is commonly put forward as one of the chief grounds, it belongs rather to the domain of political action than that of law. The seizure, for instance, by Great Britain, in 1807, of the Danish fleet, in order to frustrate the designs of Napoleon, was in fact not the assertion of a legal right resting on usage, which other States were in strictness bound to recognise or uphold, but an act of violence rendered necessary in fact by the requirements of self-preservation (*r*). Nevertheless, for certain purposes, and within certain limits, the principle of self-protection or self-defence is recognised in international law, as in municipal law, as a justification or excuse for certain forms of extra-territorial action which would otherwise be unlawful; and to this extent it may be said to possess the character of a legal rule or principle.

Self-defence as a Justification for certain Forms of Extra-territorial Action.—Amongst the more important applications of this principle we may include: (1) the right of a State to protect itself against an impending injury of a grave character, which is immediately threatened from the territory of another State, in circumstances where an appeal to the latter would be of no avail—the limits of which have already been considered in the case of *The Caroline*; (2) the right of a State to protect itself in the case where a similar injury is threatened from the high seas, by a vessel flying a foreign flag—the limits of which will be discussed subsequently in connection with the case of *The Virginius*; and (3) the right of all States to exercise a jurisdiction over vessels reasonably suspected of piracy, even though purporting to fly a foreign flag, to the extent of ascertaining their true character—the limits of which will be considered in connection with the case of *The Marianna Flora* (*s*). To the same principle are sometimes also referred such rights as—the right of belligerents in time of war to protect themselves against certain acts done by neutrals which are likely to prejudice the conduct of their military or naval operations (*t*);—the right of a State in certain cases to vindicate an infraction of its territorial laws by immediate pursuit and arrest even on the high seas (*u*);—and the right of a State to intervene for the protection of the persons, property, and interests of its nationals outside the limits of its own territory (*x*);—all of which will be considered hereafter in connection with the various topics to which they are appropriate.

(*p*) Hall, 279; Westlake, i. 296-9.

(*q*) Save, perhaps, when resorted to as a matter of international police; see p. 362, *infra*.

(*r*) See Hall, 281; Taylor, 411.

(*s*) *Infra*, p. 275.

(*t*) This subject belongs to the law of war, and will be dealt with in vol. ii. But as to the counter-right of self-preservation in such cases as against the belligerent, see *The Ship Rose* v. *U.S.* (36 Court of Claims, 291; Scott, at p. 881).

(*u*) *Infra*, p. 175.

(*x*) *Infra*, p. 181.

SELF-DEFENCE AND PROTECTIVE JURISDICTION ON THE HIGH SEAS.

THE CASE OF THE "VIRGINIUS."

[1873; Parl. Papers, 1874, vol. lxxvi.]

Case.] The "Virginius" was a steamer which had been registered in 1870 in the port of New York as an American vessel and had received a certificate in the usual form; but for some time prior to July, 1873, she had really been owned by and employed in the service of the Cuban insurgents. In July, 1873, when so employed, she left Kingston, in Jamaica, nominally for Limon Bay, in Costa Rica, but really for the coast of Cuba, and on being chased by a Spanish warship put into Port-au-Prince, in Hayti; thence she proceeded again to the coast of Cuba, but whilst still on the open sea she was again chased and eventually captured on the 1st of November by the Spanish warship "Tornado." At the time of capture she had on board a large quantity of arms and ammunition, as well as a large number of passengers, many of whom intended, as there was reason to believe, to join the insurgent forces in Cuba, and some of whom were, indeed, alleged to be leaders of the insurrection; although others, including some of the British subjects, had shipped in the belief that the vessel was really bound for Costa Rica. At the same time the "Virginius" offered, and was capable of offering, no resistance to search or capture; and her passengers were not at the time of capture armed or organised or capable, in their then position, of engaging in immediate hostilities. The vessel was thereupon taken into Santiago de Cuba, and the passengers and crew were detained on a charge of piracy and aiding rebels. Four of her passengers were tried by court-martial on the 3rd of November, and were shot on the 4th; later, sixteen British subjects, part of the crew, were similarly tried and shot, in spite of the protests of the British Consul; whilst seven others were detained in prison. Amongst those who were executed were also nine citizens of the United States. Great Britain then declared that she would hold the Spanish Government responsible for any further executions; reserving for the time

being the question of the executions that had already taken place. The Spanish Government thereupon agreed to place the surviving British subjects at the disposal of the United States Government, in view of their having been captured on what purported to be a United States vessel; and also directed the Governor-General of Cuba to hold an investigation and report on the facts, in order to ascertain if there were any right to indemnification.

Controversy.] In the controversy which ensued two main questions arose; one relating to the treatment and summary execution of British and American citizens; and the other to the right of Spain to interfere on the high seas with a vessel carrying the American flag and entered on the American register.

With respect to the former question, the Spanish Government contended that, inasmuch as it appeared from the evidence, including declarations of the captain and some of the crew, that the "Virginius" had taken on board arms and ammunition; that she had then proceeded towards the coast of Cuba with a view to landing there; that she had on board some of the insurgent leaders as well as other persons for the reinforcement of the ranks of the insurgents—both the vessel and those on board were liable to be treated as piratical. In reply, Great Britain pointed out that no complaint was made, on her part, on account of the seizure of the vessel or detention of those on board. The ground of complaint was that, even assuming such seizure and detention to have been lawful, there was no justification for the summary execution of the prisoners, after an irregular proceeding before a drum-head court-martial. There was no pretence for treating the expedition as a case of piracy *jure gentium;* and even if the "Virginius" was to be regarded as a vessel piratically engaged in a hostile or belligerent enterprise, such treatment was still unjustifiable. Much might be excused in regard to acts done in self-defence, whether by a nation or an individual; but after the capture no pretension of an imminent necessity of self-defence could be alleged; and it then became the duty of the Spanish authorities to prosecute the offenders on a definite charge and according to the due legal forms. Had this been done, it would have been found that there

was no charge, either under the law of nations or under any municipal law, under which persons in the situation of the British crew of the "Virginius" could justifiably have been condemned to death; for they owed no allegiance to Spain, their acts had been done outside Spanish jurisdiction, and they were in their employment essentially non-combatant. In the result the Spanish Government was compelled to make compensation. Similar compensation was exacted by the United States, and on similar grounds, in respect of the American citizens who had been summarily executed.

With respect to the seizure of the vessel, the United States Government also demanded reparation, on the ground that its rights had been violated by the arrest of the "Virginius" on the high seas and whilst carrying the American flag. As to this it was provisionally arranged, by a protocol of the 29th of November, that Spain should restore the vessel and the survivors of the passengers and crew forthwith, and that she should further salute the United States flag on the ensuing 25th of December, unless she should in the meantime be able to show that the "Virginius" was not entitled to carry the United States flag. This question was then submitted to the United States Attorney-General, who after careful examination decided on the facts that the American registry of the "Virginius" was fraudulent, and that she was not at the time entitled to carry the American flag. At the same time he expressed an opinion that she was as much exempt from interference on the high seas as if she had been properly registered. Spain had, no doubt, a right to capture a vessel under the American flag and register, it found in her own waters, assisting the Cuban insurrection; but she had no right to capture such vessels on the high seas, under an apprehension that, in violation of the laws of the United States, they were on their way to assist the rebellion. Spain might defend her territory and people from the hostile attack of what was, or appeared to be, an American vessel; but she had no jurisdiction whatever over the question as to whether or not such vessel was on the high seas in violation of any law of the United States. At the same time, in view of the fact that the vessel was found to have had

no title to carry the American flag, the salute to the United States flag was dispensed with; although the vessel herself was handed over to the United States authorities.

The two questions in issue were, in substance, (1) as to whether the Spanish authorities were justified in their treatment of the prisoners who had been summarily executed; and (2) as to whether the arrest of the "Virginius" on the high seas was under the circumstances justifiable. With respect to the first of these questions,—the views expressed by the British Government may be regarded as a correct exposition of the law on this subject. Even if the expedition was an unlawful one, as it undoubtedly was, and even if the arrest of the vessel was justified as a defensive measure, those on board were at any rate entitled to a regular trial according to proper legal forms and on a definite charge. Neither the "Virginius" nor those on board had committed any acts of piracy prior to capture, nor was the vessel adapted to the commission of acts of piracy. Even if she had been seized in territorial waters and in the act of landing her passengers, this would not have amounted to piracy; for the reason that the immediate object was to join a well-defined insurrectionary movement, already in existence, and having a political end. This might have been treason in municipal law; but was certainly not piracy *jure gentium*. Still less could the acts of those who were merely members of the crew, and who as foreign subjects owed no allegiance to Spain, be deemed to fall, even technically, within the category of acts of piracy. With respect to the arrest of the "Virginius" whilst carrying the American flag on the high seas, it would appear to be true, as was stated in the opinion of the United States Attorney-General (*y*), that the fact of the American registry having been fraudulently obtained under the American law—as distinct from being a mere forgery, in which case the vessel would have been virtually without national character—would not in itself have conferred on Spain a right of arrest on the high seas. Nevertheless, it would seem that the right of self-defence, as recognised by the law of nations, will confer on a State, in a case where its safety is threatened, a self-protective jurisdiction, which will entitle it, under circumstances of grave suspicion, to visit a vessel even whilst on the high seas and flying the flag of a foreign State, for the purpose of ascertaining her real object and destination, and will further entitle it, if the evidence warrants, to arrest such vessel and send her in for adjudication. But the danger must be imminent; and the circumstances, both as regards the local situation (*z*) and the conduct of the vessel, must be those of grave suspicion. In such a case, moreover, notification should at once be made to the State of the

(*y*) Although even this is not universally admitted; see the opinion of Dana, quoted in Taylor, 409, to the effect that the register of a foreign nation is not, by the law of nations, to be regarded as a conclusive guarantee of national character to all the world.

(*z*) *I.e.*, reasonable proximity to the threatened territory.

flag, and those on board the arrested vessel (*a*) should be placed at its disposal, with a view to their punishment under their own municipal law (*b*); this for the reason that the jurisdiction in such a case is merely protective, and not punitive. If, on the other hand, the suspicion should prove unfounded, then an apology, and if necessary an indemnity, should be offered; for in such a case the arresting State must be deemed to act at its peril (*c*).

General Notes.—*The Pursuit of Vessels from Territorial Waters.*—In general, a State has no right, in time of peace, and on the high seas, to interfere with vessels belonging to another State, save in cases of piracy; and, as we have seen in the case of *The Virginius*, for the purposes of self-protection. But a jurisdiction somewhat analogous to this is frequently asserted over foreign vessels that have escaped to the open sea, after committing some infraction of the local law of the Power effecting the arrest. This is sometimes called the law of "hot pursuit" (*d*), because it is an essential condition of its validity that the pursuit should be started immediately, and that the arrest should be effected, if at all, in the course of the pursuit. Subject to this, the pursuit may be continued indefinitely or until the vessel passes into the territorial waters of another State. The right of pursuit applies to offences against revenue laws or against fishery laws, or to any offence vitally affecting the interests or system of the territorial Power, such as a forcible rescue of prisoners in which the vessel participated; but it would not, it seems, apply to mere breaches of local regulations, such as leaving without a clearance or against the orders of the port authority; for the reason that the exercise of such a jurisdiction is only conceded on the ground of self-protection. Nor will it apply except in cases where the vessel herself is in fault. Hence, if an offender should escape to a foreign vessel and be carried off as a passenger, the vessel could not be pursued beyond the limit of territorial waters; the proper remedy in such a case being a demand for extradition. The existence of this right of pursuit, however, is not universally admitted. It is recognised commonly by European publicists (*e*); and also by such writers as Hall and Westlake (*f*); but reprobated by Dana (*g*). It was asserted, not, indeed, as a strict right at international law, but as one the exercise of which is commonly acquiesced in, by Sir Charles Russell in his argument in the Behring Sea arbitration (*h*); but it was denied altogether by Dr. Asser, a Dutch jurist; who, when acting as arbitrator in a seal-fishing dispute between Russia and the United States in 1891, adopted the view that

(*a*) With the possible exception of subjects of the arresting State.

(*b*) See the Foreign Enlistment Act, 1870, ss. 5, 7; *The Salvador* (L. R. 3 P. C. 218); and *infra*, vol. ii.

(*c*) On the subject generally, see Hall, 276; Taylor, 406; Westlake, i. 167.

(*d*) Piggott, Nationality, ii. 36.

(*e*) As well as by the Institute of International Law, 1894.

(*f*) Hall, 266; Westlake, i. 173; Taylor, 310.

(*g*) Dana's Wheaton, 258 *n*; Scott, 344 *n*.

(*h*) See Westlake, i. 173, and per Story, J., in *The Marianna Flora*, *infra*, p. 275.

a public vessel of one State was not entitled to pursue a vessel belonging to another State beyond the territorial waters, even though the latter had been guilty of illegal conduct within those waters (*i*). The rule, however, is good in principle, subject to the limitations suggested; and has the sanction of general if not universal usage. Apart from the right of pursuit, it is competent to any State to punish prior breaches of municipal law, as against vessels which subsequently re-enter its ports or territorial waters; and in English law it has been held by the Privy Council that, where a vessel leaves one port of the territorial Power, and thereafter enters another port, the local jurisdiction will extend to acts done even on the high seas, in any case where the offence is constituted by coming into port after having committed the acts complained of, and this even though the vessel is not otherwise subject to the territorial law (*k*).

STATE MEMBERSHIP:

(i) NATIONALS BY BIRTH.

IN RE STEPNEY ELECTION PETITION: ISAACSON v. DURANT.

[1886; 17 Q. B. D. 54.]

Case.] IN this case certain questions with respect to the Parliamentary franchise, which had arisen on the trial of an election petition, were referred for determination to the Queen's Bench Division. The main question was whether certain persons—who had been born in Hanover before the accession of Queen Victoria at a time when the Crowns of England and Hanover were held by the same persons, and who at the time of the election had been resident in the United Kingdom, but not naturalised, although in all other respects qualified to vote—were entitled to vote at an election for members of Parliament. On behalf of the claimants it was contended, in effect, on the authority of *Calvin's Case* (Coke, Rep. vii. 1), that the status of natural-born subjects in English law depended on allegiance; that the claimants having been born in the same allegiance as British subjects were therefore

(*i*) An excellent note on this subject, referring to the decisions of the United States Courts, will be found in Scott, at p. 344.

(*k*) *P. & O. Co.* v. *Kingston* [1903] (A. C., at p. 477).

invested with the status of natural-born subjects; or, failing this, then that on the separation of the two Crowns they had a right of election, which by residing in the United Kingdom they must be deemed to have exercised in favour of the British allegiance. It was held, however, that such persons, even though resident in the United Kingdom, were aliens, and were not, therefore, entitled to vote at the elections of members of Parliament.

Judgment.] In the judgment of the Court, which was delivered by Lord Coleridge, C.J., it was recognised, on the authority of *Calvin's Case*, that allegiance to the same Sovereign, such allegiance being to the Sovereign in his natural and not in his politic capacity, made the subjects of the two countries of common nationality; and hence that if Queen Victoria had remained Sovereign of Hanover, and if the claimants had been born in Hanover after her accession, then they would have been regarded as British subjects and have been entitled to vote. But the claimants were born in Hanover during the previous reign, and on the severance of the two Crowns their allegiance became due to the Sovereign of Hanover, and not to the Queen of England. The alleged right of election was altogether a novel claim, and was not supported by the authorities. Such a claim was, moreover, altogether contrary to the elementary idea of allegiance itself; for allegiance, involving as it did the obligation of protection on the one side, and service and obedience on the other, could not exist towards two masters, but must be taken to be due to the King of Hanover, or, latterly, to the Emperor of Germany, who had not been shown to have relinquished it. A person in the position of the claimants, being a Hanoverian by birth, and not naturalised elsewhere, would, if he took part in a war against Germany, be liable to be treated as a traitor; and for this reason he could not rightfully be deemed in the allegiance of any other Sovereign. The authority cited on behalf of the claimant consisted for the most part of certain dicta of the judges in *Calvin's Case*, which were mainly directed to the hypothetical case of the kingdoms of England and Scotland being again divided, and were not necessary to that decision. Moreover, all the statements in *Calvin's Case* were influenced by doctrines derived from the feudal system; a state of things which had since

been altered by 12 Car. 2, c. 24, the Act of Settlement, and 1 Geo. 1, st. 2, c. 4. The language of this last-mentioned statute, as well as of 4 Geo. 2, c. 21, and 13 Geo. 3, c. 21, was remarkable, inasmuch as it spoke of the Crown, and not of the Sovereign, thereby recognising that it was to the king in his politic and not in his personal capacity that allegiance was due. For these reasons it was held that the votes in question must be disallowed.

Nationality is the status or quality of belonging to some particular nation or State. It is primarily a question of municipal law, although at certain points it possesses, as we shall see, a certain importance also in international law (*l*). It may be acquired either by birth or by naturalisation; but as regards both methods of acquisition, it is governed in different systems by different principles. So far as relates to acquisition by birth, according to the municipal law of some States, this is determined by locality of birth (*jus soli*). This principle formerly prevailed in all those European States which had been brought under the influence of feudalism; and constitutes still the basis of the law in Great Britain, the United States of America, and certain other countries (*m*), although in both the former countries it has now been modified by statute. According to the municipal law of other States, however, the original national character is determined by the nationality of the parents (*jus sanguinis*); generally of the father, but in some cases of the mother (*n*); a principle originally introduced by the *Code Napoléon* and now adopted by most European States, although often qualified in its practical application (*o*). The case of *Isaacson* v. *Durant* serves to illustrate the former of these two principles. By the common law, British nationality was conditional on having been born in allegiance to the Sovereign; and this, again, depended, subject to certain minor exceptions, on locality of birth. In other words, by the common law, a person born within the British dominions is a "natural-born subject," whatever may have been the nationality of his parents; whilst a person born outside is an alien. And this character, moreover, could not formerly have been changed by any voluntary act on the part of the individual. The question in *Isaacson* v. *Durant* was whether, under the common law, a person once born in allegiance to the Sovereign could ever become an alien by any matter *ex post facto*; and, if he could, then whether, having been born in allegiance, he had not at any rate a right, on the subsequent severance of the two Crowns, to elect for the British allegiance. The Court, however, whilst upholding the common rule that British nationality depended on allegiance, and allegiance again on locality of birth, held, in effect, that although a person born in Hanover during the union of the two Crowns would have been regarded as a British subject during the continuance of the union, yet on a severance of the two Crowns his

(*l*) *Infra*, p. 180.
(*m*) *Infra*, p. 184.
(*n*) As in the case of illegitimacy.
(*o*) As in France; *infra*, p. 184.

allegiance became due to the Sovereign of Hanover until this was relinquished; and that, as there could not be two allegiances subsisting at the same time, the allegiance previously owed to the common ruler of both countries did not extend to his successor in the sovereignty of Great Britain, or continue to confer the status of British subject. In English law the term "subject" or "British subject," meaning a subject of the Crown, is commonly used to denote nationality (*p*).

General Notes.—*Persons subject to the Laws of a State.*—The conception of a State involves, as we have seen, not only a "territorial," but also a "personal" factor, in the sense of a community of persons, who either compose or are temporarily attached to that body politic of which the "State" (*q*) is the embodiment, and who are for the time being subject to its sovereignty and jurisdiction. The "subjects" of a State, however, using the term in the sense of all who are for the time being subject to its laws, comprise a variety of different classes, of which the following are the more important: (1) First, there is a class of persons who may be described as "citizens" or "nationals" (*r*), comprising those who are politically and internationally members of the organised community represented by the State, and who share the national character, whether "domiciled" within its territory or not, and whether they enjoy full civic privileges or not. (2) Next, there is a class who may be described as "domiciled aliens," comprising persons who are politically members of some other State and who possess some other national character, but who, by virtue of permanent residence within the State, owe to it a temporary allegiance (*s*), derive their civil status from its laws, and are identified with it in time of war, so long as their residence continues (*t*). Between domicile

(*p*) Constitutionally, the use of the term "British subject," although sanctioned by tradition, is not without its difficulties. It denotes, strictly, a personal subjection to the King (who is only titular Sovereign), which has long since been replaced by subjection to the legal sovereignty of "Parliament," or technically, perhaps, the "King in Parliament." It also fails to take count of a distinction, which, even though it may be deplored, cannot be ignored in practice—the distinction between "subjects," whether by birth or adoption, who inherit the European standards of life and culture, and the members of "subject" or "protected" races, who do not. In this way it gives rise to pretensions which, although logically indisputable, are nevertheless practically inadmissible; such as the claim on the part of coloured races, possessing a wholly different standard of living, to free access to all parts of the British dominions, by reason of their being British subjects; a difficulty which has hitherto been surmounted by the somewhat absurd language test; see p. 206, *infra*. At the same time the term "subjects," although not always appropriate, is very commonly used as an equivalent for "nationals" in international law. Since the decision in the case of *Isabella Gonzales*, it seems that the United States law recognises a triple distinction between citizens, nationals, and aliens.

(*q*) Or sometimes the Sovereign.

(*r*) This is the term commonly used in treaties, and has the merit of not confounding national character with the possession of full civic rights; see Westlake, i. 213.

(*s*) See *De Jager* v. *A.-G. of Natal* (*infra*, p. 206).

(*t*) *Infra*, pp. 216, 220.

(*domicilium*) and nationality (*patria*) there is the further distinction, that a man cannot put off or resume nationality at will, whilst domicile depends primarily on will and intention, so long as this is evidenced by appropriate facts (*u*). (3) Finally, and omitting minor classes, such as persons subject in particular systems to special disabilities by virtue of their nationality (*x*), there is a class of persons who are only transiently present in the State, whose political and civil status are both determined by the law of some other State, and who owe merely a local and temporary obedience to the laws of the State in which they happen to be.

The "Nationals" of a State.—The "nationals" of a State comprise, as we have seen, all persons who are politically members of the organised community which the State represents; all those, in fact, who share in that political relationship which exists between the individual and the State to which he owes allegiance. The attribute of State membership is commonly, although not necessarily, accompanied by the possession of, or by a capacity for, civic privileges, in which case it is properly designated "citizenship." It may or may not be accompanied by residence or domicile within the limits of the State; but even if it is not, the status which nationality confers will carry certain rights and obligations even when outside the limits of the State. This national character may be acquired either by birth, in accordance with one or other of the principles already described; or by naturalisation, including marriage and repatriation; or it may arise out of the cession or conquest of territory. Both the question of national character and its attendant privileges, and the question of the obligations which it involves, are governed by principles which differ greatly in different municipal systems. At the same time the question of nationality possesses a certain importance in the domain of external relations, for the following reasons: (1) Every State claims within certain limits a right to protect the persons of its nationals even when outside its own limits; whilst every State is also under a corresponding obligation as regards the treatment of the nationals of other States. (2) Every State represents also the proprietary interests of its nationals, as against other States; and may, irrespective of any question of their personal presence or residence within the territory of the latter, intervene, if it thinks fit, for the protection of such interests. (3) Every State also claims from its nationals, even when outside its territory, both allegiance and obedience to certain of its laws, to an extent which varies in different systems; and these obligations it will be entitled to enforce as against nationals who may be found within its jurisdiction; subject, however, if its competence should be questioned by other States, to proof of the retention of the national character. There are, moreover, some offences which it will be entitled to punish, even though the original national character has been abandoned (*y*); whilst it is still a question as to how far one State is justified in adopting as its own the nationals of another State without the express or implied permission of the latter (*z*).

(*u*) *Infra*, p. 217.

(*x*) Such as aboriginal natives of Asia or Africa in Australia.

(*y*) *Infra*, pp. 198, 199.

(*z*) *Infra*, p. 199.

(4) Finally, in some systems nationality, and not domicile, is still regarded as the criterion of a man's civil status and personal law (*a*).

The Right of a State to protect the Persons and Property of its Nationals outside its Territory.—This right extends both to nationals by origin and nationals by adoption, even when present or resident within the limits of another State. Such persons are, it is true, primarily subject to the law of the country in which they happen to be present; and in entering into or taking up their residence within its territory they must be deemed to accept the local law as they find it, together with such risks as are manifestly attendant on local conditions. Nevertheless, they may claim, and their State may extend to them, its protection, if they are without just cause subjected to violent or injurious treatment, or denied justice, or unfairly discriminated against in matters pertaining to ordinary life (*b*). The same right of protection over its nationals, when present or resident in a foreign country, will in certain circumstances apply, even as against a State other than the territorial Power; as where a belligerent invader subjects them to treatment not warranted by the usages of war. It will extend also to injuries inflicted on them in derogation of the law of nations, either on the high seas, or in territory not occupied by any civilised State. It is not usual, however, for a State to assume any obligation as regards the relief of its destitute nationals when abroad, except in the case of seamen (*c*). A claim has been made by some States to treat persons who are connected with the State by some tie falling short of the full national character, such as persons who have fulfilled some but not all the conditions necessary to complete naturalisation, or persons who are connected with the State merely by domicile, as the objects of its national protection (*d*). Much the same principles apply to the protection of the proprietary interests of its nationals, whether they are personally present within the territory of the State against which protection is sought, or not; although the question of contractual claims has now been made the subject of special treatment as regards States that have adopted the Convention of 1907 for limiting the employment of force for the recovery of contract debts.

The Right of a State to interpose on behalf of Contractual Claims of its Nationals.—The right of a State to protect the property of its nationals as against other States may under certain circumstances extend to claims arising out of contract; although the limits of this right are not well defined. Where such contracts have been made with private persons in a foreign country, a State has clearly no right to intervene, except on the ground of some manifest denial of justice to, or improper discrimination against, its nationals (*e*). Even where such a contract has been made with the foreign State itself, it would seem that the home State is not justified in doing more than using its good offices, save in the case when the breach complained of assumes the form of an act of confiscation, not remediable by ordinary process of law. It is probably in view of the inadequacy of ordinary process

(*a*) *Infra*, p. 218.
(*b*) Hall, 287; and pp. 212, 230, *infra*.
(*c*) Wharton, Digest, ii. p. 455.
(*d*) *Infra*, p. 193.
(*e*) *Infra*, p. 212.

that, in the case where a State makes default in the payment of its public debt, the principle hitherto followed has been—that any State, whose nationals are injuriously affected by such default, is justified in intervening on their behalf; although it will be a matter of discretion, depending on the circumstances of each case, whether such intervention should actually take place, and what form of redress should be resorted to in the event of failure to obtain satisfaction (*f*). This rule, whilst it appears to be correct in principle, is at the same time sufficiently flexible to enable the right of intervention to be confined, as it commonly is in practice, to cases of flagrant dishonesty, or unjust discrimination against foreigners. At the same time great exception has been taken to this view (*g*); and by The Hague Convention of 1907 it was agreed that the contracting Powers shall not have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another as being due to its nationals; although this is not to apply where the debtor State either refuses arbitration, or after accepting it prevents a settlement of the terms of reference, or fails to submit to the award. This convention has now been adopted by thirty-four States, including Great Britain and the United States of America.

The Original Acquisition of National Character: (i) *Great Britain.*—With respect to the British character, it has already been pointed out that under the common law the status of "natural-born subject" depends on allegiance; and allegiance, again, on locality of birth. This rule is, however, subject to a variety of exceptions both at common law and by statute. Thus, even at common law the children of a British King or ambassador born on foreign soil, or children born on a British public vessel anywhere, or on a private vessel on the high seas, are regarded as British natural-born subjects; whilst children of a foreign Sovereign or ambassador born on British soil, or children born to alien enemies in hostile occupation of British soil, are regarded as aliens. Moreover, by 7 Anne, c. 5; 4 Geo. 2, c. 21; and 13 Geo. 3, c. 21, children born abroad before the 1st of January, 1915, whose fathers, or grandfathers on the fathers' side, were natural-born subjects, are to be regarded as natural-born subjects to all intents and purposes. But the latter attribute is merely a personal status, and cannot be further transmitted to descendants (*h*); such children, moreover, if born abroad, are still at liberty, when *sui juris*, to renounce the British nationality by a declaration of alienage under section 4 of the Naturalisation Act, 1870. All these statutes are now repealed. The status of children born abroad since the 1st of January, 1915, is determined by the Nationality and Status of Aliens Act, 1914 (4 & 5 Geo. 5, c. 17). By section 1, sub-section 1, a child born out of his Majesty's dominions of a father born within his Majesty's allegiance or of a naturalised father, is deemed to be a British subject, but such child, it is said, cannot transmit the status of a British subject to his children born

(*f*) Hall, 287, and references there given.

(*g*) The contrary view is commonly known as the Drago doctrine, but is only adopted by The Hague Convention in a qualified form; see *The Venezuelan Preferential Case*, Scott's Hague Reports, p. 55.

(*h*) *De Geer* v. *Stone* (22 Ch. D. 243).

abroad. The term "born within his Majesty's allegiance" would appear to mean "born within the realm": allegiance here means local allegiance. Dr. Hibbert contends that the term refers to the place of birth, since if it means "born owing allegiance," such child could transmit his status to his descendants born abroad in perpetuity (*i*). This can scarcely be the intention of the Act. An exception to the rule against transmission in perpetuity is worth noting. By 4 & 5 Anne, c. 16, lineal descendants of Sophia, Electress of Hanover, are deemed natural-born British subjects, and consequently the ex-Kaiser of Germany and his descendants are British subjects, and, as such, technically liable to extradition proceedings.

(ii) *The United States of America.*—In the United States, under the earlier law, no one could be a citizen of the Union unless he was a citizen of one of the States composing the Union. In most of the States the rule appears to have prevailed (*k*) that, apart from grant, citizenship depended on locality of birth, or, in other words, on being born within the allegiance or jurisdiction of the State. A federal citizenship was, however, created by the fourteenth amendment of the Constitution, in 1868, which provided that "all persons born or naturalised in the United States and subject to the jurisdiction thereof" should be citizens of the United States and of the State in which they resided; whilst by s. 1992 of the Revised Statutes—"all persons born in the United States and not subject to any foreign Power, excluding Indians not taxed," are declared to be citizens of the United States (*l*). Apart from naturalisation, therefore, citizenship appears to depend on birth within the allegiance and jurisdiction of the United States; primarily, that is, on locality of birth. But, as in English law, the rule of locality of birth is subject to certain exceptions. In the first place, under the interpretation placed on these provisions, it appears that the children both of foreign Sovereigns and ambassadors, of Indians, and even of foreigners in transient residence, as well as children born on foreign public vessels, are excluded from citizenship, even though born within the United States (*m*). But the children of foreigners who are domiciled or permanently resident in the United States would seem to be entitled to claim American citizenship; although a withdrawal from the United States would probably be regarded as a renouncement of the American character. In the second place, by s. 1993 of the Revised Statutes, a child born out of the limits and jurisdiction of the United States, but whose father was at the time a citizen and has at some time or other resided within the United States, will himself be entitled to citizenship. But by Act of Congress of 1907 (ch. 2534), s. 6, such children, if they continue to reside out of the United States, must, in order to claim the protection of the Government, record at an American consulate, before reaching the age of eighteen years, their intention to reside in and remain citizens of the

(*i*) Intern. Private Law 29.

(*k*) As a rule of inherited law.

(*l*) Rev. Stat. s. 1992; Hare, Const. Law, 517; Hall, 236 *n.*

(*m*) For the reason that in all these cases neither parents nor children are deemed to be "subject to the jurisdiction" in the sense intended by the Constitution. On this subject see Dicey, Conflict of Laws, American Notes, p. 200 *et seq.*

United States; and must also take the oath of allegiance before attaining their majority. On the subject generally, see Rev. Stat. ss. 1992—2001.

(iii) *Other States.*—By the law of France the French national character attaches to (1) children born anywhere of French fathers; (2) children born in France (a) of unknown parents or of parents of unknown nationality; (b) of foreign parents, one of whom was born in France, subject, however, where this was the mother, to a right of renunciation within one year of attaining majority; (c) of foreign parents not born in France, if either (α) such children are found domiciled in France on attaining their majority according to French law, unless within the following year the French nationality is renounced and proof furnished of the retention of the parents' nationality, or (β) if such children are not so domiciled, then subject to their claiming French nationality, in the form prescribed, within one year from their majority, and applying to fix their domicile in France, and actually establishing it there within one year from application (*n*). By Art. 5 of the Law of 3rd July, 1917, which replaces Art. 11 of the Law of 1905, every male born in France of a foreign father and domiciled there becomes French at the age of 18 years, unless within three months he claims his nationality of origin. By the law of Germany, Austria, Hungary, Norway, Sweden, and Switzerland, as well as many other countries, national character is determined by the nationality of the parents irrespective of the place of birth (*o*). But under the law of Portugal, as well as the Argentine Republic, nationality still appears to be determined primarily by locality of birth.

Dual National Character; Election or Disclaimer.—A conflict of nationality may arise in various ways. In the first place, owing to the fact that nationality depends on municipal law, and that no uniform rules exist for the purpose of ascertaining it, a person may, from the circumstances of his birth, be invested with a different national character under the laws of different States. So, a child born in England of French parents will be entitled to the British character by English law, and the French character by French law. So, also, a child born in France whose father was a British natural-born subject will be liable to be regarded as a British subject in English law; whilst if either his mother was born in France, or if he himself remained domiciled in France at the time of attaining his majority, he will be liable to be treated as a French citizen by French law. To meet such cases municipal law often confers on the person whose nationality is thus rendered doubtful an option to declare for one national character, either by way of disclaimer or by positive election. Thus, by the Act of 1914, a person who is a natural-born British subject by reason of birth within the British dominions and allegiance, but who at birth became and still remains by the law of any foreign State a subject of that State, may, if of full age, and not under any

(*n*) Code Civil, liv. i. tit. i. arts. 8 and 9. See Clunet, vol. 44, 1637; vol. 48, 189.

(*o*) Hall, 234; and, as to Germany, Federal and State Nationality Statute, 1870, Arts. 6-11.

disability, make a declaration of alienage, as prescribed by the Secretary of State, and will thereupon cease to be a British subject; and the same rule applies to a person born abroad whose father was a British subject (*p*). So, under the French law, a child born in France of a foreign father, but whose mother was born in France, or who is himself domiciled in France on attaining his majority, although regarded as having the French character by French law, may nevertheless elect for the foreign nationality, in the year following his majority (*q*). In the second place, a conflict of nationality may often arise, as, indeed, happened in the *Bourgoise Case*, in consequence of the naturalisation in one State of the nationals of another, who by reason either of some defect of authority, or of service unfulfilled in their State of origin, are still treated as nationals under the laws of the latter. This question will however, be considered hereafter in connection with the subject of expatriation (*r*). A similar conflict may also arise under the regulations of different municipal systems relating to the effect of marriage on nationality, or the status of illegitimate children (*s*). It needs to be noticed that, under the English law, in the case of persons as to whose right to be deemed British subjects a doubt exists, the Secretary of State is empowered to grant a special certificate of naturalisation (*t*); whilst the same question may in certain cases be referred to the decision of the Court, by means of a petition presented under the Legitimacy (and Nationality) Declaration Act, 1868.

Absence of National Character.—Under certain circumstances, on the other hand, it seems possible for a person to be destitute of national character. So, under the law of some European countries a subject forfeits his national character by emigrating without intention to return, and such a person, unless naturalised elsewhere, would seem to possess no national character. In such cases it has been suggested that it would be useful to adopt a practice of ascribing to such persons the nationality of the country in which they are domiciled (*u*). It has now been decided that the condition of a State-less person is not unrecognised in English law, and it is difficult to see why it should not be recognised in international law. See *Stoeck* v. *Public Trustee* [1921] 2 Ch. 65; *infra*, p. 203.

(*p*) S. 14; and by s. 13 a British subject who, not under disability, becomes naturalised in a foreign State ceases to be a British subject.

(*q*) See Emergency Law of July 3, 1917, Clunet, 1917, p. 1540, whereby every male born in France of a foreign father becomes French at the age of 18 (if domiciled in France), unless within three months he claims his nationality of origin, and will be called to the colours. See also Law of April 7, 1915, Clunet, 1915, pp. 110-129.

(*r*) *Infra*, p. 199.

(*s*) See Hall, 236; Oppenheim, i. 470; and for a suggested rule reasonably applicable to cases of conflict, Westlake, i. 223.

(*t*) British Nationality and Status of Aliens Act, 1914, s. 4.

(*u*) See Hall, 256.

(ii) NATIONALS BY ADOPTION; NATURALISATION.

IN RE BOURGOISE.

[1889; L. R. 41 Ch. D. 310.]

Case.] IN 1866 M. Bourgoise, a French subject, came to reside in England; and in 1871, having then resided in England for five years, he obtained a certificate of naturalisation under the Naturalisation Act, 1870. In 1880 he married an Englishwoman, a widow; but soon afterwards returned to France, where he resided until 1886, when he died, leaving a widow and two children, both of whom were born in France and had always resided there. In 1887 the widow also died, leaving a declaration in writing, expressing a desire that the children should be placed under the guardianship of one William Henry Johns, her son by a former marriage. Disputes arose over the guardianship of the children, with the result that the French Courts appointed the paternal grandmother as guardian. A considerable part of the estate of the father consisted of personal property in England; and subsequently proceedings were taken in England on the part of the infants by William Henry Johns, as their next friend, asking that he might be appointed guardian of their persons and estates. The question was whether the English Court had jurisdiction to entertain the application. This appeared to depend on whether the children were to be regarded as British subjects; and this, again, on whether the English certificate of naturalisation had the effect of making their father a British subject, notwithstanding his subsequent return to his country of origin. On behalf of the French guardians it was contended (1) that, according to French law, no Frenchman could be effectually naturalised in another country without the assent of the Government, and that inasmuch as M. Bourgoise had not obtained this authority the naturalisation in England was inoperative; and (2) that under the provisions of s. 7 of the Naturalisation Act itself the naturalisation of M. Bourgoise in England was only a qualified naturalisation, and did not affect his quality of French citizen on his subsequent return to France. On the first point the evidence as to the French law was somewhat conflicting; and in any case

it was contended by the applicants that such a decree as that alleged, a decree of Napoleon I, of 1811, could not invalidate a naturalisation duly effected under the laws of another country. As to the second point, s. 7 of the Naturalisation Act provides, in effect, that an alien to whom a certificate has been granted shall be entitled to all the privileges and subject to all the obligations to which a natural-born British subject is entitled or subject in the United Kingdom, but with the qualification "that he shall not, when within the limits of the foreign State of which he was a subject previously to his obtaining a certificate of naturalisation, be deemed a British subject, unless he has ceased to be a subject of that State in pursuance of the laws thereof, or in pursuance of a treaty to that effect." In the result it was held both by Kay, J., and subsequently by the Court of Appeal, that the Court had no jurisdiction to appoint an English guardian to the infants.

Judgments.] Kay, J., in his judgment, in view of the qualification contained in s. 7, and of the fact that this was repeated on the certificate of naturalisation, held that the English naturalisation was merely partial, and only had the effect of making the recipient a British subject so long as he did not reside in his original country, unless under the law of that country he had ceased to be a subject to all intents and purposes. As a matter of fact, the French law did not appear to adopt that view of the naturalisation in question. On the contrary, it prohibited the naturalisation of its subjects without authority; and in the present case no such authority had been obtained. Hence M. Bourgoise must at the time of his death be deemed, together with his children, to have been subjects of France. The Court, accordingly, had no jurisdiction to interfere by the appointment of guardians. The judgments delivered in the Court of Appeal do not contain any definite pronouncement on this question; but are all based on the view that the children having been born in France, and having been treated as French by French law, and the French Courts having already exercised jurisdiction in the matter, it would not be right for an English Court to interfere.

Although the decision in this case relates to a question of English municipal law, and embodies no principle of general importance, yet

the case itself opens up a number of interesting questions on the subject of naturalisation, which have given rise to considerable discussion (*x*). Amongst these are the following: (1) Can a subject or citizen of one State be said to be effectually naturalised in another, in derogation of the law of the State of origin? This question was not decided in *Re Bourgoise;* but will be considered hereafter in connection with the right of expatriation. (2) Assuming M. Bourgoise to have been effectually naturalised in the United Kingdom, did this serve to confer on him the British character on his return to France? This was answered by Kay, J., in the negative, on the ground that the Naturalisation Act only conferred the rights and obligations annexed to the status of British subjects in the United Kingdom, and expressly excluded such an effect in the country of origin, unless the person naturalised had ceased to be a subject of that State in accordance with its laws; which was not the case, as regards M. Bourgoise, for the reason that it had been effected without the sanction required by French law. The provisions of s. 7 on which this decision was based appear to be somewhat illogical, in so far as they purport to confer the rights and obligations incident to the British character only in the United Kingdom, and then proceed to annex certain qualifications on the assumption that they apply outside the United Kingdom. The section probably represents a crude attempt to frame a rule which would be at once in harmony with the unsettled state of international usage on this subject, and with the claims of certain British dependencies to settle questions of citizenship for themselves. To this end the bestowal by naturalisation of the rights and duties of a British subject was specifically limited to the United Kingdom. At the same time the qualification, which would otherwise be meaningless, seems to carry by implication an attribution of the British character generally, which will avail in all foreign countries except the country of origin; and even in the country of origin if the naturalisation has been recognised by local law or by treaty. The latter view is also borne out by the official practice under which a naturalised British subject is commonly regarded as entitled to aid and protection in all foreign countries except the country of origin; although naturalisation in the United Kingdom has no direct effect in a British colony or dependency (*y*). In the result, it would seem that naturalisation under s. 7 will have the effect of conferring on the person naturalised the status of British subject, from the point of view of any Court or other authority "in the United Kingdom" that may be called on to deal with any question incident thereto, and this whether the person naturalised be in the United Kingdom or not; subject to the proviso that he will not be deemed to possess the status of a British subject when in the country of his origin, unless his British naturalisation is recognised by its laws or by treaty. This appears at once to be a reasonable construction, and not inconsistent with the decision of *Re Bourgoise*. But the proviso in s. 7 is not repeated in the corresponding s. 3 of the Act of 1914, and consequently a naturalised British

(*x*) See L. Q. R. vol. iv. p. 226; vol. v. p. 438; vol. vi. p. 379.

(*y*) See circular of 1824; and on the question generally, Piggott, Nationality, i. 113 *et seq.*

subject would appear to be entitled to protection even in the country of his origin. (3) Another question suggested by the case is, whether the status of British subject as conferred by naturalisation can be said to descend to his after-born children born abroad. In the case of children already born, these, if resident with the naturalised father in the United Kingdom, during infancy, will share in the consequences of his naturalisation under the provisions of the Naturalisation Act, 1870 (*z*). If born subsequently in the United Kingdom, they will inherit the British character, under the general law. But now, if born abroad of a naturalised British subject, by s. 1, sub-s. 1 of the Nationality and Status of Aliens Act, 1914, they are deemed to be natural-born British subjects. (4) Finally, the case serves to bring into relief the question of dual national character or conflicting nationality; a question which has already been considered (*a*). M. Bourgoise, for instance, although a British subject according to the law of England, whilst in the United Kingdom, apparently remained a French citizen in the contemplation of the law of France (*b*).

General Notes.—*Naturalisation: Generally.*—Naturalisation, in its widest sense, would seem to cover the admission by a State, by whatsoever process, of any person or body of persons, previously alien, to the status of citizens or subjects, with a consequent right to the national character. It includes both the naturalisation of individuals, whether by express act of adoption or by implication of law; and the naturalisation of whole communities, as may occur on the incorporation of new territory by virtue of conquest or cession (*c*). The bestowal of the national character, however, does not necessarily imply admission to the full privileges of citizenship (*d*). The naturalisation of individuals may be effected either expressly, as where it is conferred by legislative enactment, administrative decree, or the grant of letters or of a certificate of naturalisation; or by implication of law, as where it is made to attend on marriage with a subject or citizen, or where it is made to attach, although improperly, to residence or to the acquisition of landed property (*e*). The methods and conditions of naturalisation differ greatly in different municipal systems. These touch on international law only in so far as they involve the assumption of a new national character, with a consequent discarding of the earlier allegiance and its attendant obligations. It is in view of this latter consequence that disputes over naturalisation commonly arise between States. The State of origin, on the one hand, claims to hold its former subjects bound by obligations arising out of their original allegiance, except where this has been dissolved with its express or implied assent; whilst the adopting State, on the other hand, claims a right to protect persons who have duly assumed its national character from claims which are only incident to a status that has been discarded.

(*z*) S. 10, sub-s. 5.

(*a*) *Supra*, p. 184.

(*b*) On the subject of double nationality, see Westlake, i. 221.

(*c*) As to collective naturalisation, see *Boyd* v. *Thayer* (143 U. S. 135); *Contzen* v. *U.S.* (179 U. S. 191); and Hall, 611.

(*d*) Hall, 611.

(*e*) Hall, 217.

So there arise two classes of questions with respect to naturalisation: (1) a question as to the conditions necessary to its accomplishment in the State to which the person in question seeks to affiliate himself, which is a question of municipal law, although it not infrequently emerges in the course of international controversy; and (2) a question as to how far the naturalising State is bound, whether in law or comity, either to make its naturalisation contingent on the assent of the State of origin, or, at any rate, not to frame its naturalisation laws in such a way as to afford to the nationals of other States undue facilities for avoiding their obligations to the State of origin. In view of the international consequences that attach to the assumption of a new national character, it will be expedient to glance briefly at the practice of some of the leading States, with respect to naturalisation; and thereafter, although in connection with a different line of cases, to glance briefly at the prevailing practice with respect to the recognition of a right of expatriation (*f*).

Naturalisation (i) *in the United Kingdom* (*g*).—This subject is now governed by the Nationality and Status of Aliens Acts, 1914—1918. The Nationality Act, 1914, provides that an alien who has resided in the United Kingdom for not less than five years, or has been for that period in the service of the Crown within the last eight years, and is of good character and has an adequate knowledge of the English language, and intends to continue such residence or service, may apply to one of his Majesty's principal Secretaries of State, and may, on furnishing the requisite evidence and taking the oath of allegiance, receive a certificate of naturalisation; although the issue of such certificate is altogether discretionary. As we have already seen, a person to whom such certificate has been granted, and who has also taken the oath of allegiance, will then be entitled to all the rights, powers and privileges and subject to all the duties and obligations to which a natural-born British subject is entitled or subject, and to have to all intents and purposes the status of a natural-born British subject. Although by the common law marriage had no effect on the nationality of a woman (*h*), it is now provided that a married woman shall be deemed to be a subject of the State of which her husband is for the time being a subject; with the result that the marriage of an alien woman with a British subject makes her a British subject, and conversely the marriage of a British woman with an alien makes her an alien. But if a man ceases to be a British subject during the continuance of his marriage, his wife may make a declaration that she desires to retain her British nationality, and thereupon she shall be deemed to remain a British subject. And a British woman who has become an alien by marriage may on becoming a widow obtain a certificate of readmission to British nationality. The effect of naturalisation is also extended to the children of a naturalised father or mother (being a widow) who may be resident with their father or mother (as the case may be) in the United Kingdom during infancy.

(ii) *In British Colonies.*—By the Nationality Acts, 1914—18, s. 8, the

(*f*) *Infra*, p. 201 *et seq.*

(*g*) As to denization, see Steph. Com. ii. 546.

(*h*) *The Countess of Conway's Case* (2 Knapp, at p. 367); and *De Wall's Case* (12 Jur. (P. C.) 145).

Government of any British possession has the same power to grant or revoke a certificate of imperial naturalisation as the Secretary of State of the United Kingdom, but such certificate is subject to the approval of the Secretary of State, except in the case of India or a Dominion. In the absence of such approval a person naturalised in such a British possession is not a subject of the United Kingdom, although for international purposes he is regarded as a subject of the British Crown. But by section 9, the Dominions may adopt Part II. of the Act, in which case persons naturalised in accordance with its provisions acquire imperial naturalisation. No Dominion has yet adopted Part II. At the same time, by colonial legislation a certificate of naturalisation in the United Kingdom is frequently accepted as a sufficient foundation for the issue of a local certificate; whilst the system of naturalisation actually adopted is for the most part modelled on that of the United Kingdom, although sometimes subject to the denial of particular rights. Thus, by the Naturalisation Act, 1903, adopted by the Commonwealth of Australia, an alien who has resided for two years in the Commonwealth, or who has been previously granted a certificate of naturalisation in the United Kingdom, and who intends to settle in the Commonwealth, may apply for an Australian certificate; and, subject to certain evidence as to character and residence, or, in the case of the holder of a British certificate, as to identity, and the taking of the oath of allegiance where this has not been previously taken, the Governor-General may at his discretion issue such certificate. Thereupon the person so naturalised will be entitled, within the territory of the Commonwealth, to all the rights and liable to all the obligations of a British subject, except in matters where a distinction is drawn between natural-born and naturalised subjects (*i*). But in this as in other cases, although colonial naturalisation only purports to confer the privileges of British subjects within the limits of the possession, it is nevertheless officially treated in practice as conferring a right to the British character even in foreign countries, other than the country of origin. Thus, persons naturalised in British possessions receive passports as British subjects, and are also accorded diplomatic protection when in foreign countries; whilst they are also recognised by statute as capable of being registered as owners of British vessels (*k*). In *Reg.* v. *Prozesky* (J. S. C. L. No. 1 of 1901, p. 74) it was held that a German resident in Natal who had taken the oath of allegiance and had been entered on the voters' roll as a naturalised subject, even though by mistake no letters of naturalisation had been issued to him, was liable for treason, in that he had on the invasion of the colony joined the forces of the South African Republic and levied war against the Crown. In *Rex* v. *Francis, Ex parte Markwald* ([1918] 1 K. B. 617), Markwald was born in Germany in 1859, and in 1878 went to Australia, where in 1908 he took the oath of allegiance and was granted a certificate of naturalisation under the Australian Act, 1903. He subsequently came to reside in London,

(*i*) Ss. 5 to 8.

(*k*) See Merchant Shipping Act, 1894, s. 1. As to the attitude of other countries towards colonial naturalisation, see Westlake, i. 229; and as to nationality and naturalisation in India, Westlake, i. 231.

and was charged and convicted of being an alien. It was held by A. T. Lawrence, J., that the taking of the oath of allegiance and the grant of the certificate did not make Markwald a British subject of the United Kingdom. Allegiance exists before any oath has been taken. A natural-born subject owes *natural* allegiance, an alien *local* allegiance. "The oath of allegiance does but consecrate the allegiance already existing. Markwell's allegiance was local allegiance, and no authority had been given by the sovereign power to any one to accept any wider allegiance from him." (See also *Markwald* v. *Att.-Gen.*, [1920] 1 Ch. 348).

(iii) *In the United States of America.*—By the Constitution of the United States (*l*) Congress is empowered to establish a uniform rule of naturalisation; this power being vested exclusively in the Union, and not in the States (*m*). The conditions of naturalisation are now governed by an Act of Congress passed in 1906 (*n*). In effect, an alien seeking to be naturalised in the United States must make a declaration on oath of his intention to that effect before a competent Court; after the lapse of two years from the date of such declaration, and after five years' residence in all in the United States, and subject to his being of full age, and taking an oath of fidelity to the Constitution, and renouncing his foreign allegiance, together with any title of nobility, he may apply to one of the federal Courts mentioned in the Act, and on proof of the due fulfilment of the prescribed conditions he may thereupon be admitted to citizenship. This naturalisation, once effected, confers all rights belonging to native citizens, except that of being eligible for the office of President or Vice-President; although a longer period of residence is sometimes required as a condition of eligibility for certain other offices (*o*). The effects of such naturalisation will also extend to children who are minors at the time of the naturalisation of the father, subject to their being permanently resident in the United States (*p*). An alien woman may also become naturalised by marriage with a United States citizen (*q*); and although formerly it was held that a female citizen did not lose her nationality by marriage with an alien, where she continued to reside with him in the United States, it is now provided by statute that an American woman who marries a foreigner shall take the nationality of her husband (*r*). There is no qualification, such as exists in the British Acts, with respect to the non-recognition of American citizenship in the country of origin; a fact which, as will be seen hereafter, has given rise to many disputes (*s*).

(iv) *In other States.*—In France a foreigner must ordinarily be of full age, and obtain permission to become domiciled, subject to which

(*l*) Art. 1, s. 8.

(*m*) See *City of Minneapolis* v. *Reum* (56 Fed. R. 576; Scott, p. 390).

(*n*) "An Act to establish a bureau of immigration and naturalisation, and to provide a uniform rule for the naturalisation of aliens throughout the United States" (ch. 3592).

(*o*) *Osborn* v. *U.S. Bank* (9 Wheat. 738; Scott, 399 *n*).

(*p*) See Act of 1907 (ch. 2534), s. 4.

(*q*) Rev. Stat. s. 1994.

(*r*) See Act of 1907 (ch. 2534), s. 3. But she may resume her American citizenship on the termination of the marital relation, by residence in the United States or registering herself within one year at an American consulate.

(*s*) *Infra*, p. 202.

he may obtain letters of declaration of naturalisation after three years' domicile. Naturalisation may also be obtained in other ways, as by uninterrupted residence of ten years; or by the render of important service to the State and one year's authorised domicile; or by marriage with a French woman and one year's authorised domicile (*t*). A foreign woman marrying a Frenchman is thereby naturalised. The effects of naturalisation appear to extend to infant children, subject to their right to renounce French nationality within one year after coming of age (*u*). In Germany naturalisation can only be conferred by the high administrative authorities; the applicant must show he is at liberty under the laws of his former State to change his nationality; that he has the requisite permissions, if he is a minor; that he is domiciled in Germany; and, finally, that he is leading a respectable life and has the means of livelihood. The effects of naturalisation extend to a man's wife and to such children as are under the parental power. Some States, on the other hand, frame their naturalisation laws in such a way as to impose the national character on all persons who may become domiciled within their territory, or acquire landed property therein. So, Venezuela purports to regard foreigners as having become naturalised by the mere fact of domicile, irrespective of any desire on their part to identify themselves with the State or to assume its national character. But to attach the obligations of a new nationality, and the incidental abandonment of a former allegiance, to acts of private life, which carry with them no implication either of desire or intention to assume a fresh national character, is altogether unjustifiable. No State in fact is at liberty to naturalise foreigners against their will: see Hall, 225, and Oppenheim, i. 208 and 470 (*x*).

Naturalisation by Marriage.—According to the law of most countries, the marriage of a woman implies the adoption by her of the nationality of her husband. Hence the marriage of an alien woman with a citizen or subject commonly has the effect of naturalising her; whilst the marriage of a female citizen or subject with an alien commonly operates as an abandonment of her former national character. So, again, according to the law of most countries, a subsequent change of nationality on the part of the husband, as by naturalisation, will commonly extend also to the wife, as well as to minor children (*y*).

Imperfect Naturalisation and Domicile.—A pretension has sometimes been made to treat as nationals, for the purpose of protection against other States, persons who have only partially completed the formalities necessary to naturalisation, or who are merely domiciled in the protecting State. Thus, in the case of *Martin Koszta*, it appeared that Koszta, who was a Hungarian subject, after taking part in the rebellion of 1848, took refuge in the United States, and there duly declared his intention of becoming naturalised. But before the five years necessary to complete naturalisation had expired

(*t*) Code Civil, I. i. 8.

(*u*) *Ibid.* I. i. 12.

(*x*) As to the practice of different States with respect to foreigners naturalised by them, see Hall, 239: as to the effect of naturalisation on children who are minors, *ibid.* p. 251; whilst for more detailed information as to the methods and effect of naturalisation in foreign countries, see British Parl. Papers, Nationality and Naturalisation, Misc. 1893, No. 3; 1894, No. 1; 1895, No. 1.

(*y*) *Hall*, 238.

he returned to Smyrna; having obtained from the United States consul a travelling pass, stating that he was entitled to United States protection. Whilst at Smyrna he was arrested by the Austrian authorities, who claimed to have this right by virtue of certain treaties subsisting between Austria and Turkey, and was placed on board an Austrian man-of-war. A demand for his release was made by the American consul, and supported by threat of force on the part of a United States war vessel then in port, with the result that, through the mediation of the French Consul-General, Koszta was surrendered into the custody of that officer, and sent back to the United States; the Austrian Government, however, reserving the right to proceed against him if he returned to Turkey (*z*). Viewed in the light of the circumstances as they reasonably appeared at the time, under which such emergency acts must be judged, and more especially if the circumstances of the arrest were, as stated by Wheaton, not even professedly legal (*a*), it would seem that the United States authorities were justified in their action. An appeal to the territorial Power whose sovereignty had been violated was manifestly likely to prove abortive; Koszta was apparently a citizen of and resident in the United States, and was also in possession of a United States passport; the crime alleged was political; and the subject was detained by violence on a foreign warship in neutral territory. But, as it subsequently appeared that the passport was wrongly issued, and as it could scarcely be pretended either that Koszta was naturalised or that the fulfilment of certain preliminary forms was equivalent to naturalisation, the United States Government, in the controversy which ensued, fell back on the claim that mere domicile confers a national character. Such a pretension would appear, however, in the present state of international law, to be altogether untenable. It is questionable in principle, because it ignores the subsisting distinction between *domicilium* and *patria*—the source of the civil as distinct from the political status (*b*);—whilst it also attributes to domicile a consequence which has not hitherto attached to it by custom (*c*). It is possible, indeed, that, in the future, permanent residence within the territory of a State, and the ties which it creates, may come to replace the existing tests of national connection. And it may be that, even now, domicile within a State on the part of a person who is not strictly a national may confer a limited right of protection as against other States, especially in circumstances analogous to those of Koszta's case. But in the present state of international law, it would seem that such a claim could not lawfully be put forward in derogation of a claim to jurisdiction within its own territory on the part of the State of which the individual in question was really a national (*d*). And this appears to have been recognised, even by the

(*z*) Wheaton (Lawrence), p. 229; Wharton, Dig. ii. §§ 175, 198.

(*a*) Wheaton suggests that Koszta was seized by persons in the pay of Austria, thrown into the sea, and thereupon picked up by the Austrian war vessel.

(*b*) Although, as will be seen hereafter, there are some States which do not recognise domicile even as a source of civil status; *infra*, p. 218.

(*c*) As to the restriction of domicile to civil consequences in English law, see *Ah Yin* v. *Christie* (4 C. L. R. 1428).

(*d*) But as to the possible limits of this jurisdiction, see p. 230, *infra*.

United States, in the subsequent case of *Simon Tousig* (*e*). In that case an Austrian subject, who had emigrated to the United States without permission, and who had taken the necessary steps to become naturalised there, returned to Austria before completing his naturalisation, and was subsequently proceeded against for illegal emigration. He thereupon claimed the protection of the United States; but interference on his behalf was refused on the ground that inasmuch as he had once been subject to the laws of Austria, and had whilst so subject violated those laws, his withdrawal from the native jurisdiction and proposed acquisition of a different national character would not exempt him from their operation, if he again chose to subject himself to them (*f*).

(iii) LOSS OF NATIONAL CHARACTER; REACQUISITION.

THE KING v. LYNCH.

[1903; 1 K. B. 444.]

Case.] This was a trial at bar for high treason. In the indictment it was charged that the prisoner, a person born in Australia, of Irish parents, and therefore a British subject, had, during the war between Great Britain and the South African Republic, "adhered to the Queen's enemies." Amongst the overt acts charged and proved were: (1) that he had declared his willingness to take up arms for the Republic; (2) that he had during the war taken an oath of allegiance to the Republic; and (3) that he had in fact acted in co-operation with the military forces of the enemy. On behalf of the prisoner it was contended that he had been voluntarily naturalised in the Republic, by virtue of the right (of expatriation) conferred on British subjects by the Naturalisation Act, 1870, s. 6, and in accordance with the conditions of that Act; and that he had thereupon ceased to be a British subject and become freed from all consequences attaching to the British nationality. On behalf of the Crown it was contended that,

(*e*) Wheaton (Lawrence), p. 229; and (Dana), p. 146.

(*f*) By Act of Congress of 1907 (ch. 2534) the issue of passports, after declaration and three years' residence, is now expressly authorised, subject to certain restrictions; but such a passport is not to confer a right to protection when in the country of which the bearer was previously a citizen. On the subject of expatriation generally, see Hall, 242; Westlake, i. 200; Taylor, 225.

although it might ordinarily be open to a British subject, by virtue of the Act, to divest himself of his British character by being naturalised elsewhere, yet it was not open to him to become naturalised in a foreign country during a state of war between that country and Great Britain; that in such cases the very act of naturalisation would be a crime; and that the Naturalisation Act, 1870, s. 6, was not intended to apply to an act in itself criminal. In the result it was held that s. 6 did not empower a British subject to become naturalised in an enemy State in time of war; and that the act of being naturalised was under such circumstances an act of treason, and no answer to an indictment for subsequently joining the military forces of the enemy.

Judgment.] Judgments were delivered by Lord Alverstone, C.J., Wills, J., and Channell, J. In his judgment the Lord Chief Justice pointed out that the declaration of willingness to take up arms and the taking of the oath of allegiance, although they took place on the same day as the naturalisation, yet in fact preceded it. The other overt acts took place subsequently. It was not disputed that the alleged naturalisation would afford no defence, but for the Naturalisation Act. Reliance was, however, placed on s. 6 of that Act, which provided that "any British subject who has at any time before, or may at any time after, the passing of the Act, when in any foreign State and not under any disability, voluntarily become naturalised in such State, shall from and after the time of his so having become naturalised in such foreign State be deemed to have ceased to be a British subject, and be regarded as an alien." But even this provision would afford no defence as to the first two overt acts; for the reason that by s. 15 it was provided that "where any British subject has in pursuance of this Act become an alien, he shall not thereby be discharged from any liability in respect of any acts done before the date of his so becoming an alien." But apart from this, s. 6 did not empower a British subject to become naturalised in enemy country in time of war; and hence the question of the prisoner's liability with respect to the subsequent overt acts must also be left to the jury. An act which was in itself an act of treason could not confer any rights; and whatever might be the effect of a declaration of war, it at any rate prevented British subjects

from making arrangements with the King's enemies, when such arrangements would constitute crimes against the country to which they owed allegiance. Wills, J., in his judgment also pointed out that if the contention put forward by the prisoner were upheld, then a whole army might desert to the enemy on condition of being naturalised, and thus escape any liability for the penalties of treason.

By the common law of England, allegiance, with its attendant obligations, could not be divested by any act on the part of the individual himself; a rule embodied in the maxim *nemo potest exuere patriam*. So, in the case of *Æneas Macdonald* (18 How, St. Tr. 858), it was held that a person originally born in allegiance to the Crown was liable to the penalties of treason for being found in arms against his native country; notwithstanding that he had spent all his earlier life in France, and his riper years in profitable employment in that country, and had also held a commission from its King; this conclusion being based on the ground that it was not in the power of a natural-born subject of Great Britain to shake off his allegiance or to transfer it to a foreign prince, nor in the power of any foreign prince, by naturalising or employing a subject of Great Britain, to dissolve the bond of allegiance between that subject and the Crown. This principle is, however, now governed by the Nationality Act, 1914, which enables natural-born subjects to discard their allegiance and its attendant obligations, either by being duly naturalised in another country, or in certain cases merely by a declaration of alienage. In *The King* v. *Lynch*, however, it was held that, in view of the express reservation contained in the Act of 1870, it could not be extended to cover acts of treason committed prior to the completion of naturalisation; and, further, that it was obviously not intended to sanction the naturalisation of a British subject by an enemy State in time of war.

THE CASE OF LUCIEN ALIBERT.

[1852; U.S. Documents, 1859-60, ii. 176.]

Case.] Lucien Alibert, a French natural-born subject, went to the United States of America when about eighteen years of age, and before he had rendered the military service prescribed by French law. He was duly naturalised in the United States, but subsequently returned to France, where he was arrested as an *insoumis*; a person, that is, who has failed to join his standard when called upon. He pleaded his naturalisation in America, but was convicted, on the ground that in such a case an *insoumis*

still remains liable to the penalty for evading military service. Subsequently, however, the sentence passed on him was remitted, on the ground that more than three years had elapsed between the time when he was naturalised and the date of his return to France: the offence in such a case being purged by prescription.

The case of Lucien Alibert serves to illustrate one of the incidents of nationality which still attaches in most European countries; in virtue of which emigration or expatriation, even though otherwise allowed, is nevertheless limited by the obligation of military service. Any violation of this commonly renders the offender liable to imprisonment if he returns to his own country, or to fine or forfeiture of any property that may accrue to him; and this even though, as in France, the national character may be lost by naturalisation elsewhere. By the law of Germany, every German subject is liable to military service, which cannot be performed by deputy. The right to emigrate is limited by this obligation; and by the Penal Code any one emigrating without permission, in order to avoid military service, is liable to fine and imprisonment, and subject to military service in the event of his return; whilst this liability, if incurred before emigration, will not be purged by naturalisation elsewhere.

GENERAL NOTES.—*Loss of National Character—Expatriation.*—The methods by which nationality may be lost differ in different systems. But in general they may be said to comprise: (1) loss by naturalisation elsewhere, or by disclaimer in cases of conflict, or by marriage with an alien in the case of females (*g*); (2) loss by express deprivation or release; (3) loss by abandonment; and (4), in the case of communities, loss by transfer to some other State on cession or conquest. And these methods, or such of them as are recognised in any particular system, commonly apply to the national character both as acquired by birth or by naturalisation.

Resumption of National Character—Repatriation.—Where a national by birth has lost his original national character by naturalisation or abandonment, provision is sometimes made, under the law of particular States, for repatriation, or for a resumption of that character, by methods less formal or cumbrous than those involved in ordinary naturalisation. Thus, in France, a Frenchman who has lost the national character may recover it, on returning to France, by administrative decree; and the effect of this may be extended to his wife and children (*h*). In the case of Great Britain, it is provided by the Naturalisation Act, 1870, that where a natural-born British subject has been naturalised in another State he may, on returning to the United Kingdom, and complying with the ordinary naturalisation

(*g*) *Supra*, p. 193. (*h*) Code Civil, liv. i. tit. i. c. ii. part 18.

conditions, obtain a certificate of readmission to British nationality (*i*). So a woman who was a natural-born subject, but became an alien in consequence of marriage, may on becoming a widow be similarly readmitted to British nationality (*k*). And in each of these cases the effect of readmission will extend to any children resident with the parent, during infancy, in the United Kingdom (*l*).

Is there a Right of Expatriation?—Expatriation denotes an abandonment, or in some cases a deprivation, of a former national character, with its attendant rights and obligations. This is in practice commonly followed by the assumption of a new national character and a new allegiance in its place. As regards the attitude of States towards the naturalisation of their own subjects by other countries—some States, as we have seen, regarded allegiance as indefeasible; although this doctrine is now generally discarded. But many States still attach conditions to the abandonment of the national character, as that the consent of the State shall be obtained, or another character duly acquired; although others recognise such an abandonment, in certain events, without further inquiry. All States, however, appear to regard the expatriation as being subject to a continuing liability for obligations incurred before it took place; whilst States which impose an obligation of military service on their nationals either make the act of expatriation contingent on the due performance of this, or subject any one in default to penalties in the event of his return, or to forfeiture of any interests which he may have or acquire within the territory. As regards the attitude of States in the matter of granting naturalisation to the subjects of other countries—many States, as we have seen, afford great facilities to foreigners in the matter of naturalisation; whilst some even affect to impose it by virtue of domicile alone (*m*). Under these circumstances, various questions of an international character are likely to arise: (1) Is the naturalising State under any obligation either to recognise restrictions imposed by the State of origin on the expatriation of its nationals; or itself to impose reasonable restrictions on the naturalisation of the nationals of other States in its territory? (2) If a State naturalises a foreigner, in derogation of the law of the State of origin, is it entitled to extend to him its protection, as against the latter? (3) How far, in the circumstances last suggested, are other States entitled or bound to recognise the new national character, whether as a source of privilege on the part of the individual or as a ground of protection on the part of the naturalising State? On these points international usage is far from settled. The earlier tendency was to recognise the permanence of the original tie, until relaxed with the consent of the State of origin. And even now it is contended by some writers that the recognition of an absolute right of expatriation would be at once "anarchical in principle and inconvenient in practice"; and that it would be well if the right of every State to prescribe the conditions under which its nationals may discard their

(*i*) S. 10; but as to the difficulties of this section, see Piggott, Nationality, i. 160.

(*k*) S. 10 (2). As to the United States, see *supra*, p. 192 *n* (*r*).

(*l*) S. 10 (4). On the subject generally, see Piggott, Nationality, i. 159 *et seq.*

(*m*) *Supra*, p. 193.

nationality were admitted, and if no acquisition of foreign nationality were recognised unless these conditions had been complied with; leaving it to the good sense of States to do away with such rules as are either vexatious or unnecessary for the safeguarding of the national welfare (*n*). On the other hand, the United States of America, which was the State most largely concerned in this question, after some prior changes of attitude, finally declared, by Act of Congress passed in 1868, that "the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness," and that effect should be given to this view as against other States (*o*). And this view is not only supported by a great body of theoretical opinion, but is likely to be strengthened as time proceeds by that increasing disregard of national attachments which springs in part from economic needs and in part from modern facilities of communication. In practice, however, the difficulties that arise from the unsettled state of international law on this subject have been in some measure surmounted by treaties made between particular States; and it is not unlikely that this cause of difficulty will be ultimately settled by general international agreement. Meanwhile, and in the present state of international usage, it can scarcely be said that there is any general or unrestricted right of expatriation. Most States, even whilst conceding to their nationals a right of being naturalised elsewhere, yet concede this only subject to certain restrictions and conditions; many States also still restrict the application of their naturalisation laws or limit their effect, in deference to what are deemed to be the inherent rights of the State of origin; whilst even such States as the United States of America, which assert to the full a right of expatriation, are forced to concede that naturalisation without the consent of the State of origin still leaves the persons so naturalised subject to a continuing liability for non-extraditable offences committed prior to emigration. A review of existing conditions leads, then, to the following conclusions: (1) A State in framing or administering its naturalisation laws is, in strictness, entitled to act without reference to the nationality laws of other States; although comity requires that it should not frame or administer them in such a way as to encourage "the avoidance of reasonable obligations" due to other States by their respective nationals. (2) The competence of a State in naturalising the nationals of other States within its own territory cannot, of course, be questioned so long as they remain therein; whilst if they have been duly naturalised under the local law, this would probably also be recognised externally by all States other than the State of origin, as for the purpose of extradition (*p*). (3) But if the foreign naturalisation took place in derogation of the law of the State of origin, then the latter will, in strictness, be entitled to enforce its laws against the persons of its former nationals if they return, or against their property

(*n*) Hall, 210.

(*o*) See Rev. Stat. ss. 1999-2001; and on the subject generally, Scott, 375; Kent, Com. ii. 43.

(*p*) Whilst, conversely, such a claim on the part of the State of origin would not be entertained. But in either case this would only apply as regards States that recognise personal jurisdiction as a ground for extradition; see p. 251, *infra*.

within its territory if they do not. (4) This right is, however, now often limited by treaty to obligations incurred before emigration; and an incipient usage to that effect appears to be springing up irrespective of treaty. (5) In any case, moreover, if the foreign naturalisation involved either a breach of its laws or a violation of comity, the State of origin may, at its option, forbid its former nationals access to its territory or expel them if they enter (*q*).

Practice with respect to Expatriation: (i) *Great Britain.*—With respect to her own subjects, Great Britain has, as we have seen, by the Nationality Act, 1914, s. 13, so far relaxed the earlier rule of indefeasible allegiance (*r*) as to allow natural-born subjects to become naturalised in foreign States, when in a foreign State, and not under any disability, by obtaining a certificate of naturalisation or other voluntary and formal act. Subject to these conditions, a British subject duly naturalised in a foreign State will be discharged from the consequences of his British nationality, save as mentioned below. Any person, moreover, who is a British subject by reason of having been born within the British dominions, but who by the law of some foreign State is also regarded as a subject of that State, may, if of full age, and not under any disability, discard his British nationality by a declaration of alienage (*s*). And by section 15 a similar privilege may be also bestowed on naturalised subjects who may desire to resume their former nationality, in cases where a convention to that effect subsists between Great Britain and the State to which they previously belonged. But by section 16 the effect of such expatriation is not in any of these cases to relieve any person from liability as regards acts done before its occurrence.

(ii) *The United States of America.*—In spite of much conflict of opinion, it would seem that the earlier law on the subject of expatriation in the United States followed the common law of England (*t*). But, so far as relates to the abandonment of the American character, it is now provided by an Act of Congress of 1907 (C. 2534 s. 2), that an American citizen shall be deemed to have expatriated himself when he has been duly naturalised in a foreign country, or when he has taken an oath of allegiance to any foreign State. In the case of naturalised citizens, any such citizen shall be presumed to have lost the American character by two years' residence in the foreign State from which he came, or by five years' residence in any other foreign State; unless such presumption is rebutted by satisfactory evidence furnished to a diplomatic or consular officer of the United States; and even where there has been no such naturalisation, but only emigration, as where a citizen has removed himself and his property to a foreign country, without intention to return, it seems that this would be recognised as an abandonment of the American character, so far as relates to any claim to protection on the part of the Government (*u*). But by the same statute no American citizen is allowed to expatriate

(*q*) Hall, 239.
(*r*) *Supra*, p. 197.
(*s*) S. 14
(*t*) *Williams' Case* (Wharton, St. Tr. p. 652; Scott, pp. 372 and 374 *n*); and *Shanks* v. *Dupont* (3 Pet. 242).
(*u*) Dicey, Conflict of Laws, American Notes, p. 203 *et seq.*; Wharton, Dig. ii. § 176.

himself when the country is at war. A resumption of nationality can only be effected by the ordinary process of naturalisation. In the United States, however, the question which has generally arisen has been whether the Government would enforce on foreign States a recognition of a right of expatriation on the part of their nationals who had been naturalised in the United States. Even on this question the earlier attitude appears to have been opposed to any such insistence (*x*). But this attitude gradually underwent a change, with the result that in 1868 an Act of Congress was adopted which not merely declared the right of expatriation to be an indefeasible right, but also enacted that "all naturalised citizens of the United States while in foreign States shall be entitled to and shall receive from their Government the same protection of persons and property that is accorded to natural-born citizens in the like situation and circumstances" (*y*). Nevertheless, in the various international disputes that have occurred on this subject, the Government, whilst generally asserting a right of expatriation irrespective of any limitation imposed by the State of origin, has been forced to concede that, in the event of the person so naturalised returning to his native country, this right is subject to a liability to answer for obligations, including the non-discharge of military service, that had accrued prior to the act of emigration, although not for the act of emigration itself or for obligations alleged to have accrued subsequently (*z*). And it is on this basis that various treaties relating to this matter have been entered into with other States (*a*). It has been further conceded, in effect, that when a person naturalised in the United States subsequently returns to his State of origin, with intent to reside there permanently, this shall be regarded as a relinquishment of his American citizenship (*b*).

(iii) *Other States.*—According to the law of France, a Frenchman may lose his nationality in the following ways, amongst others: (1) by naturalisation in a foreign country; although, if still subject to military service for the active army, he must have the consent of the Government; (2) by accepting employment under a foreign Government and not renouncing the same on the demand of his own Government; (3) by entering the military service of a foreign Government without the authorisation of his own Government, but without prejudice, in this case, to any penalties to which he may be liable by French law (*c*). Emigration in fraud of military service will also render him liable to penalties if he should return to France within a certain time. By the German Imperial and State Nationality Law of July 22, 1913, section 21 of the Law of 1870 was repealed, and a German can only lose his nationality by the following acts: (1) by application for discharge from German nationality; (2) by voluntary acquisition

(*x*) This, at any rate, was the attitude taken up in the case of *Ignaço Tolen*, in 1852, and in *Tousig's Case*, 1854.

(*y*) Wharton, Dig. ii. § 172; Taylor, 225.

(*z*) Wharton, Dig. ii. §§ 180-182.

(*a*) See, by way of example, a treaty concluded with the North German Confederation, in 1868; Taylor, p. 227; Hall, 245.

(*b*) See Wharton, Dig. ii. § 179.

(*c*) Code Civil, liv. i. tit. ii. c. 2.

of a foreign nationality, or by service under a foreign Government; (3) by non-fulfilment of military service. Moreover, if he obtains permission from the competent German authority before he becomes naturalised elsewhere, he does not lose his German nationality, and provided he has not evaded his obligations, facilities are given enabling a German to regain his German nationality. The Law has been considered in three English cases. In *Ex parte Weber* ([1916] 1 K. B. 280n, [1916] A. C. 421), Weber claimed that he had lost his German nationality by residence abroad for more than ten years. It was found by the Court of Appeal, that if Weber returned to Germany and "no blame attached to him," his State of origin might acknowledge him as a German. Consequently he had not lost his German nationality. In affirming this decision, the Lord Chancellor said it was not clear that Weber was free from obligations of military service, although he had lost some of his rights. In Liebman's Case, *Rex* v. *Superintendent of Vine Street Police Station* ([1916] 1 K. B. 268), Liebman had obtained his discharge from German nationality in 1890, but never became naturalised in England. Since by the Law of 1913 he could, without even going back to Germany as "a foreigner" would have to do, recover his German nationality, it was held that he had not entirely lost the right of a natural-born German, and was therefore rightly interned as an alien enemy. In *Stoeck* v. *Public Trustee* ([1921] 2 Ch. 67) the plaintiff, a natural-born Prussian, in 1896 obtained his discharge from Prussian nationality. He made England his permanent home, but was never naturalised there or elsewhere. In 1916 he was interned and in 1918 deported to Holland; thence he went to Germany. It was proved in evidence that by his discharge Stoeck had absolutely lost his German nationality and thereby his imperial nationality, and that according to German law, having lost his German nationality and not having acquired any other, he would be regarded as State-less. There was no foundation in German law for the suggestion that a former German retains any German nationality or retains it for any purpose. Stoeck was not a German national for any purpose according to German law. Upon this evidence, Russell, J., held that Stoeck was not a German national, and that he had for all purposes lost his German nationality. The official translation of the Law of 1913 was incorrect, and the Military Act of 1874, by which he would have been liable to military service, had been repealed. The House of Lords and the Court of Appeal, in the earlier cases, would appear to have been misled by the evidence upon German law before them (*d*).

(*d*) For a summary of the laws of other States on this subject, see Hall, 238.

THE RIGHTS AND LIABILITIES OF ALIENS IN TIME OF PEACE.

MUSGROVE v. CHUN TEEONG TOY.

[L. R. 1891, App. Cas. 272.]

Case.] IN this case the appellant, who was Collector of Customs in the colony of Victoria, was sued by the respondent, a Chinese immigrant, for having prevented the latter from landing; this having been done by order of the executive Government of the colony. On behalf of the respondent it was contended that his exclusion was illegal, both on a proper construction of the Chinese Exclusion Acts in force in that colony, and at common law. The Supreme Court of Victoria having found in favour of the present respondent, an appeal was thereupon taken to the Crown in Council. The Judicial Committee, after deciding against the respondent on the question of the construction of the colonial statutes, further held that under the general law an alien has no legal right enforceable by action to enter British territory.

Judgment.] Lord Halsbury, L.Ch., in delivering judgment on behalf of the Judicial Committee, after dealing with the question of the construction of the local statutes, observed that, apart from the latter question, the facts appearing on the record raised a grave question as to whether an alien had a legal right, enforceable by action, to enter British territory. There was no authority for such a proposition. Circumstances might occur in which the refusal to permit an alien to land might be such an interference with international comity as to lead to diplomatic remonstrances from the country of which he was a native. But it was quite another thing to assert that an alien, excluded from any part of the British dominions by order of the executive Government, could maintain an action and raise such questions as had been argued in the present appeal; as to whether the excluding officer had been duly authorised by the Colonial Government, as to whether the latter had received due authority from the Crown, and as to whether the Crown itself had the right to exclude an alien without the authority of Parliament. That an alien had a right to compel the decision of such matters as these, involving

delicate and difficult constitutional questions affecting the respective rights of the Crown and Parliament, and the relations of the Mother Country to her self-governing colonies, was a proposition that could not be assented to. And, when once it was admitted that there was no absolute and unqualified right of action in such a case, it was, in the opinion of the Judicial Committee, clear that it would be impossible, on the facts admitted in the demurrer, for an alien to maintain an action.

Prior to this decision some doubt had been entertained as to whether there was not at common law a right on the part of alien friends to enter British territory. There was, indeed, no doubt that a right of exclusion, or even of expulsion, could be exercised by Parliament; and such a right had in fact been exercised on various occasions by the imperial Parliament, notably in the period between 1793 and 1848, and also by various colonial Legislatures. But it was so far not clear whether the executive Government, either of the United Kingdom or of a British colony, could exercise such a right without statutory sanction. In this case, however, the Privy Council definitely decided that an excluded alien in such a case has no remedy enforceable by action; and virtually, therefore, that he has no legal right to enter British territory (*e*). Nor does this conclusion appear to conflict with any international requirement; for, although the complete exclusion of the nationals of another State might be made a ground of complaint or retaliation, yet neither in law nor comity is a State prohibited from limiting or regulating the admission of aliens into its territory (*f*). In the United Kingdom, moreover, such restrictions are now sanctioned by statute. Thus, by the Aliens Act, 1905, the immigration of undesirable aliens is regulated and restricted; and power is also conferred on the executive to expel persons whose expulsion has been recommended by a Court in which they have been convicted, or who are certified by a Court as being without means of subsistence, or as having been sentenced in a foreign country, with which there is an extradition treaty, for an offence that would constitute an extradition offence under section 3 of the Extradition Act, 1870. At the same time it is provided that in the carrying out of the Act due regard shall be had to any treaty or convention subsisting with any foreign country (*g*). Until this statute it had been doubted whether the prerogative power to expel still survived and it was argued that an alien friend, if arrested and ordered to be expelled, was entitled to a writ of *habeas corpus* (*h*). The Aliens Restriction Act, 1914 (45 Geo. 5, c. 12), was an emergency statute giving additional powers to the Crown (irrespective of the prerogative) to prohibit aliens from entering, to deport or to require them to reside

(*e*) As to the right of expulsion under the law of certain dependencies, see *In re Adam* (1 Moo. P. C. 460).

(*f*) *Infra*, p. 210.

(*g*) S. 7, sub-s. 6; and see also 6 and 7 Will. 4. c. 11, as to the duties of masters of vessels as regards immigrant aliens.

(*h*) F. Craies, 6 L. Q. R. 27 (1890).

or remain in certain districts or to prohibit them from residing in certain districts. By the Aliens Restriction (Amendment) Act, 1919 (9 & 10 Geo. 5. c. 92), aliens attempting or committing acts calculated to cause sedition or disaffection or industrial unrest are liable to punishment, and former enemy aliens are not permitted to enter for three years after the passing of the Act without the permission of the Secretary of State (*R.* v. *Inspector of Leman Street*, and *R.* v. *Secretary of State*, 36 T. L. R. 677). In certain British colonies, owing to the fears entertained as to the effect on wages and on the existing standards of life of any extensive immigration on the part of coloured races, restrictions on Chinese immigration were imposed from a comparatively early time; and these restrictions have now, under colour of a language test, been greatly extended. Restrictions are also imposed on the immigration of persons of any race or nationality who are likely to prove noxious to the community, or whose introduction may prejudice the interests of local labour (*i*). Thus, by the Immigration Restriction Acts, 1901 to 1905, passed by the Commonwealth of Australia, certain persons—including any person who when an officer dictates to him not less than fifty words in any prescribed European language fails to write them out in the presence of that officer; any person likely to become a charge on the public; any insane person or persons suffering from a disease of a dangerous character; and any person who has within three years been convicted of a serious offence—are declared to be prohibited immigrants. The introduction or entry of such persons into the Commonwealth is either prohibited or only allowed provisionally, and in certain cases on the deposit of security. Any violation of these provisions may be visited with fine or imprisonment, in addition to the penalty which attaches to the masters, owners, or charterers of vessels. Such immigrants are also liable to be deported from the Commonwealth (*k*).

DE JAGER v. ATTORNEY-GENERAL OF NATAL.

[1907; A. C. 326.]

Case.] DE JAGER was a burgher of the South African Republic, who had been for ten years resident in Natal. After the outbreak of the war between Great Britain and the South African Republic, in 1899, he continued to reside in that colony; and upon the occupation by the Republic of that portion of Natal in which he resided, he joined the invading forces, and subsequently acted as commandant and commissioner. Apparently he was compellable to do so under his national law; although the question of

(*i*) See, by way of example, the Contract Immigrants Act, 1905, passed by the Commonwealth of Australia.

(*k*) As to a curious point of law involved in deportation, see *Robtelmes* v. *Brenan* (4 C. L. R. 395).

compulsion does not appear to have been raised. After the re-establishment of the British authority he was indicted for high treason, and, having been found guilty, was sentenced to five years' imprisonment and to pay a fine of £5,000. A petition to the Judicial Committee of the Privy Council for special leave to appeal was dismissed.

Judgment.] Lord Loreburn, L.Ch., in delivering the judgment of the Judicial Committee, said that it was old law that an alien resident within British territory owed allegiance to the Crown, and might be indicted for high treason, even though not a subject. Some authorities affirmed that this duty and liability arose from the fact that while in British territory he received the King's protection. But the protection of a State did not cease merely because the State forces, for strategical or other reasons, were temporarily withdrawn, so that the enemy for the time exercised the rights of an army in occupation. Such protection was in fact continuous, even though actual redress of what had been done amiss might be necessarily postponed until the enemy forces had been expelled. Under these circumstances the duty of an alien resident was so to act that the Crown should not be harmed by reason of its having admitted him as a resident. After referring to the modern practice by which enemy subjects were permitted to continue their residence even after the outbreak of war, it was pointed out that it would be intolerable, and must inevitably lead to a restriction of such international facilities, if, as soon as the enemy made good his military occupation of a particular district, those who had till then lived there peacefully as aliens could with impunity take up arms on behalf of the invaders.

This case serves to illustrate a rule which obtains not only in English law but also in other systems—that an alien, whether technically domiciled or not, who is actually resident in the territory of any State, owes a temporary and local allegiance to that State, so long as such residence continues; although it is competent to him at any time to release himself from the obligation by abandoning his residence (*l*). In *Rex* v. *Badenhorst* (21 N. L. R. 227), where the facts were similar to those in De Jager's case, it was urged on behalf of the

(*l*) See Hale, Pleas of the Crown, 147; Scott, 397 *n*).
i. ch. x.; *Carlisle* v. *U.S.* (16 Wall,

prisoner that he had never acquired a domicile in Natal; but it was held that it was quite sufficient to create a temporary obligation of allegiance and obedience to the law if he had resided in Natal and was not merely a casual visitor. If, indeed, on the outbreak of war he had gone back to the Transvaal, and had subsequently returned with the forces of the enemy, he could not have been prosecuted for treason, for he would not then have been amenable to the laws of Natal; but inasmuch as he continued to reside there, and had the benefit and protection of its laws, he was not entitled, upon an invasion by the enemy, to cast his allegiance to the winds and to join their forces. In the United Kingdom aliens are, by the Nationality Act, 1914, empowered to acquire, hold, and dispose of both real and personal property, in the same manner as natural-born subjects; but it is expressly provided that the Act shall not qualify an alien for any office, or for any municipal, parliamentary, or other franchise, nor to be the owner of a British ship, nor confer on him any right or privilege as a British subject except such as is expressly given to him (*m*). And these provisions also apply, in so far as may be necessary, to non-resident aliens. The expression "alien" is defined in the statute to mean "a person who is not a British subject." Resident aliens are, in fact, admitted to all common rights, including freedom of residence, and the right of access to the courts (*n*), under the same conditions as British subjects; together with the right of following any profession or calling, except where this right is expressly denied or qualified (*o*). These rights are sometimes expressly confirmed by treaties of friendship or commerce. Aliens may be required to serve on juries after ten years' residence (*p*). With respect to statutes conferring privileges, it will be a question of interpretation in each case as to how far privileges conferred extend to aliens, whether resident or non-resident (*q*). In *Routledge* v. *Low* (L. R. 3 H. L. 100) it was held that where personal rights are conferred on persons filling any character of which foreigners are capable, such foreigners will be deemed to be included, unless a contrary intention is expressed or implied. In *Davidsson* v. *Hill* ([1901] 2 K. B. 606) it was held also that a foreigner might recover damages under Lord Campbell's Act for loss sustained by the death of relatives on the high seas in a collision occasioned by the negligence of a British vessel. In British colonies the position of resident aliens is for the most part very similar, save that persons belonging to certain excepted races, such as the Chinese, are occasionally made the subject of special disabilities.

(*m*) S. 17.

(*n*) Although it is perhaps doubtful if an alien could maintain a petition of right against the Crown; see Piggott, Nationality, i. 176.

(*o*) See, by way of example, 49 and 50 Vict. c. 48, ss. 12 and 13.

(*p*) Juries Act, 1870, s. 8.

(*q*) *Infra*, p. 240.

THE CASE OF DON PACIFICO.

[1850; Annual Register, p. 281.]

Case.] M. Pacifico was a Jew, born at Gibraltar, and hence by birth a British subject; but in 1847 he became a resident at Athens. It was customary in Greece for the people to burn an effigy of Judas Iscariot at Easter; but in 1847 it was decided by the authorities, for certain reasons, to prohibit this ceremony. Thereupon a mob of persons, attributing this order to interference by or on behalf of the Jews, attacked M. Pacifico's house and plundered it. M. Pacifico, having made a complaint to the Greek Government without obtaining any redress, and reasonably believing that he would have little hope of obtaining justice in the Greek Courts, appealed to the British Government. The British Government, deeming the claim to be well founded, thereupon intervened, and made a demand for compensation on M. Pacifico's behalf. To this demand the Greek Government replied, in effect, that the authorities had made every effort at once to prevent the outrage, and thereafter to bring the perpetrators to justice, and that with this its liability must be regarded as at an end. It was contended, moreover, that according to the municipal law of Greece and other European countries, as well as the requirements of international comity, M. Pacifico should first have been required to bring an action for damages in the local tribunals before recourse was had to diplomatic intervention. On the failure of the Greek Government to make compensation, the British Government caused an embargo to be laid on Greek vessels; with the result that on the mediation of France a convention was entered into, by which the claim of M. Pacifico was referred to certain commissioners, who, after investigation, awarded him £150 by way of compensation for the damage sustained.

The case of M. Pacifico serves to illustrate the position of aliens when within the territory of another State, and the right of their national Government, in certain contingencies, to intervene for the purpose of protecting their interests. Although the action of the British Government in this case has been the subject of much adverse criticism, and although it may be admitted, as a general rule, that all judicial remedies should be resorted to before intervention, yet the

fact that M. Pacifico had brought his claim under the notice of the authorities, without obtaining satisfaction; the fact that a civil remedy against a mob of unknown persons was virtually impracticable; and the notorious existence at the time of a bitter feeling of animosity against persons of the Jewish race, may be said to have justified the intervention. At the same time, the measures adopted were probably too drastic; whilst the amount of damages originally claimed was no doubt excessive (*r*).

GENERAL NOTES.—*The Admission or Reception of Aliens.*—Every State has a right, which is at once inherent in its sovereignty, and essential to its safety, either to refuse or to regulate the admission of aliens into its territory. At the same time, as between States of European civilisation, the right to refuse admission is qualified in practice by the obligations of comity, which limit the restriction to the exclusion of such classes as are reasonably regarded as dangerous, or noxious, or liable to become a charge on the community, such as criminals, lunatics, and paupers. To exceed this limit, or to exercise the right of exclusion without due cause or proper consideration, would afford a just ground for complaint or retaliation on the part of other States. Hence in practice aliens are usually allowed to come and go freely, subject, however, in the case of some States, to the requirement of a passport; and also to reside or even to acquire a domicile within the State, subject, again, in the case of some States, to the obtaining of the necessary authorisation. In relation to Oriental States and communities, however, European Powers, as well as the United States, have in many cases assumed not only to enforce a right of access for their nationals, but also to exempt them after admission from the local jurisdiction (*s*). By way of contrast to this, both in the United States and in certain British colonies, the fear of the effect on wages and on the prevailing standards of living of any large intrusion on the part of Chinese and kindred races has led to an attempt at partial or total exclusion. Thus, in the United States, since 1894 an absolute prohibition has been placed on the immigration of Chinese labourers, although merchants and students are exempted from its scope (*t*). Until recently such restrictions were enforced only against States or communities unable to offer any effective resistance; but the emergence of Japan as a Great Power, and the not improbable rise of China to a like position, may in the future give rise to some questions of no little difficulty. Every State, on the other hand, also possesses the right, if

(*r*) The claim, as originally put forward by Pacifico, appears to have exceeded £30,000; but the bulk of this was on account of the destruction of certain documents substantiating a claim of his against the Portuguese Government. Great Britain claimed £500 on account of his personal sufferings and those of his family, and 120,000 drachmas (about £4,400) on account of losses sustained by him.

(*s*) *Infra*, p. 259.

(*t*) It was the harsh treatment adopted towards merchants and students that provoked the Chinese boycott of American goods in 1904. As to the treatment of the Chinese in the United States, see Wharton, Dig. i. § 67, especially at pp. 474 and 487; and as to the exclusion of aliens from certain British colonies, see p. 206, *supra*.

it chooses, to grant an asylum within its territory to refugees from other States; subject, of course, to the obligation of extradition where this exists by treaty; and subject also to its not allowing such persons to use the State territory as a base for enterprises injurious to other States (*u*).

Civil Obligations of Aliens.—Once within the territory of another State, aliens, save in those exceptional cases where a right of exterritoriality exists either by usage or treaty, become subject to the local law and local jurisdiction, to an extent varying with the character of their residence. If merely passing through, or temporarily resident within the territory, they owe only a temporary obedience to the local laws, and possess only corresponding right to protection (*x*). But in the case where an alien becomes permanently resident, then, as was laid down in *Rex* v. *Badenhorst* (*y*), whether such residence amounts technically to a domicile or not, he will, whilst retaining an ultimate right to the protection of his own State, yet owe a provisional allegiance to the State under whose immediate protection he lives. He will further be liable to taxation, and will also be subject to the jurisdiction of the local Courts. And, although not subject to ordinary military service, he may be called on to aid in the maintenance of social order as a measure of police, or even to share in the defence of the community against savage foes. So, during the American Civil War, on a question arising whether British subjects resident in the United States were liable to serve in the army, the British Government stated that, whilst fully recognising that there was no rule or principle of international law which prohibited the Government of any country from requiring resident aliens to serve in the militia or police, or to contribute to the support of such establishments, it must nevertheless refuse to consent to British subjects being compelled to serve in the armies of either party, where, "in addition to the ordinary incidents of battle, they would be exposed to be treated as traitors or rebels in a quarrel in which, as aliens, they had no concern." It therefore required that all who could prove their nationality should be exempted. It refused, however, to interfere on behalf of subjects who had either been completely naturalised, or who had exercised the privileges of United States citizenship (*z*). And when at a later stage of the war the conscription was extended to persons who had declared an intention of becoming naturalised, subject to the alternative of exempting themselves by quitting the country within sixty-five days, it again refused to interfere (*a*). Aliens are also liable to expulsion, where such a power is conferred by the local law; although any wholesale expulsion, or expulsion without just cause, would be a matter for protest, or even for retaliation (*b*).

Civil Rights of Aliens.—The position occupied by an alien in the

(*u*) On the subject generally, see Hall, 223 *et seq.*; Westlake, i. 208.

(*x*) As to the varying degrees of fixity involved in these relations, see Westlake, i. 203.

(*y*) *Supra*, p. 206.

(*z*) For a list of these cases, see Halleck, i. 449 *n*.

(*a*) British Parl. Papers, North America, No. 13, 1864, p. 34.

(*b*) On the subject generally, see Hall, 223; and as to the expulsion of aliens, Oppenheim, i. 498.

matter of civil rights, when within the territory of a State other than his own, is again strictly a matter of municipal law. But in general aliens are allowed to hold personal property, and in many States real property also, although some States still forbid this (*c*). They are allowed to intermarry, to engage in trade or commerce, to enter into contracts, and to have recourse to the Courts as regards claims within their competence. But they are usually debarred from the exercise of public rights; and also from being registered as owners of vessels entitled to the national character; and sometimes also from following certain professions. As they owe a temporary allegiance to the local law, so they are entitled to its protection, and the State to which they belong is entitled to require from the State in which they reside that the latter shall ensure that laws for their protection are adequately enforced (*d*). At the same time they are not entitled to greater protection than native residents, and cannot, in general, complain if they suffer only in common with other inhabitants of the country. So, injury or damage suffered in the course of civil war or foreign invasion in common with native residents will not afford any cause of complaint against the territorial Power. On this ground Great Britain refused to demand compensation for injuries inflicted on the property of British residents in the course of the American Civil War in 1863, or in the course of the German invasion of France in 1870 (*e*). By the Peace Treaties, Germany and Austria undertook not to subject the property rights or interests of the nationals of the Allied or Associated Powers to any measures in derogation which are not applied equally to the property rights or interests of German or Austrian nationals respectively, and in the event of any such derogation to pay adequate compensation (*f*).

Responsibility of the Territorial Power.—Nevertheless a resident alien occupies in some respects a better position than a native resident, for the reason that under certain conditions he will be entitled to fall back on the international responsibility of the State in which he resides, and for this purpose to appeal for protection to the State to which he belongs. And this right applies not only as against the territorial Power, but also as against a third Power. So, in time of war a belligerent invader who has inflicted injuries on the citizens of a neutral State resident within the invaded territory, in violation of the laws of war, may be held internationally responsible to the State to which such persons belong (*g*). The responsibility of the territorial Power in relation to nationals of other States present or resident within its limits may perhaps be summarised as follows: (1) *Primâ facie*, the nationals of one State who voluntarily enter or take up their residence within the territory of another State will be deemed to accept both its laws and its system of administration as they find them, and also to accept any risks arising out of peculiar local conditions. (2) Nevertheless, the territorial Power, if it allows such persons to enter and

(*c*) This was the case in England formerly, and is still the case in some of the States, as well as in the territories of the United States.

(*d*) As to cases where the local law is defective, and the case of *Rahming*, see Hall, 287; and *infra*, p. 230.

(*e*) Taylor, 262.

(*f*) Treaty of Versailles, 1919, Art. 276. Treaty of St. Germain, 1920, Art. 250.

(*g*) *Secus* if the injury arose out of acts of legitimate warfare; see Wharton, Dig. ii. 582.

reside within its limits, and exercises jurisdiction over them, is required to treat them with reasonable consideration; to see that the existing law is adequately enforced on their behalf; and to see that they are not denied justice, or discriminated against in matters necessary to ordinary life. (3) The territorial Power, moreover, is bound, not merely to see that its laws are fairly administered, but also to provide laws and a system of administration that are not glaringly deficient according to civilised standards, together with a reasonable measure of protection, having regard to the standards of an average well-ordered community and the existing local conditions (*h*). On this principle every State is bound to provide reasonable means for preventing injury to other States and their subjects, including an honest judiciary and an adequate police (*i*). These may vary according to local conditions and the character of the national institutions; but they must not fall short of such means as may be considered essential to an average well-ordered community. (4) At the same time a State is not bound to provide absolute protection; and to establish a case of international responsibility there must be some proof of international delinquency, in the shape of a failure on the part of the territorial Power to fulfil the obligations already indicated (*k*).

Possible Cases of Injury.—In a case where the injury arises from some wrongful act or omission on the part of its officials, the local Power will be deemed responsible, unless such acts are disavowed and adequate reparation made (*kk*). In a case where the injury arises out of a wrong alleged to have been sustained by the defective administration of justice, a State will not, of course, incur any liability for decisions that are merely erroneous; but a State will be internationally responsible if it can be shown that the law unjustly discriminates against aliens, or that the ordinary administration of justice has been manifestly perverted or distorted to the detriment of some particular individual, without hope of judicial redress (*l*). In a case where the injury arises out of the acts of private persons, as happened in M. Pacifico's case, in order to establish any international delinquency it must be shown, either that the local Power could by reasonable diligence have prevented the outrage complained of; or, if this was impracticable, then that it failed to exercise reasonable diligence in prosecuting the offenders and in affording such other reparation as was warranted by the local law; or, finally, that the law was so defective or the Courts so corrupt as virtually to afford no adequate protection to foreigners within its limits (*m*). Nor, in general, can defects of the

(*h*) Hall, 217, 225, 287.

(*i*) As regards the administration of justice, see *Cutting's Case*, p. 228, *infra*.

(*k*) Taylor, 259. For a short account of the abduction of Miss Stone, an American, by Turkish brigands, in 1902, and the issues involved, see the Law Magazine and Review, May, 1902.

(*kk*) Oppenheim, i.

(*l*) See *Cutting's Case*, p. 221, *infra*; Taylor, 260; Hall, 218; and as to contractual claims especially against a foreign Government, p. 181, *supra*.

(*m*) See the judgment in *Hubbell* v. *U.S.* (15 Ct. Cl. 546; Scott, p. 462 *n*). For the New Orleans lynching of Italians in 1891, see Scott, p. 328 *n*; and Wharton, Dig. i. p. 473 *et seq.*, and ii. p. 600. For the *Cadenhead Case*, see Amer. J. I. L. vol. viii. 663-5.

local constitution or of the existing municipal law be set up as an excuse for the non-fulfilment of international obligations of the character previously described. This question was raised both in *Cutting's Case* and virtually also in the Newfoundland fishery dispute between Great Britain and the United States. A general answer is attempted at p. 230, *infra*. It arose again in 1907, when complaint was made by Japan to the United States Government with respect to the treatment of its subjects in California, and the unjust discrimination against them shown in their exclusion from the local schools; this being really a matter for the State Legislature, which the federal authorities appeared to have no power to remedy. In the result, however, and at the request of the federal authorities, the obnoxious regulations were withdrawn. And a similar fate has, so far, overtaken other obnoxious legislation proposed in the State Legislature; although the anti-Japanese feeling has by no means subsided. In September, 1907, similar demonstrations and disturbances occurred in British Columbia.

DOMICILE.

THE "INDIAN CHIEF."

[1800; 3 C. Rob. 12.]

Case.] In 1795, during war between Great Britain and Holland, the "Indian Chief," a vessel belonging to one Johnson, but sailing as an American ship, with American papers, proceeded on a voyage from London to Madeira, and thence to Madras, Tranquebar, and Batavia. In 1797, on the return voyage, with a cargo shipped at Batavia, the master put into an English port for orders; whereupon the vessel was arrested, on the ground that she was the property of a British subject, and had been engaged in an illegal trade with the enemy. It appeared that Johnson had been born in America before the War of Independence; that on the outbreak of hostilities he went to France; and that in 1783 he came to England, and was resident and engaged in trade in that country until 1797. It appeared, however, that in 1797, before the arrest of the vessel, he had left England and returned to the United States. It was held that although between 1783 and 1797 he must undoubtedly be taken to have acquired an English domicile, and to have been subject to English municipal law, yet that on his return to the United States in 1797 his American character must be

deemed to have reverted; and that the vessel was not therefore liable to condemnation. In the same case a question also arose as to the nationality and consequent liability of the owner of the cargo. This belonged to one Millar, who was engaged in trade in Calcutta, but also acted as American consul at that place. After some discussion as to the nature of the British authority in India, it was held, in effect, that as the credentials of consuls there were addressed to the British Government, Millar must be regarded, in view of the fact that he resided and carried on trade in British territory, as a British merchant, and that the cargo belonging to him, having been taken in trade with the enemy, was subject to confiscation.

Judgment.]. Sir W. Scott (Lord Stowell), in giving judgment, stated that although the vessel sailed as an American ship and with American papers, yet if the owner really resided in England and the voyage were such as an English merchant could not engage in, then the fact of his being an American citizen, and the fact of his furnishing the ship with American papers, would not protect the vessel, for the reason that liability depended on the actual character of the owner. On a review of the facts the learned judge held that Johnson must be regarded as an American by birth, as having been adopted as an American subject by the act of the American Government, and as retaining the benefit of his native American character. Nevertheless, between 1783 and 1797, during which time he resided in England and engaged in trade there, he was undoubtedly to be considered as an English trader; for no position was better established than this—that "if a person goes to another country and engages in trade and resides there, he is by the law of nations to be considered as a merchant of that country." If Johnson had continued to reside in England, the transaction would have been considered as a British transaction, and therefore as a criminal transaction, on the common principle that it is illegal in any person owing an allegiance, even though temporary, to trade with the public enemy. But there was evidence that Johnson had for some time formed an intention of leaving England, which had been prevented by various obstacles; and it was clearly shown that in September, 1797, he did actually return to America, and that this occurred some weeks before the

arrest of the vessel. Inasmuch as the character of Johnson as a British merchant was only acquired by residence, and founded on residence, it must be held that from the moment he turned his back on the country where he resided, on his way to his own country, he resumed his original character, and was to be considered as an American. The character gained by residence was an adventitious character, which no longer attached from the moment he put himself in motion, *bonâ fide*, to quit the country, *sine animo revertendi*.

This case serves to illustrate the nature of what is sometimes called "commercial domicile" (*n*); although it may perhaps be doubted whether there is any substantial distinction between this and the "civil domicile" referred to hereafter (*o*). Commercial domicile denotes a settled residence in a particular country, for the purposes of trade, by virtue of which a person, even though politically a member of another State, is deemed to be so far identified with the State in which he resides and trades as to share its national character, whether as belligerent or neutral, in time of war. So, from the point of view of the British Courts and of those of the United States and Japan, if, in time of war, a person, whatever his national character, is found to be domiciled in the territory of one belligerent, his ships and property on the sea will be deemed to be liable to capture by the other (*p*). Moreover, if his domicile is British, he will be debarred from engaging in trade with the enemy, under pain of forfeiting the property involved (*q*). Finally, if domiciled in the enemy territory, he will also be debarred from suing in British Courts during the continuance of the war (*r*). But, inasmuch as these consequences are founded only on residence, they will cease to apply so soon as such residence has been brought to an end *bonâ fide* and *sine animo revertendi;* more especially in a case where the withdrawal is to the country of origin. Conversely, if, in time of war, a person is found to be domiciled in a neutral country, he will, from the point of view of the British Courts, even though a subject of either belligerent, be freed from such of these consequences as would otherwise attach to him (*s*). Commercial domicile, however, which depends on residence, and confers, generally, an enemy character, must be distinguished from the possession of a house of trade, or an interest in a house of trade, in the enemy country, which, independently of residence and even though accompanied by a neutral domicile, will affect with an

(*n*) Dicey, Conflict of Laws, p. 735 *et seq.*

(*o*) *Infra*, p. 217.

(*p*) *The Harmony* (2 C. Rob. 322); *The Venus* (8 Cranch, 253); *infra*, p. 217 *n* (*u*).

(*q*) *The Indian Chief* (*supra*).

(*r*) *Albrecht* v. *Sussmann* (2 Ves. & B. 323).

(*s*) Hence, even though a British subject, he will not be debarred from engaging in trade with the enemy; see *The Danous* (4 C. Rob. 255 *n*).

enemy character all property connected with that particular business (*t*). The various applications of these principles will be considered hereafter in connection with the law of war (*u*). Domicile, however, is also important for another purpose. Permanent residence in a particular country, accompanied by intent to remain, is regarded by the British Courts, as well as by the Courts of the United States and certain other countries, as determining the personal law by which a man's civil rights and liabilities are for the most part governed—as the criterion, in fact, of his civil status. This form of domicile we may perhaps call "civil domicile." This frequently coincides with "commercial domicile"; but the distinction which is commonly drawn between the two is that, whilst "civil domicile" is founded on actual or presumed residence in a country for the purpose of making it one's home, commercial domicile is founded on residence for the purposes of trade. Commercial domicile, in fact, is said to imply some relation in the nature of a trade establishment, sufficient to identify the trader with the country, and of a kind calculated to contribute to its resources, but not necessarily a permanent or indefinite relation such as that involved in civil domicile. But really it would seem that both these forms of domicile involve a similar relation to the country of residence; and that both are governed by similar principles (*x*), and attended by similar consequences in a case where the facts admit of their application. In each case there must be residence with intent to continue; although in one case this is looked to for the purpose of ascertaining civil status, and in the other for ascertaining liability in war, especially as regards commercial property. A fixed residence with intent to remain, whether for the purposes of a home or for trade, will equally confer a civil status, and an enemy character in time of war; and it would seem that nothing short of fixed residence will suffice in either case (*y*).

GENERAL NOTES.—*Political and Civil Status.*—The law of nearly every country attributes to every individual two status: (1) a political status, in virtue of which he becomes a citizen or subject of some particular State, to which he owes allegiance and to which he may look for protection; and (2) a civil status, in virtue of which he becomes invested with certain rights and duties, capacities and incapacities, within the domain of private law. It is by the law governing this civil status that questions of civil capacity, including capacity to marry,

(*t*) *The Portland* (3 C. Rob. 41).

(*u*) *Infra*, vol. ii., *sub nom.* "Enemy Character of Persons and Property," where the authorities are more fully cited and considered.

(*x*) Prize cases, such as *The Indian Chief*, are cited in civil right cases, and *vice versâ*. It is sometimes said that they differ in the greater facility with which commercial domicile may be relinquished, but even this appears to be only a difference in the mode of proof.

(*y*) As to trading without domicile, see p. 216, *supra*. For a discussion of this question see two articles by T. Baty and Westlake, J. S. C. L. (N.S.), xix. p. 157, and xx. p. 265. See also *Janson* v. *Driefontein* ([1902] A. C., at p. 505); and *Nigel G. M. Co.* v. *Hoode*, (17 L. T. R. 711).

and even to enter into other contracts, capacity to alienate movables, capacity to make a will of movables, and the succession to movables, including both tangible things and *choses in action*, are for the most part determined. And the rights and duties, capacities and incapacities, which so accrue will, in general, be recognised by the Courts of other civilised States (*z*).

How Civil Status is determined.—From the point of view of British and American Courts, the question of civil status is determined by the principle of domicile. That is, a man's civil status will be deemed to depend on the law of the country in which he is, or is presumed to be, permanently resident. From this point of view, it will frequently happen that both the political and civil status of a given individual will be referable to the law of one and the same country. So, a person born in France of French parentage, and permanently resident there, will possess both the political and civil status of a Frenchman. But they may, on the other hand, be referable to different laws. So, a person who was by birth a natural-born British subject may become permanently resident in France, although without becoming naturalised there; in which case he will still retain his political status as a British subject, whilst his civil status will be governed by the law of France, as being the law of his domicile (*a*). In *King* v. *Foxwell* (L. R. 3 Ch. D. 518) it was held that a natural-born British subject, who had emigrated to the United States, and had been naturalised there, nevertheless recovered his English domicile and its attendant status on returning to England with intent to remain, even though he retained the political status of a citizen of the United States. The same State, moreover, may comprise within its territory several countries, each of which possesses its own system of private law; and in such a case each such country will be regarded as a separate entity or unit for the purpose of determining civil status. So, a person domiciled in England, Scotland, Ireland, or a British possession, will be deemed to possess a civil status which will be governed by the private law of that particular part of the British dominions in which he resides. The rule that civil status is determined by domicile is also adopted by other municipal systems, such as those of Denmark, Norway, and Austria. On the other hand, in other countries, such as France, Germany, and Italy, the question of civil no less than political status appears to be determined by the principle of nationality, or by the law of the State to which the individual in question owes allegiance as a subject or citizen (*b*). Of these two principles, that of domicile appears to be the more convenient; for the reasons (1) that it is more dependent on external facts, and hence more easy of ascertainment than nationality; (2) that it makes a man's civil status and personal law more dependent on his own will; and (3) that for the purposes of private law, and in the domain of civil right, it treats citizen and alien as being on an equal footing (*c*). "Nationality," moreover, is

(*z*) Although not universally; see *Lynch* v. *Paraguay* (L. R. 2 P. & D. 268); *Worms* v. *De Valdor* (49 L. J. Ch. 261).

(*a*) *Udny* v. *Udny* (L. R. 1 Sc. App. 441).

(*b*) Dicey, Conflict of Laws, 102 *n*; and L. Q. R. April, 1908, p. 133.

(*c*) See Meili, 116 and 123.

altogether inapplicable as a criterion of civil status in the case of countries such as England, Scotland, and Ireland, which, whilst possessing separate systems of private law and judicature, are yet nationally parts of one and the same State (*d*).

Civil Domicile: (i) *How acquired.*—Domicile has been defined as a man's principal place of residence; *ubi quis larem rerum ac fortunarum suam summam constituit.* It is, in fact, the place where a man has or is presumed to have his home, and which is therefore the centre of his jural relations. It is said to depend, and does in most cases actually depend, on a combination of fact and intention; on the physical fact of a man's fixing his residence at a particular place, and on his mental purpose to remain there permanently or for an indefinite time. Every man is presumed to have some domicile. At his birth he inherits the domicile of the father if he is legitimate, or that of the mother if he is illegitimate. This is called the "domicile of origin"; and is frequently, although not necessarily, identified with the country from which a person derives his national character. Thereafter, and until he becomes *sui juris*, his domicile continues dependent on that of his father; or, if the father be dead, then primarily on that of his mother; whilst if both parents are dead, he should, it is conceived, be regarded as retaining the domicile which belonged to his father at the time of death (*e*). When a person becomes *sui juris*, it will be competent to him to choose another domicile; a domicile so acquired being termed a "domicile of choice." For this it is necessary that he should abandon his former domicile, and take up his residence in a new country, with intent to remain there for an unlimited time. With respect to the evidence necessary to establish a new domicile, Courts of justice much necessarily draw their own conclusions from the circumstances of each particular case (*f*). The two essential factors are residence and intention. More will depend on the nature and character of the residence than on its length. If the intention is manifest, the duration of residence is comparatively unimportant; but in other or doubtful cases time will be regarded as an important factor in determining domicile (*g*).

(ii) *How lost.*—A domicile of origin may be extinguished by act of law, as by a sentence of perpetual exile. The acquisition of a new domicile of choice, however, will not extinguish but will merely suspend the domicile of origin; which will accordingly revert, if the domicile of choice should be abandoned without a new domicile being acquired (*h*). Domicile of choice, on the other hand, as it is gained *animo et facto*, must in like fashion be determined *animo et facto;* and to constitute an abandonment there must be an actual cessation of residence, coupled

(*d*) For an example, see *In re Johnson* [1903] (1 Ch. 821).

(*e*) Although this is not settled; see Dicey, Conflict of Laws, 124.

(*f*) As to the legal presumptions with respect to domicile, see Dicey, Conflict of Laws, 132.

(*g*) *The Harmony* (2 C. Rob. 322); and Nelson, Cases in Private International Law, 15-33.

(*h*) See *The Indian Chief* (*supra*); *Udny* v. *Udny* (L. R. 1 Sc. App. 441); and *Bell* v. *Kennedy* (L. R. 1 Sc. App. 307).

with an intention to abandon; neither being sufficient without the other (*i*).

Domicile in Public International Law.—With the question of civil status public international law is not strictly concerned, save in so far as may be necessary to mark clearly the distinction between that and political status. Nevertheless domicile possesses a certain importance even in the domain of external relations. In the first place, as has already been pointed out, the nationals of one State, if resident within the territory of another, are the objects of certain international requirements as regards their treatment (*k*); and these requirements apply equally to domiciled aliens, although, in view of the fixed relation which domicile involves, the intervention of the parent State is sometimes less readily conceded (*l*). In the second place, according to the view entertained by some States, enemy character in time of war (*m*) is determined mainly, although not exclusively, by "domicile"; and even though other States adopt "nationality" as the criterion for determining the liability of property to maritime capture, yet all alike recognise residence, and *a fortiori* domicile, as determining liability to the incidents of land warfare (*n*). Finally, as we have seen, domicile, as distinct from nationality, has occasionally been put forward as conferring on a State a right of protection over persons domiciled within its territory, when personally present in other States; although it is conceived that, in the present state of international usage, such a right cannot justly be asserted as against the State of origin (*o*). In general, however, and subject to the exceptions previously mentioned (*p*), it would seem that domicile must be limited in its effects to matters of civil status. So, in *Ah Yin* v. *Christie* (4 C. L. R. 1428) it was held that an admitted domicile on the part of an alien father could not confer a right of entry, in derogation of the local immigration law, on an infant child who was resident in a foreign country; for the reason that domicile was confined to the determination of questions of civil status (*q*).

(*i*) *In the Goods of Raffenel* (32 L. J. P. & M. 203); and *Re Steer* (28 L. J. Ex. 22).

(*k*) *Supra*, p. 212.

(*l*) Hall, 287.

(*m*) *Supra*, p. 216.

(*n*) This subject is discussed more fully in vol. ii., *sub nom.* "Enemy Character in Time of War."

(*o*) *Supra*, p. 193; but for a possible limitation, see p. 230, *infra*.

(*p*) *Supra*, pp. 194, 216.

(*q*) In *The Countess of Conway's Case* (2 Knapp, at p. 367), however, some observations made by Baron Parke suggest that domicile may be a good foundation for a claim made in the character of British subject.

CRIMINAL JURISDICTION AND LAW OF A STATE.

(i) TERRITORIAL.

MACLEOD v. ATTORNEY-GENERAL FOR NEW SOUTH WALES.

[1891; App. Cas. 455.]

Case.] IN 1872 the appellant was married in New South Wales to one Mary Manson. In 1889, and during the lifetime of Mary Manson, he was married in the United States of America to one Mary Elizabeth Cameron. He was subsequently arrested in New South Wales, and indicted for bigamy under s. 54 of the Criminal Law Amendment Act, 1883, a statute passed by the local Legislature. That section was in the following words: "Whosoever, being married, marries another person during the life of the former husband or wife, wheresoever such second marriage takes place, shall be liable to penal servitude for ten years." On this indictment the appellant was convicted at a Court of Quarter Sessions, and his conviction was subsequently affirmed by the Supreme Court. On appeal, by special leave, to the Privy Council, however, this judgment was reversed and the conviction set aside on the ground that the provisions of the local statute must be regarded as having been intended to apply only to offences committed by persons within the territory of the Legislature by which it was passed.

Judgment.] In the judgment of the Judicial Committee, which was delivered by Lord Halsbury, L.C., it was pointed out that the word "whosoever" in the section would, if accepted in its ordinary meaning, cover all persons all over the world, natives of whatever country; whilst the word "wheresoever" was equally universal in its application. Hence, if they were to construe the statute as it stood, any person married to any other person, who married a second time anywhere in the habitable globe, would be amenable to the criminal jurisdiction of New South Wales, if caught in that colony. But that was an impossible construction, and they could not attribute to the Colonial Legislature an effort

to enlarge its jurisdiction to an extent inconsistent not only with the powers committed to a colony but also with the most familiar principles of international law. Hence it must be taken that "whosoever being married" meant "whosoever being married, and who is amenable at the time of the offence committed to the jurisdiction of the colony"; whilst "wheresoever" might well—in view of the fact that there were in the colony subordinate jurisdictions, some of them extending over the whole colony, others confined within local limits of venue—be taken to mean "wheresoever in this colony the offence is committed." Upon the face of the record the offence was charged to have been committed in Missouri, in the United States of America; hence the offence charged was manifestly beyond the jurisdiction of the colony of New South Wales; and the conviction must therefore be set aside.

If the wider construction were applied, it would clearly have been beyond the jurisdiction of the colony to enact such a law. Their jurisdiction was confined within their own territories, and the maxim *Extra territorium jus dicenti impune non paretur* would be applicable. Lord Wensleydale, in advising the House of Lords in *Jefferys* v. *Boosey* (4 H. L. C. 926), expressed the same proposition tersely when he said: "The Legislature has no power over any persons except its own subjects—that is, persons natural-born subjects, or residents whilst they are within the limits of the kingdom. The Legislature can impose no duties except on them, and when legislating for the benefit of persons must, *primâ facie*, be considered to mean the benefit of those who owe obedience to our laws." All crime was really local; the jurisdiction over it belonged only to the country where the crime was committed; and except over its own subjects even the imperial Legislature had no power whatever. No reference appears to have been made to an imperial statute, 9 Geo. 4, c. 31, which was apparently applicable to New South Wales by virtue of 9 Geo. 4, c. 83, s. 24, and which made it felony for a British subject to contract a bigamous marriage in England or elsewhere. In the subsequent case of *R.* v. *Hilaire* (3 S. R. N.S.W. 228), however, it was held by the Supreme Court of New South Wales that, notwithstanding this statute, the Courts of the State had no jurisdiction to try such a case

where the second marriage had been contracted outside New South Wales.

In cases of crime the question of the applicability of the law of a State and the question of the jurisdiction of its Courts are substantially identical; for the reason that the Courts of one State will not aid in the enforcement of the criminal or penal law of another State (*r*). The decision in *Macleod* v. *The Attorney-General of New South Wales* serves to illustrate the principle that, both by the English law, except where otherwise provided by Act of Parliament—and by the law of nations—the criminal law and jurisdiction of a State are primarily territorial; or, in other words, that the application of its law and the exercise of jurisdiction on the part of its Courts are primarily restricted to crimes committed within its territorial limits.

Before proceeding to consider the various applications of this principle, however, under the British system, it will be desirable to glance very briefly at certain constitutional features of that system which have some bearing both on this and the succeeding questions. The British Empire is an aggregation of countries and communities which possess, although in varying degrees, some of the characteristics of separate States. Omitting certain minor dependencies, it may be said broadly that each of its constituent parts possesses (1) its own Legislature, although this is not, of course, always a representative Legislature, and although in the case of England, Scotland, and Ireland the imperial Parliament serves in lieu of a local legislative body (*s*)—(2) its own judicial system—and (3) its own system of private law; and hence that each constitutes a separate legal and jurisdictional unit. But this legal and judicial detachment of the constituent parts of the Empire is subject to the following qualifications: (1) In the matter of legislation all parts alike are subject to the legislative supremacy of the imperial Parliament, and will be bound by its enactments, if so intended. As regards Scotland and Ireland, all Acts passed in England are presumed to apply to those countries, unless they are excepted, either expressly or by necessary implication (*t*); whilst, as regards other British possessions, Acts passed in England are presumed not to apply, unless a contrary intention appears either expressly or by necessary implication (*u*). (2) In the matter of judicature, although each country has its own Courts and judicial system, there is a final appeal to the House of Lords, as regards England, Scotland, and Ireland; and to the Crown in Council as regards other parts of the British dominions, except where this has been expressly limited by or under the authority of imperial statute (*x*). (3) In the matter of law, although each of the con-

(*r*) *Folliott* v. *Ogden* (1 H. Bl. 124).

(*s*) From this standpoint, the British Parliament, both as the Legislature of the Empire, and as the Legislature of the United Kingdom, may be said to represent a union of the former Legislatures.

(*t*) Stephen, Com. i. 53, 58.

(*u*) *Williams* v. *Davies* [1891] (A. C., at p. 466).

(*x*) As under the Commonwealth of Australia Constitution Act, 1900, s. 74, as regards certain questions between the Commonwealth and the States.

stituent parts has its own system of local or territorial law, and although the English law, including the common law, strictly only applies to England and Wales, yet all are subject to certain prerogative rights of the Crown (*y*); whilst in many of these countries the English law constitutes also an important factor in the territorial law—this either by reason of its having been applied by Parliament, as in the case of Ireland—or of its having been inherited, as in the case of settled colonies, where the settlers are presumed to carry the English law with them in so far as it is applicable to the new situation (*z*)—or of its having been adopted by the local Legislature, as has happened largely both in settled and conquered colonies. Thus the uniformity of system is greater than might perhaps be expected in an aggregate of communities so loosely knit together.

Returning now to the question of criminal law and jurisdiction—by the common law of England all crime is local in its character, and both the application of the criminal law and the exercise of a criminal jurisdiction, except in cases of piracy, are confined to offences committed on land in England or in land-locked waters forming part of an English county (*a*). But the Admiralty has from time immemorial claimed jurisdiction over all crimes committed on board British ships, whether by subjects or foreigners, on the "high seas"—including in that term all waters where great ships go and lie afloat; and this jurisdiction has now been transferred to and is exercisable by the ordinary criminal Courts.

The doctrine, moreover, that criminal law and jurisdiction are territorial applies not only in England, but also in other parts of the British dominions; in some cases as a principle inherited from English law, and in all cases as a principle which restricts the scope of local legislation in deference to the requirements of international law. It is true that this restriction may be relaxed by imperial statute, but, in default of such authority, it is not competent to a local Legislature to give its criminal law an extra-territorial application or to confer on its Courts an extra-territorial jurisdiction, derogating from the principles of international law. It is, however, competent to Parliament, as the supreme law-making body, to extend both the scope of the criminal law and the jurisdiction of the Courts, whether of the United Kingdom or of other parts of the British dominions, to crimes committed outside the territorial limits; and if it clearly manifests such an intention, this will be given effect to by all British tribunals, although the jurisdiction as thus extended would not be recognised externally. Such an extra-territorial jurisdiction has in fact been bestowed by Parliament in a large number of instances, the more important of which are enumerated below (*b*). It is equally competent to Parliament to confer on a subordinate Legislature, such as that of a British colony, a power to give its laws an extra-territorial application and to bestow on its Courts an

(*y*) Which, in this connection, really represent the rights of the British State in relation to its dependencies.

(*z*) A similar result has sometimes been reached by imperial enactment; *cf* 9 Geo. 4. c. 31, s. 8, and c. 83, s. 24.

(*a*) *Reg.* v. *Keyn* (L. R. 2 Exch. D. 63); *Reg.* v. *Cunningham* (Bell, C. C. 72).

(*b*) *Infra*, p. 228.

extra-territorial jurisdiction; and Parliament has in fact done this in certain instances, and as regards certain kinds of offences (*c*).

The risk of allowing criminals who offend in one country but escape to another to go unpunished, which might otherwise arise from the doctrine that criminal law and jurisdiction can only be applied in the country where the offence was committed, is for the most part avoided by a system of extradition, established as between the various parts of the British dominions by the Fugitive Offenders Act, 1881, and, as between the British dominions and foreign countries, by a series of treaties made under the Extradition Acts, 1870—1906 (*d*).

The question of criminal jurisdiction arises internationally mainly, although not exclusively, in cases of extradition. In such cases the view adopted by the English and American Courts appears to be that, inasmuch as the territoriality of criminal jurisdiction is a principle of international law, no claim for extradition can be validly preferred except by a State within whose territory the offence was committed. So, in *The Queen* v. *Ganz* (9 Q. B. D. 93), where the prisoner, who was by birth an Austrian subject, but by naturalisation a citizen of the United States, was charged with an offence committed in Holland, it was held that he was amenable, not to the law of Austria or of any other country, but to the law of the State where the offence was committed, and that he was therefore extraditable, under the extradition treaty between Great Britain and Holland. "By the law of nations," it was said, "each person who is within the jurisdiction of the particular country in which he commits a crime is subject to that jurisdiction; otherwise the criminal law could not be administered according to a civilised method. This has been the law from very far back; it is recognised by the earliest writers; it has been adopted again and again in treaties . . . and it is found to be stated in all the text-books on the subject, and in all the cases in which the matter has been discussed." In 1873 Carl Vogt, a German subject, was accused of robbery and murder in Belgium, and escaped to the United States. There was at the time an extradition treaty with Germany, but none with Belgium. The extradition of the offender was sought by both countries—by Germany on the ground that Vogt was personally amenable to the German criminal law, and by Belgium by reason of the offence having been committed in Belgian territory; but the application of Germany was refused on the ground that the crime was not (according to the law of nations) committed within the German jurisdiction or governed by German law, whilst that of Belgium was refused on the ground of there being no treaty (*e*). Again, in *The Attorney-General of Hong-Hong* v. *Kwok-a-Sing* (L. R. 5 P. C. 179), where a Chinese who had taken refuge in Hong-Kong was accused of having murdered the captain of a French ship, on the sea, it was held that he could not be delivered up to China, under an ordinance of Hong-Kong, which authorised the delivery up of any Chinese who was reasonably suspected of having committed "an

(*c*) See, by way of example, 63 & 64 Vict. c. 12, ss. 5, 51, sub-s. 10 and 29; 12 & 13 Vict. c. 96; 23 & 24 Vict. c. 122; and 53 & 54 Vict. c. 27.

(*d*) *Infra*, pp. 252-3.

(*e*) See Wheaton (Boyd), p. 183; and as to the United States practice with respect to extradition, Wharton, Dig. ii. pp. 744 *et seq.*

offence against the laws of China," both because it could not be assumed that there was any law of China punishing the murder of a foreigner on foreign territory, and because, even if it could be so assumed, still, the offence, having been committed on what was equivalent to French territory, must be treated as an offence against French and not against Chinese law. The question of criminal jurisdiction may also arise internationally where a subject or citizen of one State is proceeded against in the Courts of another State in respect of an offence alleged to have been committed outside the territory of the latter. This question, however, will be discussed hereafter (*f*).

(ii) EXTRA-TERRITORIAL; IN RELATION TO NATIONALS.

EARL RUSSELL'S CASE.

[1901; A. C. 446.]

Case.] EARL RUSSELL, a British subject, and a peer of the realm, was in 1890 married in England to one Mabel Edith Scott. In 1900 he obtained an order of divorce from the Courts of Nevada, in the United States of America. Such divorce was, however, defective from the point of view of English law, by reason of the accused not having been domiciled there. In the same year, and in the same State, he went through the ceremony of marriage with one Mollie Cook. Thereupon the prisoner's wife, Mabel Edith, obtained a divorce in England on the ground of bigamous adultery. The prisoner was subsequently arrested in England; and a true bill having been found by the grand jury, this fact was communicated by the Recorder to the House of Lords; arrangements were then made for the trial of the accused before his peers; and a commission was issued to Lord Halsbury, L.C., to preside at the trial as Lord High Steward. The indictment having been removed into the House of Lords by writ of *certiorari*, the accused was thereupon arraigned before the House; 160 peers, including the Law Lords who usually hear appeals, being present, together with eleven of the judges. The prisoner was charged under the Offences against the Person Act,

(*f*) See *Cutting's Case*, p. 228, *infra*.

1861, s. 57 of which provides that "whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of felony." It was sought to quash the indictment on the ground that the statute did not in express terms apply to any offence committed beyond the King's dominions; and that the term "elsewhere" meant elsewhere within the King's dominions. In aid of this contention, it was pointed out that criminal jurisdiction extended generally only to offences within the territory, and that if it was to extend outside, then express words must be added; also, that in dealing with homicide, which is clearly triable even though committed outside the territory, the same statute added the words, "whether within the Queen's dominions or without." Reference was also made to *Macleod* v. *A.-G. of N.S.W.* [1891] (A. C. 455). In the result the prisoner was convicted and sentenced to six months' imprisonment.

Judgment.] In the judgment, which was delivered by Lord Halsbury, it was held that s. 57 extended to marriages contracted by British subjects in any part of the world.

This case, which possesses a certain historic interest as regards the procedure involved, serves to illustrate that personal jurisdiction which is claimed by most States, although in varying degrees, over their citizens or subjects with respect to offences committed outside their territorial limits. This jurisdiction is independent of place, and rests commonly on the national character of the persons over whom it is exercised, although sometimes extended to foreigners. So, in the present case, the accused, being a British subject, was on his return within the jurisdiction held amenable to a law made by Parliament, which extended to offences committed in a foreign State. The difference between this case and that of *Macleod* v. *A.-G. of N.S.W.* lay in the fact that whilst the imperial Parliament can confer such an extra-territorial jurisdiction, a colonial Legislature cannot do so except under the authority of an imperial Act. With respect to the English law, the common law principle that both the application of the criminal law and the exercise of criminal jurisdiction are confined to offences committed in England has now been greatly qualified by statute; with the result that a criminal jurisdiction has now been conferred in a large number of cases over offences committed by subjects—and in some cases over offences committed by foreigners—outside the limits of the United Kingdom, or even outside the dominions of the Crown. But such extended jurisdiction cannot strictly be made the foundation of

any international right (*g*). It can only be exercised, moreover, in the case where the offender is at the time of arraignment personally present within the jurisdiction. In some cases this extra-territorial jurisdiction is confined as to its exercise to the Courts of the United Kingdom; in other cases it either extends or is made extensible to the Courts of other British possessions (*h*). In some cases, again, it is exercisable only over British subjects; in other cases it extends even to foreigners, although usually only in virtue of some special connection, such as service within three months on board a British vessel (*i*). The more important cases in which extra-territorial criminal jurisdiction has been conferred by statute are: (1) treason, although in this case the seat of the offence would seem to be really local (*k*); (2) murder or manslaughter committed by British subjects on land outside the United Kingdom (*l*); (3) bigamy committed by British subjects anywhere (*m*), for the purposes of trial in the United Kingdom; (4) offences committed in territorial waters (*n*); (5) offences within s. 4 of the Foreign Enlistment Act, 1870, committed by British subjects anywhere (*o*); (6) offences under the Slave Trading Act, 1824, if committed by British subjects or any person resident within the British dominions (*p*); (7) offences committed out of the British dominions by any seaman who at the time of the offence or within three months previously has served on board a British vessel (*q*); (8) offences committed by British subjects in countries without regular government, and coming within the terms of the Foreign Jurisdiction Act, 1890, and the Orders in Council passed thereunder (*r*); as well as in certain other cases of minor importance (*s*).

(iii) EXTRA-TERRITORIAL; IN RELATION TO FOREIGNERS.

CUTTING'S CASE.

[1896; Wharton, Digest, i. pp. 48-49; ii. pp. 439-442.]

Case.] In 1886, Mr. Cutting, an American citizen, who for some time previously had been a resident "off and on" at Paso del Norte, in Mexico, published in a newspaper circulating at El Paso,

(*g*) *Supra*, p. 224.
(*h*) *Supra*, p. 225 *n* (*n*).
(*i*) *Infra*.
(*k*) 25 Edw. 3, st. 5, c. 2; 35 Hen. 8, c. 2 and *Rex* v. *Casement* [1917] 1 K. B. 98.
(*l*) 24 & 25 Vict. c. 100, s. 9.
(*m*) *Ibid.* s. 57.
(*n*) 41 & 42 Vict. c. 73; although this, again, is not strictly an exception.
(*o*) 33 & 34 Vict. c. 90, s. 4.
(*p*) 5 Geo. 4, c. 113, ss. 9 and 10.
(*q*) Merchant Shipping Act, 1894, s. 687. As to what amounts to service, see *Rex* v. *De Mattos* (7 C. & P. 458).
(*r*) See the Foreign Jurisdiction Act, 1890, s. 2, and the Order in Council of the 9th of May, 1891; and p. 258, *infra*.
(*s*) For a complete list, see Stephen, Digest of Criminal Procedure, p. 3 *et seq.*

in Texas, in the United States of America, a libel reflecting on the character of one Medina, a Mexican citizen, with whom he had been in controversy. Thereupon criminal proceedings were instituted in the Mexican Courts, with the result that Mr. Cutting, on being found some time afterwards in Mexican territory, was arrested and imprisoned, and subjected to other injurious treatment by the local authorities. These proceedings were based on certain provisions of the Mexican Penal Code, Art. 186, which purported to give the local Courts jurisdiction over offences against Mexican citizens, even when committed within the territory of a foreign country.

Controversy.] On the facts becoming known, the United States Minister was instructed to demand the immediate release of Mr. Cutting. In a despatch relating to the arrest, Mr. Bayard, the Secretary of State, pointed out that the newspaper containing the libel complained of had not been published in Mexico; and that the proposition that Mexico could assume jurisdiction over the author by reason of a publication made in the United States was wholly inadmissible. Otherwise Mexico would be entitled to assume jurisdiction over the authors of any criticisms on Mexican business operations which might appear in newspapers published in the United States, in the event of such persons coming within Mexican territory. Such an assumption of jurisdiction would not be tolerated either by the Federal or the State Government. Each of these Governments would itself mete out justice for wrongs done within its own jurisdiction, but none would permit its prerogative in this respect to be usurped by Mexico, or permit a citizen of the United States to be called to account elsewhere for acts done in the United States. There was moreover another ground on which the demand for release might be based. By the law of nations, no punishment could be inflicted on a citizen of another country, unless in conformity with those sanctions of justice which all civilised nations held in common. These included the right of having the facts on which the accusation was based inquired into by an impartial Court; a due explanation of these facts to the accused; the opportunity of having counsel; sufficient delay to enable the accused to prepare his defence; permission in cases not capital to go at large on

bail till trial; the production on oath of evidence in support of the charge, with the right to cross-examine and to adduce evidence in reply; and release even from temporary imprisonment where the charge was merely of a threatened breach of the peace, and due security was tendered. But in the present case all these sanctions were violated. In reply, the Mexican Government appears to have relied on the fact that Mr. Cutting's offence was one punishable under the local law; and that the national Government had no power to interfere with the ordinary course of law (*t*). In the result, however, Mr. Cutting was released; the Mexican Government having apparently induced the prosecutor to withdraw from the case (*u*).

Some States claim to apply their criminal law and to exercise a criminal jurisdiction in the case of offences committed outside their territorial limits not only by subjects, but also by foreigners. The present case serves to illustrate at once the nature of, and the risks incident to, such a practice. The position taken up by the United States was that the claim put forward by Mexico to take cognisance of an offence committed in the United States by a United States citizen, even though it affected a Mexican citizen, and even though the alleged offender might subsequently be apprehended in Mexico, was bad in principle as involving a violation of the right of every State to exercise exclusive sovereignty and jurisdiction as to all persons and things within its own territory; that it was not warranted by the accepted custom of nations; and, finally, that it was in the highest degree inconvenient and dangerous. These contentions appear to be in substance correct. Such a claim goes beyond that exceptional jurisdiction which is frequently claimed and exercised by States over their own subjects, for the reason that the latter jurisdiction is only exercisable when the citizen or subject has returned to his native land and to his natural allegiance, and when, consequently, no other State has any right or interest in protecting him against his personal law. Even in such a case, however, if the person proceeded against were domiciled in some other State, the claim to exercise jurisdiction over him might conceivably be impugned, unless the offence charged was one affecting his allegiance to his native country, or unless the seat of the offence was really local (*x*).

Incidentally two other questions arose: (1) Is one State justified in intervening for the purpose of ensuring fair treatment for its nationals when arraigned before the Courts of another State? On this point the contention of the United States was that an alien, when arraigned before the Courts of the State in which he happens to be present, is

(*t*) Wharton, ii. 441
(*u*) Westlake, i. 252.
(*x*) But see pp. 194, 220, *supra*.

entitled to certain rights which are recognised by the common assent of civilised States as necessary incidents to the administration of justice, including an impartial tribunal, knowledge of the charge, reasonable facilities for defence, due proof and opportunity for disproof of the offence, and release on bail in an appropriate case; and that the home State is entitled to intervene for the purpose of vindicating this right. This contention appears to accord with the principles previously suggested, that any State is entitled to intervene in a case where its nationals are concerned, if justice is denied, or perverted, or the treatment meted out to them is such as does not ocmply with standards prevalent in an ordinary civilised community (*y*). (2) What is the position of a State as regards international delinquencies which the national constitution or the local law either sanction or do not enable it to remedy? To this question no answer was given in *Cutting's Case;* but in general the answer would appear to be that defects in the local constitution or local law cannot be accepted as an excuse for the non-fulfilment of international duties (*z*); and that as regards breaches that have already occurred, an adequate indemnity must in any case be made; although existing defects may perhaps be urged in mitigation of delay or default in visiting with punishment particular offenders. With respect to the possible recurrence of such delinquencies, although a State cannot be required to alter its national polity in deference to possible injuries to other States or their subjects, yet it is bound to make such provision for fulfilling its international obligations as is consistent with the character of the national institutions; and also to ensure that such provision shall not be glaringly defective in safeguarding the fundamental rights of other States and their subjects (*a*).

General Notes.—*The Question of Jurisdiction and Law generally.*—Where a case involving a foreign element, whether in relation to persons, things, or occurrences, presents itself for determination before the Courts of any particular State two questions will arise: (1) whether the Court has, in the circumstances, a right to try and to pronounce judgment in the case—this being a question of jurisdiction; and, if this should be answered in the affirmative, then (2) what law should be applied to its decision—this being a question of the application of law. The question, it should be observed, is here not one of competency as between Courts of the same judicial system, or of the selection of the rule properly applicable under the domestic code, but one of international competency as between the Courts, and of selecting the appropriate law as between the laws, of different States that might otherwise claim to be seised of the matter. From an international standpoint each State is supposed to confine the operation of its laws and the action of its Courts within certain generally accepted limits. It is, of course, competent to any State to extend these limits by positive

(*y*) *Supra*, pp. 175, 212; Wharton, Dig. i. 49.

(*z*) See the case of *The Alabama*, and the Award of the Geneva Tribunal, *infra*, vol. ii.

(*a*) *Supra*, pp. 165, 213; Hall, 219; and for an account of *Rahming's Case*, *ibid*, 288; Oppenheim i. 239; Moore ii. § 201; Calvo vi. §§ 171-3; Westlake i. 252.

enactment, and such an extension either of its jurisdiction or of its law will necessarily be given effect to by its own Courts so far as their powers extend. But in so far as it transcends the international limit, it will not, in general, be recognised externally, or be given effect to by the Courts of other States; whilst if it should affect prejudicially the subjects of other States, then this may conceivably provoke remonstrance or intervention.

Jurisdiction and Law primarily Territorial.—Every State is deemed to possess an exclusive power of making law and an exclusive right of jurisdiction within its own territory (*b*). This principle, which lies at the very root of the whole State system, has both a positive and negative aspect. On its positive side it means that the laws and jurisdiction of a State will be deemed to extend to all persons and things found, and, as regards acts, to all acts done, within its territory, including in this term its ports and territorial waters; as well as on its public vessels everywhere and its private vessels on the high seas (*c*). On its negative side, it means that one State cannot by its laws or by any exercise of jurisdiction on the part of its Courts bind directly persons or things found, or take cognisance of acts done, within the territory of any other State. But this principle is subject to a number of exceptions, both on its positive and negative side.

Exceptions to Territorial Principle.—The more important exceptions to the territorial principle may, for our present purposes, be grouped under three categories: (1) By the common usage of nations, and in accordance with the doctrine of exterritoriality, certain persons and things found in the territory of one State are withdrawn from the jurisdiction and from the operation of the laws of the territorial Power, and relegated to those of the Power to which they belong. The subjects and limits of this group of exceptions will be considered hereafter (*d*). (2) Nearly all States, moreover, claim within certain limits, which vary greatly in different systems, to make their territorial law binding on their subjects even when outside their own territory or within the territory of some other State, and to exercise all consequent jurisdiction in as far as this can be done without violating the sovereignty of the territorial Power; whilst some States, as we have seen, claim to extend their law and jurisdiction even to acts done by foreigners, and within the territory of a foreign State. Such a jurisdiction, however, has, it would seem, no international sanction; and depends for its efficacy on the law of the State by which it purports to be assumed. And, although one State will not generally interfere with another State in so far as the latter applies its domestic law to, or exercises jurisdiction over, persons who are its subjects and within its control, yet other States will not in general lend any aid to the exercise of such a jurisdiction—*e.g.*, by a grant of extradition, nor will it be recognised or given effect to by the Courts of other States. If exercised over foreigners, moreover, it may, as we have seen in *Cutting's Case*, provoke intervention on the part of States whose subjects are affected. The extent of this extra-territorial jurisdiction and operation of law varies in each

(*b*) For recognition of this, see arts. 21, 25, 60, and 76 of the Peace Convention, 1907.

(*c*) The latter jurisdiction may perhaps be styled *quasi-territorial*.

(*d*) See p. 258, *infra*.

particular municipal system. Its extent in English law in cases of crime has already been touched on, whilst its extent in civil cases will be considered hereafter. (3) Finally, it is necessary to mark and distinguish another class of cases, purely civil in their character, in which either an extra-territorial jurisdiction or an extra-territorial application of law is exercised or conceded by virtue of a body of principles which are recognised and followed by the Courts of all civilised States, and which constitute indeed in civil matters a kind of common law of the civilised world. Although these principles, which are commonly known as Private International Law, strictly constitute a kind of supplement to the territorial law of every civilised State, yet they really rest on a basis of comity and mutual convenience, and possess in some degree an international character. In deference to these principles we find that the Courts of one State sometimes give an extra-territorial effect to their own domestic law, whilst at other times they concede an extra-territorial effect to the law of some other State; and the same applies also in the matter of jurisdiction. The nature and operation of these principles, in so far as they fall within the scope of this work, will be discussed in connection with the case next following.

Legal and Jurisdictional Units.—In general the units of international law are States, and it is to the relations of independent States that the principles previously indicated are specially applicable. It needs to be noticed, however, that in relation to the question of the operation of law and the exercise of jurisdiction every country which possesses a separate legal and judicial system is regarded as a separate unit, even though in other respects it may be politically dependent on or form part of a larger union. In most cases, indeed, the area over which the Sovereign rules is co-extensive with the area over which the Courts have jurisdiction; there is one system of law and one system of judicature for the whole State; and in such cases the State constitutes at once the international and the jurisdictional unit. But in other cases it may happen that a State is made up of a variety of countries and areas, each of which, although ultimately subject to some common authority, has its own system of law and its own system of judicature. The complex organisation of the British Empire in this respect has already been described. From this it will be seen that, so far as concerns the operation of the territorial law and the exercise of jurisdiction, not only do England, Scotland, and Ireland, as well as the more important colonies and dependencies, constitute separate units; but the law and jurisdiction of each is regarded as "foreign" in relation to any other, except in so far as this is affected by imperial legislation or by the existence of common Courts of Appeal (*e*). So, again, in the United States of America each of the various States composing the union, although subject to federal legislation and authority in matters prescribed by the constitution, yet possesses its own legal and judicial system; and the law of one State is regarded primarily as "foreign" in the Courts of other States. And the same observation applies to the various States composing the Commonwealth of Australia, subject, however, to such limitations as are imposed either by imperial Act or by the federal Parliament within the limits of the constitution.

(*e*) P. 223, *supra*.

In the case of the Commonwealth of Australia and the Dominion of Canada, indeed, there are three sets of authorities—the Imperial, the Federal, and the State—each occupying, either by convention or by law, a separate sphere. As between countries which form part of the same State, the doctrine of exterritoriality has of course no application (*f*); nor can the assumption of an extra-territorial criminal jurisdiction give rise to questions such as may occur between independent States (*g*). Moreover, the exclusiveness of the local law-making power and the jurisdictional right is often modified by the legislation of some paramount authority. If, however, allowance be made for these considerations, then the general principles governing the territorial competency of the Courts and Legislatures of independent States would appear to be equally applicable to all countries that possess a separate legal and judicial system.

The Question of Jurisdiction and Law in Criminal Cases.—In criminal cases, as we have seen, the question of competency in the matter of jurisdiction and the question of what law shall be applied are commonly identical; for the reason that the Courts of one State will not generally either recognise or enforce the criminal or penal law of any other State (*h*). Once, therefore, there is jurisdiction in a case of crime, then the national law, and that only, will be applied. The question of jurisdiction is primarily a matter which each State settles for itself, and the grounds upon which jurisdiction is claimed in criminal cases vary greatly in different systems of municipal law. All States alike will exercise jurisdiction over offences committed within their territory. Some deviate from this only in a limited class of cases; others assume a wide personal jurisdiction over their subjects even when outside the State territory, and refuse on this ground to surrender subjects who may have committed offences within foreign territory; whilst others, again, claim, under certain conditions, to exercise a general jurisdiction over offences committed by foreigners even on foreign soil. Although the question of criminal jurisdiction is for the most part a question of municipal law, yet it has, as will be seen by reference to the cases of *Vogt* and *Cutting*, at certain points an important bearing in the domain of external relations. In general, it would seem that it is only the territorial claim which is entitled to external recognition; or, at any rate, that this claim is to be preferred in the case of competing claims (*i*).

Practice of particular States with respect to Criminal Jurisdiction.—In view of its possible bearing on external relations, it may be profitable to glance briefly at the practice of States in this matter. Some States, such as Great Britain and the United States, act primarily on the territorial principle, and confine their criminal law and jurisdiction to offences committed within their territorial limits, except in so far as such jurisdiction may, in particular cases, be extended by positive enactment (*k*). Some States, such as Russia, Austria, Italy, Norway, many of the German States, and some of the Swiss cantons, claim a general criminal jurisdiction over their nationals, even though resi-

(*f*) *Infra*, p. 258.
(*g*) *Supra*, pp. 230, 233.
(*h*) *Supra*, p. 223.
(*i*) *Infra*, p. 252.
(*k*) See p. 227, *supra*.

dent abroad, and this whether the offence be against the State itself, or against fellow nationals, or foreigners. France, however, would seem to limit the exercise of this jurisdiction over its nationals to "crimes" committed either against France or against Frenchmen in a case where complaint is made locally by the injured party. The exercise of such a jurisdiction over nationals is generally contingent on the return of the offender within the territory of the State to which he owes allegiance, although proceedings are sometimes allowed to be taken *par contumace*; and it does not usually affect external relations or give rise to international questions (*l*). This system has, however, led to the undesirable practice of embodying in extradition treaties a clause exempting States from the obligation of surrendering their own subjects (*m*). Some States, again, claim a criminal jurisdiction over offences committed even by foreigners and on foreign soil, although this pretension varies greatly in its scope. France, Germany, Austria, Italy, Spain, Belgium, and Switzerland appear to limit this to offences committed against the safety or high prerogatives of the State, in which case, if the offence has produced local effects, its seat may perhaps be regarded as local. Russia, Italy, Mexico, Greece, and the Netherlands extend it to offences of a certain gravity, committed against their own subjects. Austria and Italy claim to take cognisance of offences committed by foreigners on foreign soil, which affect neither the State nor its subjects, so long as the offender has been arrested locally and an offer of extradition has been refused; a practice which makes a near approach to a cosmopolitan theory of criminal jurisdiction, as distinct from that which is merely territorial or personal (*n*). The actual exercise of jurisdiction in such cases is subject to the condition that the offender shall have been arrested locally, for the reason that such claims would not generally constitute a good ground for a demand for extradition; and that he shall not previously have been tried elsewhere.

The Disadvantages of the Extra-territorial Principle in Criminal Cases.—Nevertheless the system under which a criminal jurisdiction is claimed or exercised by a State over offences committed outside its territory is, for the most part, and saving certain necessary exceptions (*o*), at bottom a bad one. It tends to obstruct or impede the course of justice by making the prosecution of crime difficult and expensive, owing to need of transporting witnesses and proofs to another country than that in which the crime was committed. By dissociating punishment from the locality of the offence, it also tends to diminish its deterrent effect. Nor is it commonly necessary; for the reason that the escape of the offender to another country can generally be met by a

(*l*) But for a possible exception to this, see p. 231, *supra*.

(*m*) As to this, see p. 251, *infra*; and Scott, p. 293 *n*.

(*n*) On the subject generally, see Hall, 219; Moore, ii. § 201; and Taylor, 240.

(*o*) As where the offence is committed in territory not occupied by a civilised Power, or where the act done outside the territory depends for its character on some act previously done within the territory, or where the offence affects the safety or public order of the State exercising jurisdiction.

proper system of extradition (*p*). It is also anomalous, for the reason that whilst it rests in some measure itself on a territorial basis—viz., the presence of the offender within the territory—it is really subversive of the territorial principle. Finally, as was pointed out in *Cutting's Case*, it is a system which, when applied to offences committed by foreigners in foreign territory, is open to grave abuses (*q*).

CIVIL JURISDICTION AND LAW OF A STATE.

SIRDAR GURDYAL SINGH v. THE RAJAH OF FARIDKOTE.

[1894; A. C. 670.]

Case.] THIS was an appeal in an action originally brought by the Rajah of Faridkote (the present respondent) against Sirdar Gurdyal Singh (the present appellant) in the Indian Courts. The action was itself based on certain judgments previously obtained by the plaintiff against the defendant in the Courts of Faridkote. Faridkote is a native State of India, which is under British protection but does not constitute an integral part of the British dominions, and which possesses, therefore, those attributes of an independent State, such as the right of enacting its own laws and exercising jurisdiction through its own Courts, which are compatible with protection and political dependence. The defendant had been treasurer of Faridkote, and was alleged in that capacity to have become indebted to the plaintiff in certain large sums of money. After the defendant had ceased to be treasurer, and had left Faridkote and become domiciled in Jhind, another protected State, the plaintiff instituted proceedings against the defendant in the civil Courts of Faridkote; the defendant, although notified of these proceedings, did not appear; and judgment in each case was accordingly given in favour of the plaintiff for sums amounting in all to Rs. 76,474.11.3 and costs. The defendant had no assets in Faridkote, and the plaintiff did not think fit to take proceedings in Jhind; but the defendant having meanwhile engaged in trading transactions at Lahore, and

(*p*) As to its effect on extradition, see p. 251, *infra*.

(*q*) On the subject generally, see Hall, 219; Westlake, i. 251.

being for this reason subject to the jurisdiction of the Indian Courts, two actions based on the Faridkote judgments were thereupon brought by the plaintiff against the defendant in the Courts of Lahore. In the lower Courts these actions failed, it having been held that the Faridkote Court had, under the circumstances, no jurisdiction as against the defendant; but on appeal to the chief Court of the Punjaub the jurisdiction of the Faridkote Court was upheld, and judgment given in favour of the plaintiff. From this judgment the defendant now appealed to the Privy Council. In the result it was held by the Judicial Committee that no territorial legislation can give jurisdiction, which any foreign Court ought to recognise, against absent foreigners who owe no allegiance or obedience to the legislative Power; that in all personal actions the Courts of the country in which the defendant resides, and not the Courts of the country where the cause of action arose, should be resorted to; that for this reason the decrees of the Faridkote Court were a nullity by international law, and that the actions brought upon them in the Indian Courts must therefore fail. Judgment was accordingly given in favour of the appellant, with costs.

Judgment.] In the judgment of the Judicial Committee, which was delivered by Lord Selborne, Faridkote was defined as a native State, the Rajah of which had been recognised by the Crown as having an independent civil, criminal, and fiscal jurisdiction; with the result that the judgments of its Courts were to be regarded as foreign judgments, on which actions could be brought in the Courts of British India. At the time of the institution of the proceedings in the Faridkote Courts, however, the appellant (the original defendant) had ceased to reside in Faridkote, to which he never returned, and had become domiciled in another independent native State, that of Jhind. Although he had notice of the proceedings in the Faridkote Court, he disregarded them, and did not appear or otherwise submit himself to their jurisdiction; nor was he, indeed, under any obligation to do so, unless that Court had lawful jurisdiction over him. On the question whether the Faridkote Courts had such jurisdiction, it was held that, in the circumstances stated, there was nothing to take the case out of the general rule that a plaintiff must sue in

the Court to which the defendant is subject at the time of the suit, *actor sequitur forum rei*; which was rightly stated by Phillimore (Int. Law, iv. s. 891) "to lie at the root of all international, of most domestic jurisprudence in this matter." All jurisdiction was properly territorial, and *extra territorium jus dicenti, impune non paretur*. Subject to special exceptions, territorial jurisdiction was exercisable over all persons either permanently or temporarily resident within the terrntory, while they remain within it; but it did not follow them after they had withdrawn from it, and when they were living in another independent country. Such a jurisdiction, indeed, always existed as to land within the territory; and it might be exercised over movables within the territory; whilst in questions of status or succession, governed by domicile, it might exist as to all persons domiciled, or who when living were domiciled, within the territory. As between different provinces under one sovereignty, the Legislature of the Sovereign might regulate such jurisdiction; but no territorial Legislature could give jurisdiction which any foreign Court ought to recognise, as against foreigners who owed no allegiance or obedience to the legislative Power. In a personal action, to which none of these causes of jurisdiction applied, a decree pronounced *in absentia* by a foreign Court, to the jurisdiction of which the defendant had not in any way submitted himself, was therefore an absolute nullity. These doctrines were laid down by all the leading authorities on international law; and no exception was made to them in favour of the exercise of jurisdiction against a defendant not otherwise subject to it, by the Courts of a country in which the cause of action arose (*r*).

Although this case belongs rather to the subject of private than public international law, yet it deals incidentally with certain matters that have an important bearing on questions of international organisation (*s*). In the first place, it serves to illustrate the position of those countries or communities which, whilst politically part of a larger State, are nevertheless regarded, in virtue of having their own system of private law and their own judicial system, as separate legal and

(*r*) The question, it will be observed, is here dealt with from an international standpoint. This serves to distinguish the present case from *Ashbury* v. *Ellis* [1893] (A. C. 339), with which it is sometimes thought to be in conflict.

(*s*) *Infra*, p. 242.

jurisdictional units (*t*). Next, it serves to illustrate the principle that, from an international standpoint, both the law and the jurisdiction of a State are, in civil matters as well as in criminal, primarily territorial. "All jurisdiction," it was said, "is properly territorial," and "territorial jurisdiction is exercisable only over persons permanently or temporarily resident within the territory." Nor could a man be called upon to defend himself before a jurisdiction to which he was not territorially subject, and to which he had not otherwise submitted himself. Finally, by its enunciation of the principle that the plaintiff must sue in the Court of the defendant, which frequently necessitates the assumption of jurisdiction over foreign transactions, and the application of some rule of foreign law, and by its reference to the exceptions to the ordinary rule of territorial jurisdiction, it serves to direct attention to the general character of that body of principles known as private international law, in virtue of which an extra-territorial jurisdiction and an extra-territorial application of law (*u*), in civil cases, are conceded or required by usage and comity.

General Notes.—*The Question of Law and Jurisdiction in Civil Cases.*—In civil cases, as in criminal, both the law and the jurisdiction of every country constituting a separate legal and judicial unit are primarily territorial. Its law (*x*) is intended primarily to govern the civil rights of persons who are found within its territory, and the legal effect of acts and transactions that occur there; whilst the jurisdiction of its Courts is exercisable primarily over persons and things within its territory, and in relation to similar acts and transactions. The more important exceptions to this principle have already been noticed (*y*); but as regards civil cases certain points need to be further emphasised. One is that, whilst in criminal cases questions of law and jurisdiction are identical, in civil cases they are often distinct; with the result that a Court competent in the matter of jurisdiction will often apply to its decision a rule of foreign law, or give effect to rights acquired thereunder. Another is that although in civil as in criminal cases it is competent to any country, by positive provision, to extend its law and jurisdiction to foreign persons, things, or transactions, and although such a provision, if duly made, will be given effect to within its own territory, yet in so far as this exceeds the generally accepted limit it will not be recognised or given effect to by the laws of other countries. At the same time such an extension of the national law and jurisdiction, *proprio vigore*, is a common incident of most municipal systems; although here it will not be possible to do more than glance briefly at the general character of such extensions under the English system. Finally, we need to notice that, in civil cases, by far the more important exceptions to the territorial principle, involving both a concession and relaxation of sovereign right, accrue by virtue of the operation of the principles of private international law; in deference

(*t*) *Supra*, p. 233.
(*u*) See pp. 242 *n* (*q*), and 243, *infra*.
(*x*) In the sense of its territorial law, see p. 232, *supra*.
(*y*) *Supra*, p. 232.

to which an extra-territorial jurisdiction or an extra-territorial application of law (*z*) is exercised or conceded by or as between the Courts of different countries. Thus, in the matter of jurisdiction, although in personal actions it is generally necessary that the defendant should be resident or present in the country before whose Courts he is cited, yet there are cases in which a jurisdiction may be rightly assumed over an absent defendant; as where he has expressly or impliedly accepted the jurisdiction, or where the subject of the action is properly situated within the territory. Again, in the matter of the law to be applied, it may often happen that although jurisdiction exists, as where the defendant is resident within the country, yet the cause of action may relate to some foreign act or transaction, as regards which it is only just and proper that its legal effects should be measured by the law of the place where it occurred.

The Extra-territorial Application of the Domestic Law by Positive Provision.—Confining ourselves to the English system, we find that although the English law is in civil cases, as in criminal, primarily territorial in the sense previously described (*a*), yet it is competent to the imperial Parliament, if it thinks fit, to extend its operation; and if Parliament expressly or impliedly manifests such an intention, then it will be incumbent on all British Courts within the limits of their respective jurisdictions to give effect to it. Hence the question of the application of laws enacted by Parliament to persons, things, or transactions outside the territory usually resolves itself into a question of construction. On this principle British statutes have been held applicable to British subjects outside the jurisdiction (*b*); and, indeed, on such matters as personal status or capacity this is always presumed (*c*). So, British statutes may bind the property of British subjects, other than foreign land, held by them outside the jurisdiction (*d*). On the same principle British statutes have been held to confer rights on foreigners outside the jurisdiction (*e*). But with respect to statutes imposing obligations there will always be a very strong presumption against such an intention, for the reason that this would infringe the principle of the exclusive sovereignty and jurisdiction of other States within their own limits. Hence it is an accepted rule of construction that every statute must, so far as its language admits, be interpreted and applied so as not to conflict with the rights

(*z*) Or strictly of rights acquired thereunder.

(*a*) *Supra*, p. 234, 239; and see *The Zollverein* (Swab. Adm. Rep. 96); and *Cope* v. *Doherty* (27 L. J. Ch. 600), although the effect of this decision has now been altered by the later Merchant Shipping Acts.

(*b*) *The Sussex Peerage Case* (11 Cl. & F. at p. 146).

(*c*) *Brook* v. *Brook* (9 H. L. C. 193).

(*d*) *Colquhoun* v. *Brooks* (14 A. C. 493); although the Bankruptcy Act, 1883, appears in terms to apply to land both in a British colony and elsewhere; *Williams* v. *Davies* [1891] (A. C. 460).

(*e*) *Davidsson* v. *Hill* [1901] (2 K. B. 606). In *Jeffreys* v. *Boosey* (4 H. L. C. 815), indeed, it was held that the Copyright Act, 8 Anne, c. 19, did not apply to an alien; but in *Routledge* v. *Low* (L. R. 3 H. L. 100) it was held that a later Act, 5 & 6 Vict. c. 45, did apply, although in this case the alien was temporarily present in a British colony.

of other States or the established rules of international law (*f*); and that all general terms must be narrowed in order to avoid such a result (*g*). And so, with respect to other systems than the English, it may be said that the territorial law of one State can have no intrinsic force except within its territorial limits, for although it may purport to apply beyond these limits, and although such a provision may be enforced as against persons subsequently coming within the local jurisdiction, or property belonging to them which may be found there, yet such an extended application cannot be made the foundation of rights or duties which the Courts of other countries will recognise or enforce.

Extra-territorial Jurisdiction.—The grounds upon which the jurisdiction exercisable by English Courts in civil cases rests vary greatly according to the nature of the suit. But if we exclude suits of a special nature, such as those brought in relation to matters of admiralty, bankruptcy, marriage or divorce, and probate or administration, as outside the scope of this note, it will be sufficient for our present purpose to call attention to the following points: (1) Suits relating to foreign land will always be regarded as outside the jurisdiction, and must be brought in the Courts of the State where the land is situated; whilst, conversely, suits relating to English land will also be a proper subject of jurisdiction even though the owner be outside the territory (*h*). (2) In personal actions (*i*) jurisdiction is primarily based on the presence of the defendant, and the service of process on him, within the jurisdiction (*k*). (3) But by various statutes passed from time to time the service of process outside the jurisdiction was allowed in certain specified cases, whilst by the rules at present in force under the Judicature Acts of 1873 and 1875 the service of process, or of notice in lieu of process, outside the jurisdiction may, at the discretion of the Court, be allowed in the cases specified by the rules; as where the suit relates directly or indirectly to land or hereditaments within the jurisdiction; or relief is sought against a person domiciled or ordinarily resident within the jurisdiction; or where the suit is for breach of some contract which was to be performed within the jurisdiction; or where it is sought to restrain the commission of some wrongful act within the jurisdiction (*l*).

(*f*) *Per* Maule, J., in *Leroux* v. *Brown* (12 C. B. 801); see also *Lopez* v. *Burslem* (4 Moo. P. C. at p. 305); *A.-G.* v. *Campbell* (L. R. 5 H. L. at p. 530); *The Amalia* (1 Moo. P. C. N. S. 471); *Bulkeley* v. *Schutz* (L. R. 3 P. C., at p. 769); *Ex parte Blain* (L. R. 12 Ch. D., at p. 526); and for a summary of principles, *Russell* v. *Cambefort*, 23 Q. B. D. 526.

(*g*) *Le Louis* (2 Dods., at p. 239).

(*h*) *British South Africa Co.* v. *Companhia de Moçambique* [1893] (A. C. 602), and *Potter* v. *Broken Hill Proprietary Co.* (3 C. L. R. 479); but as to the enforcement of personal equities, see *Penn* v. *Baltimore* (1 Ves. Junr. 444).

(*i*) These at common law were styled "transitory" actions.

(*k*) See *Jackson* v. *Spittall* (L. R. 5 C. P. 542, 549); *Ewing* v. *Orr Ewing* (L. R. 10 A. C. 453, 531); and the judgment of Lord Mansfield in *Mostyn* v. *Fabrigas* (1 Cowp. 161). Subject to this, any person might maintain a suit as plaintiff, although, if non-resident, security for costs might be exacted.

(*l*) For other examples, see Order XI. r. 1 *et seq.*

Private International Law: (i) *Subject-matter.*—Private international law is a body of principles for determining questions of jurisdiction, and questions as to the selection of the appropriate law, in civil cases which present themselves for decision before the Courts of one State or country, but which involve a "foreign element," in the sense next described (*m*). Where a transaction occurs wholly within a particular "country" (*n*), all the parties being present there, then the Courts of that country alone will be competent to exercise jurisdiction; and its territorial law alone will be applicable. But in the complicated social and commercial relations of modern life it often happens that cases present themselves for decision before the Courts of one country, which affect foreign persons, or foreign things, or transactions that have been entered into wholly or partly in a foreign country or with reference to some foreign system of law (*o*). Such cases are then said to involve a "foreign element," in the sense of being justly regulable as to their legal consequences by the law of some foreign system. It is with this class of cases that private international law is concerned. It includes in its range a great variety of topics; such as questions of status or capacity, questions as to the title to or transfer or devolution of different kinds of property, including testate or intestate succession, questions as to the validity and effect of contracts, questions as to liability for wrongs other than crimes, and more especially questions as to the recognition and enforcement of foreign judgments (*p*). So, by way of example, an English Court may be asked to adjudicate on the legitimation of a child born in Scotland, or the validity of a marriage contracted in France by persons then domiciled in Portugal, or as to the effect of an American divorce, or as to the validity of an assignment of movable property made in Norway, or as to the effect of a contract made in France and to be performed in Italy, or as to the effect on English property of a will made abroad by a foreign testator, or as to the distribution of the English property of a foreign intestate, or as to the effect of a judgment rendered in Germany, or a sequestration order made in Victoria, or a Canadian discharge in bankruptcy. And similar questions may, of course, present themselves for decision before the Courts of other States. In cases such as these the question may arise (1) as to whether the Court is internationally competent in the matter of jurisdiction; (2) as to what law should be properly applied to its decision (*q*); whilst, later on, (3) the further question may arise as to what effect should be given to its judgment in the Courts of some other country in which it is sought to be enforced (*r*).

(ii) *Its Juridical Character and Basis.*—This body of principles is of

(*m*) Dicey, Conflict of Laws, 1; Westlake, i. 239.

(*n*) As to the meaning of this term, and as to what are legal and jurisdictional units for this purpose, see p. 223, *supra*.

(*o*) As to the meaning of the term "foreign" in this connection, see p. 232, *supra*.

(*p*) It is at this point and by this means that questions as to the competency and rightful exercise of jurisdiction by foreign Courts are raised.

(*q*) Although it should be noticed that, in strictness, the English Courts do not purport to enforce foreign law, but merely rights acquired thereunder; Dicey, Conflict of Laws, 10.

(*r*) On the subject generally, see Dicey, Conflict of Laws, 1-12.

comparatively modern growth (*s*). It is commonly stated not to be part of international law proper, for the reasons—(1) that it is concerned with the relations of individuals and not of States; (2) that it derives its force immediately from the sovereignty of the State by whose Courts it is administered, and not from international usage or agreement; and (3) that its remedies have to be sought in municipal Courts, and are therefore wholly distinct from those that obtain between States. According to this view, what is commonly called "private international law" really constitutes a part or branch of each system of national law. From this standpoint, both the law of England, and that of every other civilised State, may, in its broadest sense, be said to consist of two branches: (1) the domestic or territorial law, which is primarily applicable to all persons, things, and transactions within its territory; and (2) a kind of supplementary code, embracing the principles of private international law, which are applied in cases that involve some foreign element (*t*). For the like reasons many writers prefer to use the terms "the conflict of laws," or "comity," or "international private law" (*u*). Nevertheless, the term "private international law" is usual and convenient; and is not, perhaps, so misleading as is commonly supposed. For this body of rules really possesses in some degree an international character. It rests, as a whole, on a basis of international comity; and perhaps also on a basis of mutuality in so far as its rules are definitely settled (*x*). Its object is to secure —(1) that rights duly acquired under the law of one country shall be recognised and enforced in any other country, in which such recognition or enforcement may be material; and (2) to confer jurisdiction on that country whose Courts, in the circumstances, are best able to deal with the case and to make their judgment effective. In this way it may be said that this body of principles occupies an important place in the existing scheme of international organisation. Even now similar, although not identical, principles are followed by the Courts of most civilised States. Several attempts have also been made to secure the adoption of uniform rules (*y*), and it is probable that this result will ultimately be attained by common international agreement. When this is attained the system will constitute, in matters of civil right, a kind of common law of nations operating, in many respects, independently of national boundaries and the restrictions incident to territorial sovereignty.

(*s*) Dicey, Conflict of Laws, p. 24. It is also worthy of notice that its development in England and America has been largely influenced by the works of Story and Westlake.

(*t*) *Ibid.* pp. 3-4.

(*u*) For an examination of these terms, see Holland, Jurisprudence, 419 *et seq.*, and Dicey, 12.

(*x*) *Simpson* v. *Fogo* (32 L. J. Ch. 249), although this is perhaps questionable.

(*y*) As at the Conferences of 1893, 1894, 1900, and 1904, held at The Hague; see Meili, 13, and Bellot, Dict. Pol. Econ. Title "Uniformity of Laws."

THE EXTRADITION OF CRIMINALS.

U.S. v. RAUSCHER.

[1886; 119 U. S. 407.]

Case.] THE prisoner had been indicted, under the laws of the United States, for having, whilst serving as mate on board an American vessel, unlawfully assaulted and inflicted cruel and unusual punishment on one Janssen, a member of the crew; and had been found guilty. In arrest of judgment, it was moved on behalf of the prisoner that inasmuch as he had been surrendered by Great Britain to the United States on a charge of murder, it was not competent to try him on a charge different from that for which he had been surrendered, and that the conviction ought therefore to be set aside. The judges of the Circuit Court being divided on this question, the matter was carried to the Supreme Court. Here it was held that the conviction must be set aside, on the ground that where a person had been brought within the jurisdiction of the Court by virtue of proceedings under an extradition treaty, he could only be tried for one of the offences mentioned in the treaty, and for the offence with which he had actually been charged in the extradition proceedings, at any rate until a reasonable opportunity had been given him to return to the country from which he had been brought.

Judgment.] The judgment of the Supreme Court was delivered by Mr. Justice Miller. After referring to the facts, and to the provisions of the treaty of 1842, under which the prisoner had been surrendered, the learned Judge pointed out that the practice of surrender now depended on treaty; and that apart from treaty no well-defined obligation to surrender existed, although in comity, and at the discretion of the Government whose action was involved, such surrender was sometimes made. In the United States the extradition of criminals was, in the opinion of the Court, a matter exclusively within the jurisdiction of the Federal Government, and not of the States. This was now all the more clear for the reason that the practice of extradition, as between the United States and nearly all other nations, had

come to be regulated by treaty; such treaties being supplemented by Acts of Congress.

The question in the present case depended on the treaty of 1842, made between the United States and Great Britain, and upon certain Acts of Congress, the provisions of which were embodied in §§ 5270, 5272, and 5275 of the revised statutes. This treaty, as a part of the law of the land, the Court was bound both to take judicial notice of and to construe. According to the opinions of the writers on international law, a country receiving an offender against its laws from another country had no right to proceed against him for any other offence than that for which he had been surrendered. In cases where there was no treaty, such a condition was almost a necessary adjunct to the discretionary exercise of the power of rendition; for the reason that a Government, although it might be willing to surrender for grave offences, would scarcely be willing to surrender for minor offences, or offences of a political character, and would not, therefore, be willing to surrender except on the allegation and proof of some specific offence, and subject also to certain limitations with respect to the subsequent prosecution of the party. Similar principles had now been imported into the obligations resting on treaties. In most of these treaties the enumeration of offences was so specific, and marked by such a clear line in regard to the magnitude and importance of such offences, that it was impossible to come to any other conclusion than that the right of extradition was intended to be excluded in the case of other offences than those specifically referred to.

That the present treaty did not intend to depart from the recognised public law that prevailed in the absence of treaties, and did not intend that extradition should avail for any other offence than one of those enumerated in the treaty, seemed clear, not only on the general principle that the specific enumeration of certain matters implied the exclusion of all others, but also from its general tenor and the processes by which it was to be carried into effect. If a person surrendered for one offence was liable to be tried for another, it was difficult to see why the demand for surrender had to be based on the description of some specific offence. In the present case, moreover, the treaty not only required that

the party should be charged with one of the crimes specifically mentioned, but also that such evidence should be produced of the commission of the offence as would suffice to justify commitment for trial by the law of the country from which extradition was sought. Nor, if such was the intention of the treaty, could it be said that its provisions in this respect were not equally obligatory on the country demanding extradition, after the extradition had been effected. The transfer having been made for a definite and limited purpose, no jurisdiction inconsistent with such purpose could well be exercised by the receiving country, except at the cost of a breach of faith towards the country making the surrender and of fraud on the rights of the party surrendered. If any doubt remained as to whether this was the proper construction, the language of the two Acts of Congress previously cited served to set this at rest. The obvious meaning of those statutes, which related to all extradition treaties made by the United States, was, on the one hand, that a person should not be surrendered by the United States to be tried for any other offence than that charged in the extradition proceedings; and, on the other, that when surrendered to the United States he should not be tried for any other offence than that with which he was charged, until he had had a reasonable time to return unmolested to the country from which he was brought.

This and the following case are cited as illustrating some of the more important principles that govern the practice of extradition as between independent States. In *The United States* v. *Rauscher* it was decided that where a person has been surrendered for one offence he cannot be tried for another, unless he has in the meantime been freed from the restraint involved in the extradition process. And this principle may be said to represent the correct international usage on this subject; except in cases where a contrary intention is clearly expressed (*z*). This decision also put an end to a long-standing controversy between Great Britain and the United States on this point; the United States having previously insisted both in *Lawrence's Case* and in *Winslow's Case* that when once a person had been duly extradited he became for all purposes subject to the local jurisdiction (*a*). The rule contended for by Great Britain was finally affirmed in *The United States* v. *Rauscher*; and has since been expressly incorporated

(*z*) Westlake, i. 250.

(*a*) See Wharton, Dig. ii. 758; Wheaton (Boyd), 187.

in the extradition treaty of 1890. The French Courts have also laid it down as a principle of international law that a prisoner who has been extradited cannot be tried for any offence except those specified in the demand for surrender (*b*).

IN RE CASTIONI.

[1891; 1 Q. B. D. 149.]

Case.] Castioni, a Swiss subject, was arrested in England, on the requisition of the Swiss Government, on a charge of murder, and was subsequently remitted to prison by the magistrate before whom the charge had been heard, with a view to his surrender. The present application was for an order calling on the magistrate, and the Consul-General of Switzerland, and the Solicitor to the Treasury, to show cause why a writ of *habeas corpus* should not issue to bring up the body of Castioni with a view to his discharge from custody. The facts were shortly these: In September, 1890, a political disturbance took place in the canton of Ticino, arising out of certain administrative abuses alleged to exist there, and out of a refusal by the Government to submit a revision of the constitution, for the remedying of such abuses, to the popular vote. A number of citizens of Bellinzona, including the prisoner, thereupon seized the arsenal, and having thus provided themselves with arms and overcome the police, marched to the municipal palace demanding admittance. In default an entrance was forced, and in the scuffle that ensued a municipal councillor named Rossi was shot at and killed by the prisoner. It did not appear that the prisoner had any previous knowledge of Rossi, or that the act was in any way one of private malice; but neither did it appear that the killing of Rossi was necessary to the success of the insurrection. A provisional Government was formed by the insurgents, but was soon afterwards suppressed, whereupon Castioni took refuge in England. It is provided by the Extradition Act, 1870, s. 3, sub-s. 1, that a fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character. The question was whether the prisoner's act came under this category. It was held that it did; and on this ground the prisoner was discharged.

(*b*) *Dalloz*, 502.

Judgment.] The Divisional Court, comprising three judges, held unanimously that crimes, otherwise extraditable, became political offences if they were incidental to and formed part of a political disturbance. Proceeding to apply this principle to the case before the Court, it was held in effect that, although the killing of Rossi might have been a cruel and unnecessary act, yet inasmuch as the prisoner had no private spite against Rossi, who was unknown to him, and as the act appeared also to have been done in furtherance of the rising, the offence must be deemed one of a political character, and the prisoner must be set at liberty. At the same time Hawkins, J., took occasion to observe that it must not be assumed that any act done in the course of a political rising was of itself necessarily of a political character. For if a man, even though in the course of a political rising, deliberately and as a matter of private revenge, and for the purpose of doing an injury to another, shot an unoffending man, he would undoubtedly be guilty of the crime of murder, and in such a case the offence could not be said to have any relation at all to a political crime.

This decision, although primarily a decision on a question arising under the British Extradition Act, 1870, yet serves to illustrate the nature and scope of the rule, now almost universally adopted, that extradition does not extend to political offences. The definition of a political offence adopted by the Court is that suggested by Stephen in his History of the Criminal Law (*c*). In the subsequent case of *In re Meunier* [1894] (2 Q. B. 415), however—where the prisoner, who was an anarchist, was proved to have caused two explosions, one at the Café Véry, in Paris, which had caused the death of two persons, and the other at certain barracks—it was held that in order to constitute a political offence there must be two or more parties in the State, each seeking to impose the government of its choice on the other, and that if an offence were committed by one side or the other in pursuance of that object, then it would be regarded as having a political character, but otherwise not. In view of the fact that such conditions were not present in *Meunier's Case*, that the accused was in fact identified with the party of anarchy and inimical to all government, and that his efforts, even though incidentally directed against a particular government, were primarily directed against the general body of citizens, it was held that the offence was not political; and the prisoner was accordingly surrendered to the French authorities.

(*c*) Vol. ii.; Oppenheimer, i. 502.

General Notes.—*Extradition Generally.*—Crimes committed by foreigners in foreign countries, and not affecting the State in whose territory the offender may be found, are almost invariably regarded as being outside the scope of the local law, at all events until extradition has been offered and refused (*d*). Nor, as has already been pointed out, will one State take upon itself to give effect to the criminal law of another State (*e*). In such cases, therefore, the only question will be how far a State, in which a foreign criminal has taken refuge, is bound, in view of the common interest in the repression of crime, to surrender him to the State claiming to have jurisdiction over the offence. On this question there was formerly much divergence both of opinion and practice (*f*). But at the present time the rule enunciated in *The United States* v. *Rauscher*, to the effect that apart from treaty there is no legal obligation to surrender, even though in comity and at the discretion of the Government whose action is involved such surrender may be sometimes made, probably represents both the correct view and common practice of States (*g*). France, indeed, still appears to adhere to the earlier doctrine that there is an inherent obligation to surrender foreign criminals, even though such obligation is commonly regulated by treaty. But, subject to a few exceptions, it may be said that extradition now depends on treaty, and will in general only be conceded in the cases and subject to the conditions prescribed by treaty. In view of the fact, moreover, that extradition involves an invasion of the right of asylum, it is, even when conceded by treaty, usually subjected to certain restrictions and safeguards. In some States both the subject of extradition and the international arrangements that may be entered into with respect to it are regulated by municipal law, to which, therefore, all treaties must conform. So, in Great Britain, although the Crown may conclude treaties, yet extradition treaties, for the reason that they derogate from the rights and liberties of the common law, and are also an invasion of the right of asylum, can only be carried into effect under the authority of an Act of Parliament (*h*). And in the United States, although treaties duly made constitute in themselves a part of the law of the land, yet such treaties are supplemented by Acts of Congress (*i*). With respect to the making of treaties and conventions, it is commonly, although not universally, recognised that, in view of the facilities for escape afforded by modern conditions, there is at any rate a moral obligation incumbent on civilised States not to refuse such conventional arrangements for the surrender of criminals as may be necessary in the common interest of civilised society. Some writers go further and allege that every State has a legal right, although only of an "imperfect" kind, to demand such arrangements at the hands of other States (*k*). Although extradition treaties vary somewhat both as regards the offences to which they apply and the procedure to be followed, yet there are certain general principles or conditions which are usually observed both as regards the making and

(*d*) See p. 234, *supra*.

(*e*) *Supra*, p. 223; except in so far as this may be involved in extradition.

(*f*) Wheaton (Lawrence), 184.

(*g*) But see Clarke, Extradition, 1-14.

(*h*) *Infra*, p. 252.

(*i*) *Supra*, p. 245.

(*k*) *Supra*, p. 122; and Westlake, Principles, pp. 74, 75.

the interpretation of such arrangements; and these may perhaps be said to constitute the germ of a new international usage on this subject. The Institute of International Law, in 1880 and 1892, has also formulated a series of rules on this subject (*l*).

Political Offences.—The principle that extradition shall not be applied to purely "political" offences is now almost universally followed in extradition treaties (*m*); its general acceptance being largely attributable to the attitude taken up by certain Powers, such as Great Britain, the United States of America, France, Switzerland, and Belgium. But much difficulty exists in determining what constitutes a political offence for the purposes of this exception. Some offences, of course, such as treason, political conspiracy, and seditious libel, are manifestly political. But a political character is often claimed for offences such as homicide and attempts at homicide, by reason of their having occurred in the course of some political movement, or having been prompted by a political motive. The effect of the decision in *In re Castioni* goes to show that if such an offence was incidental to and formed part of a political disturbance, and if it was done solely with intent to promote the political end in view, then, even though not actually necessary, it will constitute a political offence. But, as was held in *In re Meunier*, this will not cover acts directed, not against a certain State or form of government, but against society at large; for the reason that the perpetrators of such crimes are not political partisans, but are, like pirates, the common enemies of the human race. Nor would this exemption extend to acts done in the course of insurrection which even as between enemies would not be permissible under the laws of war. The frequent attempts recently made on the lives of the heads of States, both monarchical and republican, have led to the adoption, by a large body of States, of a rule that the murder or attempted murder of the head of a foreign State, or of a member of his family, shall not be considered as a political offence. Nearly all European States, except Great Britain, Switzerland, and Italy, have now acceded to this view; and even the Government of the United States has concluded treaties to the same effect (*n*). It is probably useless to attempt to provide beforehand such a definition of what constitutes a political offence for this purpose as would meet every conceivable difficulty (*o*); and the best method of dealing with such questions is probably to leave their determination to the higher Courts of each State, with power to decide each case as it arises and in the light of the special circumstances attending it. Although a State will not surrender political offenders, it is, as has already been pointed out, bound to prevent any abuse of its hospitality, and to adopt all necessary measures for preventing the use of its territory as a centre of active operations against the peace and order of other States (*p*).

Deserters.—Some treaties also exempt from extradition military deserters; but in the case of both these and naval deserters the question

(*l*) An account of these rules will be found in Westlake, i. 244.

(*m*) A treaty of 1888 between Russia and Spain, however, appears to extend to political offences.

(*n*) Scott, 293 *n*.

(*o*) But see Art. 13 of the rules formulated by the Institute of International Law; this is given in Westlake, i. 246.

(*p*) *Supra*, p. 211; Wheaton (Boyd), 184.

of surrender appears to be merely one of comity and mutual arrangement (*q*). As regards sailors who have deserted from merchant ships, however, the practice of surrender is commonly approved and followed. Thus, in the case of Great Britain it is now provided by the Merchant Shipping Act, 1894, that where it appears that due facilities are given by any foreign State for the recovery of seamen deserting from British merchant ships in its territory, the Crown may by Order in Council bring into force certain provisions of the Act enabling deserters from merchant ships belonging to such State, when within British dominions, to be apprehended and given up (*r*); and such facilities have now been mutually conceded in a large number of instances.

Extradition Demand must accord with Treaty, and Trial with Surrender.—It is the practice, in framing extradition treaties, to enumerate specifically the offences to which extradition shall apply, such offences being usually of the graver kind; and sometimes also to require that the demand for extradition shall be based on such evidence as would justify committal within the local jurisdiction. This impliedly excludes demands on any other ground; and also involves an obligation, on the part of the demanding State, even though there may be no express stipulation to that effect, not to proceed against the offender for any other offence than that for which he was surrendered, save, perhaps, with the assent of the State effecting the surrender in a case where the offence proposed to be tried was also within the treaty. It also implies an obligation not to surrender him to any other Government.

The Surrender by a State of its own Subjects.—Owing to the claim made by many States to exercise an extra-territorial criminal jurisdiction over their subjects (*s*), it has become customary to insert in extradition treaties a clause exempting States from the obligation of surrendering their own nationals. And this exemption is commonly insisted on by the majority of European States, although not favoured, and so far as possible excluded, by Great Britain (*t*). This practice is undesirable both because the trial of an offence in any other country than that in which it was committed is in itself open to grave objection (*u*); and also because, in a case where one of the parties to the treaty follows primarily the territorial principle, it may result in the offender remaining unpunished (*x*). Such an exemption, however, even where it is recognised, will not, it seems, apply where the fugitive has acquired the national character of the State in which an asylum has been sought, after the commission of the offence. Although such a stipulation is invariably reciprocal, Great Britain, in cases where the treaty embodies merely a right of refusal as distinct from a denial of extradition, occasionally concedes the surrender of her own subjects, even though not obligatory (*y*).

(*q*) See Wheaton (Boyd), 191, and authorities there cited.

(*r*) S. 238, and also ss. 223 and 244.

(*s*) *Supra*, p. 234.

(*t*) Clarke, Extradition, 68.

(*u*) For the reasons already indicated, pp. 232, 235, *supra*.

(*x*) For an example of this, see *R.* v. *Wilson* (3 Q. B. D. 42).

(*y*) As in the case of *De Tourville*, 1876; and this despite 24 and 25 Viet. c. 100, s. 9 (*supra*, p. 227); see Wheaton (Boyd), 192; and Westlake, i. 245 *n*.

Competing Claims.—According to the opinion of some writers and the practice of some States, a demand for extradition may be made not only by the State in whose territory the offence was committed, but also by a State claiming personal jurisdiction over the alleged offender by reason of his nationality. But such claims are not admitted by Great Britain or the United States of America (*z*); and would also seem generally inadmissible on those grounds of principle and convenience which have already been discussed (*a*). But in any case, as between competing claims, it would seem that preference should be given to the territorial claim; whilst as between claims equally well founded, it would seem that preference should be given to the claim which involves the graver offence, or, in cases of doubt, to the claim which ranks first in order of time (*b*).

British Extradition Arrangements: (i) *As between the United Kingdom and Foreign Countries.*—The extradition system that now obtains as between Great Britain and other States is based on the Extradition Acts, 1870 to 1906, and on the various treaties which have now been entered into with most civilised States under the authority of those Acts (*c*). The Extradition Acts, in substance, provide: (1) that the Crown may by Order in Council, to be laid before Parliament, apply the provisions of these Acts to such extradition treaties as may be entered into with other States; and (2) that by virtue of such arrangements any person charged with or convicted of any of the offences specified by treaty may be arrested, and surrendered on such evidence as would have justified a committal for trial on a similar charge in England. With respect to the kinds of offences to which extradition may be applied, the general result of the Acts is to admit of nearly all offences being made extraditable, subject to the limitations hereafter mentioned (*d*); but under the treaties actually entered into extradition is usually confined to offences of a certain degree of gravity. Thus, by the treaty of 1890, and supplementary conventions, made between Great Britain and the United States of America, extraditable offences include murder, manslaughter, piracy by municipal law, arson, robbery, forgery, burglary, embezzlement, malicious injury endangering life, larceny of property of the value of £10, and bribery. The limitations imposed on extradition are these: (1) no person is to be surrendered for "political offences" (*e*); (2) no person is to be surrendered unless provision is made by the law of the State requesting surrender, or by arrangement, that he shall not be tried for any offence committed prior to his surrender, other than the crime proved by facts on which the surrender took place, unless he has previously had an opportunity of returning to the country which surrendered him; (3) no fugitive criminal who at the time when his surrender is requested is undergoing

(*z*) See *Carl Vogt's Case*; and *supra*, pp. 225, 234.

(*a*) *Supra*, p. 235, save, perhaps, where the offence was committed in a place not within the territory of any civilised State.

(*b*) On the subject generally, see Westlake, i. 244; and Wheaton (Boyd), 180.

(*c*) For a list of extradition treaties, see Encyclopædia of the Laws of England, v. 269.

(*d*) See the schedules to the Acts of 1870 and 1873.

(*e*) *Supra*, p. 249.

punishment for an offence committed within the British jurisdiction is to be surrendered until discharged; and (4) no person is to be surrendered until the expiration of fifteen days from the date at which he was committed for the purpose of surrender (*f*). The procedure in the United Kingdom in cases of extradition is shortly as follows: A requisition for surrender is made by the diplomatic representative or Consul-General of the demanding State, whereupon the Secretary of State issues an order to one of the Bow Street police magistrates requiring him to issue a warrant of arrest. This warrant is to be issued on receipt of such order, and on such evidence as would justify an arrest under the local law; and may then be executed in any part of the United Kingdom. If the fugitive is arrested the case is heard before the magistrate, and if the evidence is such as would warrant a committal in England, the prisoner is committed under the Act; this fact being reported to the Secretary of State. The prisoner has then fifteen days within which to apply for a writ of *habeas corpus*, of which fact he must be duly informed. After this the Secretary of State may issue his warrant of surrender. If not surrendered within three months the prisoner is entitled to his discharge (*g*).

A curious point arose in the *Savarkar Case* between France and Great Britain in 1911. Savarkar, a British subject, charged with high treason and with being accessory to a murder, whilst being transported to India escaped ashore at Marseilles, was seized by a French policeman, and, without any formalities, handed back to the British authorities on board the P. & O. SS. "Morea," from which he had fled. It was found by the Permanent Court of Arbitration of The Hague that, although an irregularity had been committed, there is no rule of international law imposing, in circumstances such as these, any obligation on the Power which has in its custody a prisoner, to restore him because of a mistake committed by the foreign agent who delivered him up to that Power (*h*). This award is considered by many jurists as inconsistent with the principle of territorial sovereignty. So it is, but no good purpose would have been served by restoring the prisoner and going through the formalities of extradition. The Court took a broad and sensible view.

(ii) *As between other British Possessions and Foreign States.*— Inasmuch as extradition now depends on treaty, and inasmuch as treaties can only be entered into by the sovereign authority, it follows that any system of extradition obtaining between other parts of the British possessions and foreign States must depend on arrangements made by the imperial Government. As a matter of fact, all extradition treaties recently entered into between Great Britain and foreign States have been made applicable to colonies and dependencies. The provisions of the Extradition Acts, upon which the operation of such treaties depends, also apply to all British possessions, except in so far as may be otherwise provided by Order in Council, and saving certain necessary modifications in the matter of procedure which are provided for by the Act itself. In the case where a foreign criminal

(*f*) See Act of 1870, s. 3; and for a criticism, Stephen, History of Criminal Law, ii. 69.

(*g*) For variations in this procedure, see Stephen, Digest of Criminal Procedure, p. 100 *et seq.*

(*h*) Hague Court Reports, 275.

has taken refuge in a British possession, a requisition for his surrender may be made to the Governor, either by a consular officer of the demanding State, or, if the fugitive has escaped from a foreign colony or dependency, then by its Governor; thereafter the procedure followed is much the same as in the United Kingdom; whilst the warrant for surrender is issued by the British Governor subject to a similar right on the part of the person charged to challenge the legality of the surrender (*i*). It is provided, however, by the Act, that in the event of the Legislature of any British colony or dependency passing any law of its own for the surrender of fugitive criminals, the Crown may suspend the provisions of the imperial Act, either in whole or in part, or may direct that the local law shall take effect, either with or without modification, as if it were part of the imperial Act (*k*). So, in the case of the Dominion of Canada, the operation of the imperial Act, so far as relates to the procedure for ascertaining the criminality and identity in the fugitive, has now been suspended by Order in Council in favour of certain local provisions contained in the Acts of 1877 and 1882 (*l*). In the Commonwealth of Australia the procedure in cases of extradition is also regulated by the local Extradition Act of 1903 (*m*). In the case where the Government of a British possession desires to obtain the extradition of a domestic fugitive from a foreign State, application is usually made through the imperial Government; but in some cases a requisition for surrender may be made to the foreign State by the Attorney-General, either through the local consular officer, or through the British diplomatic representative (*n*).

(iii) *As between different Parts of the Empire.*—The complex organisation of the British Empire, and the fact that it is made up of different countries or areas, each of which possesses its own legal and judicial system, has necessitated the adoption of domestic arrangements for ensuring the arrest and surrender of fugitive offenders, as between its different parts. (1) As between different parts of the United Kingdom, provision is made, although under a great variety of statutes, for the execution in one part of warrants of arrest issued in another, subject to their being locally endorsed by the proper judicial or other officer (*o*). (2) As between the United Kingdom and other British possessions or countries to which the Foreign Jurisdiction Acts have been applied, and also as between such possessions or countries themselves, the arrest and surrender of fugitive offenders is provided for by the Fugitive Offenders Act, 1881. (3) Finally, where a dominion or dependency comprises different States or provinces, which in other respects constitute separate legal or judicial units, domestic extradition is commonly provided for by the federal or other common legislative authority (*p*). By the Fugitive Offenders Act, 1881, a person charged in one part of the British dominions with any offence punishable on conviction with

(*i*) See Extradition Act, 1870, s. 17; and 1895, s. 2.
(*k*) See Extradition Act, 1870, s. 18.
(*l*) Todd, Col. Govt. p. 290.
(*m*) See ss. 4 and 5.
(*n*) See Extradition Act, 1903, of the Commonwealth of Australia, s. 6.
(*o*) For a summary of the statutes on this subject, see the Encyclopædia of the Laws of England, vi. 23 *et seq.*
(*p*) As in the Commonwealth of Australia, by the Service and Execution of Process Act, 1901, s. 18.

imprisonment for twelve months or more, with hard labour, may be arrested in another part under a warrant locally endorsed; whilst a person who is suspected of having committed any such offence may also be arrested under a provisional warrant issued locally; and in either case the person so arrested may, after an investigation before a magistrate, and on the production of evidence affording a reasonable presumption of guilt, and subject also to such a period of delay as may enable him to challenge the legality of the proceedings by a writ of *habeas corpus*, be ordered to be surrendered, and thereafter be returned to that part of the dominions from which he has escaped (*q*). By Part II. of the Act, moreover, proceedings of a somewhat simpler character are provided for groups of contiguous colonies, subject to their being made applicable by Order in Council (*r*).

EXTRA-TERRITORIAL COMMUNITIES—FOREIGN JURISDICTION.

PAPAYANNI v. THE RUSSIAN STEAM NAVIGATION COMPANY.

[1863; 2 Moo. P. C., N.S. 161.]

Case.] A collision had taken place, off the island of Marmora, between the "Laconia," a steamship belonging to the appellant, a British subject domiciled in England, and the "Colchida," a steamship belonging to the respondents, a Russian company, in the course of which the "Colchida" had been sunk. An action *in rem* was then brought by the owners of the "Colchida" in the Consular Court of Constantinople, in which they claimed damages for losses alleged to have been sustained by reason of the negligence of those on board the "Laconia." The owners of the latter entered a protest against the jurisdiction of the Court to entertain the suit, on the ground of its being a proceeding *in rem*; and, upon this being overruled, they instituted a cross-action against the owners of the "Colchida." At the trial, and on the evidence, the Consular Court found both vessels in fault; and, acting on the rule of the English Court of Admiralty,

(*q*) See the Fugitive Offenders Act, 1881, Part I., especially ss. 1, 2, 3, 26.

(*r*) As to the extent to which this part of the Act has been made operative, see Encyclopædia of the Laws of England, vi. 23 *et seq.*

adjudged that each party should bear a moiety of the aggregate loss sustained, but without costs. From this decision and from the judgment affirming jurisdiction the present appeals were brought to the Privy Council. In the result the Judicial Committee held: (1) that inasmuch as jurisdiction had customarily been exercised in such proceedings, the cause was one which properly fell within the jurisdiction of the Consular Court; and (2) that, on the merits, both actions should be dismissed, each party paying his own costs.

Judgment.] In delivering judgment, Dr. Lushington pointed out that although in general no State could claim jurisdiction within the territorial limits of another independent State, and although as between Christian States such a claim could not be supported except by treaty, yet a great difference existed in respect of Oriental nations; and that the same rule did not necessarily apply within the dominions of the Porte. In such cases, quite apart from treaty, a privileged jurisdiction might well be supported by constant usage, wittingly acquiesced in by the local authorities. In the present case, if any objection to the jurisdiction were taken, it ought to be taken by the Ottoman Government, and not by a British subject. But in fact such a jurisdiction had long been exercised and acquiesced in. At first grave differences in religion had made it necessary to withdraw British subjects from the native Courts; in time and with the progress of commerce, and Western nations having the same interest in abstaining from Mussulman tribunals, recourse was had to the Consular Courts; whilst finally the system became general. The acquiescence of the Ottoman Government proved its consent. But although the Porte had given the Christian Powers authority to administer justice to their own subjects, it could not give one Power jurisdiction over the subjects of another. Still, it had left them at liberty to deal with each other as they might think fit; and if the subjects of one Power desired to resort to the tribunals of another, there was no objection to their doing so by mutual consent. Hence, although a British Court in Turkey could not exercise compulsion over any but British subjects, yet a foreign subject might, if he chose, voluntarily resort to it, with the consent of his Sovereign, and thereby submit himself to its jurisdiction. The

exercise of such a jurisdiction in foreign countries was provided for by the Foreign Jurisdiction Act, 6 and 7 Vict. c. 94, s. 1, which, after reciting that her Majesty had, by treaty, capitulation, grant, usage, sufferance, or other lawful means, power and jurisdiction in divers countries and places out of her Majesty's dominions, and that doubts had arisen as to how far such jurisdiction was controlled by the laws of the realm, enacted, in effect, that such jurisdiction might be exercised in the same and as ample a manner as if it had been acquired by the cession or acquisition of territory. So the British consular jurisdiction in the Ottoman dominions, in so far as it existed by usage or sufferance, must be deemed to be regulated by the Orders in Council which had been passed in pursuance of that Act. The Order in Council of the 27th of August, 1860, s. 64 amongst other things, empowered the Supreme or other Consular Court, according to its jurisdiction, and in conformity with the rules regulating suits between British subjects, to hear and determine any suit of a civil nature between a British subject and a subject of the Porte or of any other friendly State, provided that the latter obtained and filed in Court the consent in writing of some competent local authority or of the consul of his State, as the case might be, to his submitting to the jurisdiction, and did actually submit to the same, and gave security if required. In the present case the respondents had complied with the conditions, and did not now question the jurisdiction. It was not, therefore, competent to the party who, as a British subject, was by law subject to such tribunal to raise any such objection.

This case is cited mainly as illustrating the nature and origin of that extra-territorial jurisdiction which is still exercised by Christian States over their subjects whilst residing within the borders of certain non-Christian States, and which has led to the establishment of those extra-territorial communities which will be described hereafter (*s*). It further serves to illustrate the conditions under which such "foreign" jurisdiction may be exercised under the English law; and more especially the necessity of obtaining the consent of a foreign

(*s*) *Infra*, p. 259. As to the extra-territorial jurisdiction in Japan, now abandoned, see *Imperial Japanese Government* v. *The P. & O. Co.* (L. R. 1895, A. C. 644); and, as to the legal position of members of these communities, *Abdul-Messih* v. *Farra* (L. R. 13 App. Cas. 431), and an article in the L.Q.R., October, 1908, p. 440, by C. H. Huberich.

State before such jurisdiction can be exercised over its subjects. From the point of view of English law the term foreign jurisdiction may be used in two senses: (1) It may be used to indicate that jurisdiction which Great Britain in certain cases asserts over her subjects when outside British territory, and even when within the territory of a civilised State (*t*). (2) It is, however, commonly used in a more restricted sense, to denote that jurisdiction—more limited as regards the cases to which it applies, but more complete and effective when it does apply—which is exercised over British subjects or those classed with them, when resident in certain non-Christian States, or in countries not possessing any civil Government. Such a jurisdiction may be acquired either by treaty, usage, or sufferance; but as between the Crown and its subjects, the exercise of such a jurisdiction is now regulated by the Foreign Jurisdiction Act, 1890 (*u*), and the various Orders in Council passed or maintained under its authority (*x*). In addition to the general Act there are various special Acts which authorise and regulate the exercise of foreign jurisdiction within particular areas (*y*). Such foreign jurisdiction is exercised, according to the terms of the Order in Council, either by judicial officers, or by consular officers, or by naval and military officers, or by commissioners.

GENERAL NOTES.—*The Doctrine of Exterritoriality.*—The exclusive jurisdiction of every State within its own territory is subject, both on its positive and negative side (*z*), to certain exceptions, which are frequently, although it would seem incorrectly, attributed to the doctrine of exterritoriality. This is virtually a legal fiction by which certain persons and things are deemed, for the purposes of jurisdiction and control, to be outside the territory of the State in which they really are, and within that of some other State, the jurisdiction of which is to that extent enlarged. Its principal applications in international law are to (1) Sovereigns, whilst travelling or resident in foreign countries; (2) Ambassadors and other diplomatic agents having a representative character; (3) Public vessels, whilst in foreign ports or territorial waters; (4) The armed forces of a State, when passing through foreign territory; and (5) Foreigners of European or American

(*t*) As where it claims from its subjects the duty of allegiance wherever they may be resident; or where it prescribes penalties for acts done by them abroad—24 & 25 Vict. c. 100, s. 9; or when it assumes to determine the validity of acts done abroad—24 & 25 Vict. c. 114; see p. 216, *supra*.

(*u*) This Act consolidates and supersedes, subject to a saving of any previous orders passed thereunder, the earlier Foreign Jurisdiction Acts of 1843, 1865, 1866, 1875, and 1878.

(*x*) A list of Orders in Council regulating foreign jurisdiction will be found in the Encyclopædia of the Laws of England, v. 430; and see Hall, Foreign Jurisdiction, Index of Orders, p. 298.

(*y*) Such as 26 & 27 Vict. c. 35 (now revocable by Order in Council), in relation to certain parts of South Africa; and 35 & 36 Vict. c. 19, and 38 & 39 Vict. c. 51, as to the islands of the Pacific. See Hall, Foreign Jurisdiction, p. 230.

(*z*) *Supra*, p. 234.

extraction, when resident in certain Eastern States (*a*). Exterritoriality, however, is at bottom only a rough mode of describing certain immunities, which attach to such persons or things on grounds of convenience or comity, and which really depend, both as regards their scope and effect, on usage or treaty. It is at most a convenient phrase or metaphor; and cannot be treated as an independent source of legal right (*b*).

Extra-territorial Communities.—In the case of non-Christian countries, European Governments from a comparatively early time found it necessary, owing to differences of religion and culture, and more especially owing to the barbarous methods of procedure and punishment which then prevailed, to withdraw their subjects from the local jurisdiction. In the case of Turkey this exemption was originally founded on the Capitulations. These were treaties made by the Crown with the Sultan, which provided that all disputes between British subjects should be left to the decision of the ambassador or consuls; and that if a British subject were accused of crime or sued civilly by an Ottoman subject the case should not proceed unless some British official were present in Court. They also conferred certain exemptions with respect to the arrest of the persons, the entry of the houses, and the taxation of the property of British subjects. Similar treaties were made from time to time by the Sultan with other European States; with the result that a complete system of extra-territorial jurisdiction was gradually established, extending in many respects beyond the original grants, but sanctioned by long usage and acquiescence (*c*). This system, which originated in the dominions of the Porte, including Egypt, was afterwards extended by treaty or convention to other non-Christian countries, such as Morocco, Muscat, Persia, China, Korea, Siam, and even Japan. The result has been to establish "extra-territorial" communities, consisting of persons who, whilst resident in the territory of the local Power, are yet deemed for the purposes of civil and criminal jurisdiction, and sometimes even for the purposes of taxation, to be outside its borders, and resident within their own country. Such persons continue subject to the law of the country of which they are nationals; such law being administered by their consul or other authority appointed by their own Government. As regards Japan, however, this system of extra-territorial jurisdiction has now been abrogated under a series of conventions entered into in 1895, which took effect in 1899; whilst it is also being relaxed in Siam, where by an agreement made in 1909, British subjects not previously registered are to fall under the local jurisdiction. In the other countries mentioned the system still continues; although in Egypt, under the Protectorate of Great Britain, the necessary modifications of the régime of the Capitulations are sought to be secured by agree-

(*a*) Another instance of a particular nature is that of the Pope, who, by virtue of the Law of Papal Guarantees of 1871, is, together with the papal palace, and all buildings inhabited by persons forming his court, declared to be exempt from Italian jurisdiction.

(*b*) Hall, 178.

(*c*) For an interesting account of the origin of this system, the difficulties that arose on the abolition of the Levant Company, and the passing of the Foreign Jurisdiction Act, 1843, see Jenkyns, British Rule, &c., pp. 148, 248 *et seq.*

ments between Great Britain and the capitulatory Powers. These agreements seek the closing of the foreign consular Courts, so as to render possible the reorganisation and the extension of the jurisdiction of the existing mixed tribunals and the application to all foreigners in Egypt of the legislation enacted by the Egyptian Legislature. Elsewhere the system is subject to a more systematic administration than that which formerly obtained. The system of extra-territorial jurisdiction occupies a place in international law both in so far as it constitutes an exception to the ordinary rule of territorial supremacy (*d*), and in so far as it affects the position of consuls, who in such countries are commonly invested by treaty both with diplomatic privileges and judicial functions.

Consular Jurisdiction Generally.—The privilege of exemption from jurisdiction granted by the Capitulations and by other treaties carried with it an implied obligation on the part of the States enjoying these privileges to make some provision under their municipal law for the punishment of crimes committed by, and for the determination of civil disputes arising between, their subjects. In general this obligation was met by conferring a jurisdiction, both civil and criminal, in the first instance, on the consuls by which such States were locally represented; with power, however, in graver cases, to send offenders home for trial, or to refer the matters to the home Courts. Hence it followed that, in such countries, consuls, being not merely exempt from the local jurisdiction, but also positively invested with a jurisdiction over others, and possessing also other immunities conferred on them by treaty, as well as extensive powers of intervention and protection, came in fact to enjoy something of the diplomatic character and its attendant privileges; a character and position which they do not enjoy when residing in civilised States (*e*). Their consulates came to be regarded as exterritorial, and the consuls themselves as international representatives of their States rather than commercial agents. The consuls also claimed the right of determining what persons were under their protection, and of granting protection to strangers irrespective of origin or nationality; a privilege which gradually won its way to recognition, but which is often greatly abused (*f*).

The British System of Consular Jurisdiction.—The British system of consular jurisdiction in the Ottoman dominions is now regulated by an Order in Council of 1873 and various supplementary Orders. In brief outline, the system is as follows: All British subjects are required to register themselves at the consulates. A limited civil and criminal jurisdiction, both original and appellate, is vested in the Supreme Consular Court, which consists of judges who have had a legal training, and ordinarily sits at Constantinople, with a further right of appeal in civil cases to the Privy Council. The law administered is for the most part English law. The ordinary method of trial is either by a jury or with assessors. Even foreigners may sue on obtaining the consent of their State and giving security if required (*g*). In September, 1914, Turkey denounced the Capitulations, but by

(*d*) *Supra*, p. 234.
(*e*) *Infra*, pp. 323, 325.
(*f*) Westlake, i. 199, 200; and Wharton, i. pp. 791, 801.
(*g*) Hall, Foreign Jurisdiction, 153.

Art. 136 of the Treaty of Sèvres, August 10, 1920, Turkey agreed to accept such new judicial system as may be approved by the principal Allied Powers (*h*). A very similar system obtained in Egypt, for which there is still a Chief Consular Court. But the functions of the Consular Courts have now, so far as relates to mixed suits, been suspended by an Order in Council of 1876, in favour of certain International Courts established by the Khedive with the assent of the Powers in 1875. These International Courts comprise three Courts of First Instance, sitting at Alexandria, Cairo, and Zagazig; with a Court of Appeal at Alexandria. The staff of judges is composed partly of natives and partly of foreigners, the latter constituting a majority. Their jurisdiction is confined to "mixed cases," in which persons of different nationality are concerned; and is for the most part civil. Both the law which they administer and the procedure which they follow are now expressed in codes (*i*). If Egypt becomes an independent State the judicial system will have to be approved by the capitulary Powers, except Germany and Austria, who renounced the benefits of the Capitulations in Egypt, Morocco, and Siam, by the Peace Treaties. The Orders made for other countries, such as Persia, Morocco, the Persian coast and islands, Korea, and Siam, are all framed on similar lines, although they vary in detail. For China and Korea there is also a Supreme Court, which sits at Shanghai, and consists of judges who have had legal training (*k*).

THE PUBLIC VESSELS AND ARMED FORCES OF A STATE.

(i) SHIPS OF WAR.

THE "EXCHANGE" v. McFADDON.

[1812; 7 Cranch. 116.]

Case.] In December, 1810, while on a voyage from Baltimore to St. Sebastian, the "Exchange," then the property of two American citizens, was seized by order of the Emperor Napoleon. She was thereupon converted at Bayonne into a man-of-war, and commissioned as a public vessel of the French Government, under the name of the "Balaou." In this character she subsequently put into the port of Philadelphia, whereupon proceedings were

(*h*) Treaty Series, No. 11, 1920 [Cmd. 964].

(*i*) See Codes Égyptiens et Lois Usuelles en Viguer en Égypte. Par Wathelet et Brunton, 1919 and 1920.

(*k*) Jenkyns, 162; Phill. ii, 341.

instituted against her with the object of procuring her restoration to her former owners. In the District Court the proceedings against the vessel were dismissed, on a suggestion, filed on behalf of the executive Government, that the vessel, as a public vessel belonging to a foreign Government, was exempt from the local jurisdiction. In the Circuit Court this judgment was reversed. But on appeal to the Supreme Court the judgment of the District Court was affirmed, and the proceedings against the vessel were dismissed.

Judgment.] Marshall, C.J., in giving judgment, after pointing to the dearth of authority in the shape either of precedent or written law, stated that the jurisdiction of every nation within its own territory was necessarily exclusive and absolute, and was susceptible of no limitation that was not imposed with its own assent; for the reason that any restriction deriving its validity from an external source would imply a corresponding diminution or transfer of its sovereignty. Any exception to the full and complete power of a nation within its own territory must be traced to the assent of the nation itself.

Such an assent, however, might be either express or implied; if it was only implied, then it might indeed be less determinate, but if understood it was not less obligatory. Such an assent might in some instances be evidenced by common usage, and by common opinion growing out of that usage. The mutual equality and independence of Sovereigns, and their common interest, had given rise to a class of cases in which every Sovereign was understood to waive the exercise of a part of his exclusive territorial jurisdiction. One of these cases was admitted to be the exemption of the person of a Sovereign from arrest and detention when within a foreign country. A second case, standing on the same principles, was the immunity which all civilised nations allowed to foreign Ministers. A third case in which a Sovereign was understood to waive a portion of his territorial jurisdiction was where he allowed the troops of a foreign prince to pass through his dominion. In such a case the grant of passage, if expressly conceded, implied a waiver of jurisdiction; for otherwise the military force of a foreign independent nation might be diverted from its national objects and withdrawn from the control of its

Sovereign. Moreover, even if there were no special licence, but only a general permit, it would seem that a similar waiver of jurisdiction must necessarily follow. It was true that the passage of an army through foreign territory was at all times inconvenient, and might often be dangerous to the local Power; and for this reason a general licence to foreigners to enter the dominions was never understood to extend to a military force, for whose entry in time of peace a special licence was therefore required.

But this rule, applicable to armies, did not appear to be equally applicable to ships of war entering the ports of a friendly Power; for the reason that such entry was not attended by similar inconvenience or dangers. Hence in such cases no special licence was required. If for reasons of State it was desired to close the ports of a nation or any particular ports against vessels of war generally, or against the vessels of any particular nation, express notice was usually given. In default of such prohibition the ports of a friendly nation were considered as open to the public ships of all Powers with which it was at peace. In some cases, indeed, such a right was conferred expressly by treaty, and in such a case the same immunity from local jurisdiction which was conferred by special licence in the case of armed forces would certainly attach to public vessels; but even if there were no treaty, yet if a Sovereign permitted his ports to remain open to the public ships of friendly Powers, the conclusion seemed irresistible that they entered by his assent.

It was true that the same privilege, whether conceded expressly by treaty or implied from the absence of express prohibition, extended also to the case of private vessels; and it might on this ground be urged that public vessels were therefore in the same condition as merchant vessels entering for trade purposes, and that they, like the latter, became subject to the local jurisdiction. But it appeared to the Court that in such cases a clear distinction was to be drawn between the rights accorded to private trading vessels and those accorded to public armed ships. A public armed ship constituted a part of the military force of her nation; she acted under the immediate and direct command of the Sovereign, and was employed by him for

national objects. Hence she could not be interfered with without affecting his power and his dignity. The implied licence, therefore, under which such a vessel entered a friendly port might reasonably be construed, and, as it seemed to the Court, ought to be construed, as containing an exemption from the jurisdiction of the Sovereign within whose territory she claimed the rights of hospitality.

Adverting to an opinion expressed by Bynkershoek, that the property of a foreign Sovereign was not distinguished by any legal exemption from that of an ordinary individual, the Chief Justice, without expressing any opinion on that subject, pointed out that there was a manifest distinction between the private property of a person who happened to be Sovereign and that military force which supported the sovereign power and maintained the dignity of the nation. In the former case a Sovereign, by acquiring property in a foreign country, might possibly be considered as subjecting it to the territorial jurisdiction, but he could not be presumed to do this as regards any portion of the armed force of the nation.

It must therefore be concluded that it was an undoubted principle of public law that national ships of war entering the ports of a foreign Power open for their reception were to be considered as exempted, by consent of that Power, from its jurisdiction. The Sovereign of the place could no doubt destroy such an implication; but until that was done in a manner not to be misunderstood, he could not be considered as having imparted to the ordinary tribunals a power which it would be a breach of faith to exercise.

As to a contention that it was the duty of the Court to inquire whether the title of the original owners had been extinguished by an act recognised as valid by the municipal law, it was held that the ship must be considered to have come into American territory under an implied condition that, while necessarily within it and demeaning herself in a friendly manner, she should be altogether exempt from the local jurisdiction.

This case serves to illustrate the general rule with respect to the immunity of the armed forces or the public vessels of one State when within the territorial limits of another. It may probably be regarded

as the leading case on this subject; and the decision is all the more weighty for the reason that the title of the foreign Sovereign in this particular case was notoriously wrongful. Despite this it was held that the title of such foreign Sovereign could not, according to the accepted principles of public law, even be inquired into. The judgment, it will be seen, clearly upholds the exclusive sovereignty of every State within its own territory; and therefore bases the exemption both of armed forces and public vessels, when within the limits of a foreign State, on an express or implied assent on the part of the latter to waive that control and jurisdiction which would otherwise belong to it. The qualification, "and demeaning herself in a friendly manner" probably means no more than that if a public vessel were to commit some palpable act of hostility her immunity would be at an end and she would be liable to be treated as an enemy. As has already been pointed out, the "public" property of a foreign Sovereign or State, whatever its nature, is, by virtue of its public character alone, exempt from the local jurisdiction; but in the case of public vessels forming part of the armed forces of a State this exemption goes further, and extends to both vessel and crew and other persons on board, as constituting an instrument of State and a part of the national machinery. And the same principle has now been fully recognised by the English Courts. In the case of *The Constitution* [1879] (48 L. J. (N. S.) P. D. & A. 13) proceedings were taken in the Admiralty Division to obtain warrants of arrest against the vessel and the cargo on board, in order to recover compensation for salvage services rendered to her by the steam tug "Admiral," at a time when the "Constitution" was stranded on the English coast. At the hearing both the Crown and the American Legation were represented, and the Court was informed that the "Constitution" was a public vessel commissioned by the United States and employed on the public service. She was at the time engaged in carrying back to America certain goods belonging to American exhibitors at the Paris Exhibition; and the salvors contended that the cargo, being private property, was not at any rate entitled to any privilege. It was held, however, that a ship of war belonging to a nation with which Great Britain was at peace was exempt from the local jurisdiction of the British Courts; and further that no distinction could be drawn between proceedings against the ship and proceedings against the cargo, in a case where the latter was found on board a foreign vessel of war and under the charge of a foreign Government for public purposes. Prior to this decision some doubt appears to have existed as to whether salvage proceedings might not be instituted in the English Court of Admiralty against a public vessel (*l*). The same principle appears to be recognised by the municipal law and followed by the Courts of other States. "The sound and true exposition of the law on this point is that a public ship of war belonging to a State with which amicable relations exist is exempt from the jurisdiction of the State in whose territorial waters she may happen to be" (*m*).

(*l*) See *The Charkieh* (4 A. & E. 59). (*m*) Phillimore, i. 481.

(ii) PUBLIC VESSELS OTHER THAN SHIPS OF WAR.

THE "PARLEMENT BELGE."

[1880; L. R. 5 P. D. 197.]

Case.] IN this case proceedings were commenced in the Admiralty Division against the "Parlement Belge," for the purpose of recovering damages in respect of a collision which had occurred in Dover Harbour between that vessel and the steam tug "Daring." In the course of these proceedings, and no appearance having been entered on behalf of the vessel, it was sought to issue a warrant of arrest against the "Parlement Belge"; but to this a protest was entered on behalf of the Attorney-General, asserting that the Court had no jurisdiction to entertain the suit, on the ground that the vessel was the property of the King of the Belgians, and was therefore entitled to be treated as a public vessel of the State. It appeared that the "Parlement Belge" was a mail packet running between Ostend and Dover, and employed in a service which was the subject of a convention made in 1876 between Great Britain and Belgium; that she was the property of the King of the Belgians and carried the royal pennon; and that she was at the time in the possession and employment of the Government and under the charge of officers holding commissions in the Belgian navy; although in fact carrying merchandise and passengers, for hire, in addition to the mails. In the lower Court this protest was overruled; but on appeal this judgment was reversed and the vessel held exempt from the local jurisdiction.

Judgment.] Brett, L.J., in delivering the judgment of the Court of Appeal, after referring to the facts, observed that the first question was whether the Court had power to proceed against a ship which, though present in this country, was at once the property of a foreign Sovereign and in his possession and control —which was also a public vessel of the State in the sense of being used for purposes treated as public national services —but which, although commissioned, was not an armed ship of war, or employed as a part of the military force of the country. On this point the Court laid it down as a principle deducible

from the authorities that every State declined to exercise by means of any of its Courts territorial jurisdiction over the person of the Sovereign or ambassador of any other State, or over the public property of any State which was destined to its public use, including its public vessels, or over the property of any ambassador; even though such Sovereign, ambassador, or property might be within its territory. It was held, moreover, that in such cases the immunity so established could not be defeated by the adoption of proceedings *in rem*, directed merely against the property; for the reason that by such proceedings the owner of the property was nevertheless indirectly impleaded to answer to and affected by the judgment of the Court. The effect of such a proceeding against the property of a foreign Sovereign was, in fact, to call upon him either to sacrifice his property or his independence; and to place him in that position was virtually a breach of the principle upon which his immunity from jurisdiction was based.

The second question was whether such immunity had been lost by reason of the ship having been used for trading purposes. As to this, it must be maintained either that the ship had been so used as to have been employed substantially as a mere trading ship, and not substantially for national purposes; or else that a use of her in part for trading purposes took away the immunity, even though she remained in the possession of the sovereign authority by the hands of commissioned officers and was substantially in use for national purposes. As to the first of these contentions, the ship in the present case had been declared by the Sovereign of Belgium to be in his possession, and to be a public vessel of the State. It was difficult to see how any Court could inquire into the correctness of such a declaration without bringing the Sovereign under its jurisdiction. It has been held, moreover, in the case of the "Exchange" (*n*), under very trying circumstances, that if a ship were declared by the sovereign authority by the usual means to be a ship of war, that declaration could not be inquired into; and the question whether a public ship, not being a ship of war, was used for national purposes appeared to come within the same rule. But, even if such an

(*n*) *Supra*, p. 261.

inquiry could be instituted, it seemed to the Court in the present case that the ship had been mainly used for the purpose of carrying the mails and only subordinately for trading purposes, and hence that she did not fall within the first contention. As to the second, it had been frequently stated that an independent Sovereign could not be sued personally, even though he might have carried on a private trading venture; and the same rule applied to an ambassador; for the reason that in either case such a suit would be inconsistent with the independence and equality of the State which such Sovereign or ambassador represented. In the present case, however, it appeared to the Court that the ship had been used only subordinately and partially for trading; and that this did not take away her general immunity.

This case serves to show that, from the point of view of the English Courts, the fact of a vessel belonging to a foreign Sovereign having been used subordinately for trading purposes will not forfeit her right to treatment as a public vessel. In spite, however, of some expressions used in the judgment—which on the facts as found were not necessary to the decision—it would seem on principle that if such a vessel were used wholly as a trading vessel, and had passed out of the possession and control of the Sovereign, then this privilege would no longer avail; for the reason that the Sovereign in such a case must be deemed to have voluntarily abandoned for the time being her "public" character, whether as an instrument of State or as property. At the same time, the effect of this is somewhat qualified by the rule that, on the question of "public" character, the declaration of the foreign Sovereign will ordinarily be treated as conclusive (*o*). So, in the subsequent case of *The Jassy* (1906, P. 270) it was held that process by way of arrest, in an action *in rem* for damage, would not lie against a vessel belonging to a foreign sovereign State (Roumania) and destined to its public use; and that upon an application by its Government and the production of a certificate from the Foreign Office as to its public character all proceedings would be stayed. It was further held that the fact of the local agents of the ship having under a misapprehension, and in order to procure her release, entered an absolute appearance did not constitute a submission to the local jurisdiction. So, too, in *The Gagara* [1919] P. 95, the Court refused jurisdiction on the statement of the Attorney-General that the Government had recognised the National Esthonian Council as a *de facto* independent Government.

The law as laid down in *The Parlement Belge* was also followed in *The Porto Alexandre* [1920] P. 30, where it was held by the Court of Appeal, affirming Hill, J., that a sovereign State could not be impleaded

(*o*) But see p. 271, *infra*.

either by being served *in personam* or indirectly by proceedings against its property, and if that were the principle it mattered not how the property was being employed. In this case the vessel (formerly German-owned) was being employed in ordinary trading voyages, earning freights for the Portuguese Government, by which she had been requisitioned.

(iii) PERSONS ON BOARD PUBLIC VESSELS.

THE "SITKA."

[1855; Opinions of U.S. Attorneys-General, vii. 122.]

Case.] In 1856, during the Crimean War, the "Sitka," a Russian ship, was captured by a British man-of-war, and brought into San Francisco, with a prize crew on board. An application for a writ of *habeas corpus* was made to the Californian Courts on behalf of two prisoners on board for the purpose of trying the validity of their detention; and the writ having been issued, was thereupon served on board the "Sitka." This proceeding, however, was ignored by the commander of the "Sitka," who got under way and left the port with the prisoners on board.

Opinion.] The United States Government being in doubt as to whether a cause of complaint had not arisen against Great Britain, the opinion of Mr. Cushing, the Attorney-General of the United States, was taken on the question. In his opinion Mr. Cushing pointed out that judicial decisions had settled the point that, except where there had been a violation of its neutrality, as in the case of the "Santissima Trinidad," the Courts of a neutral State had no jurisdiction to decide on the validity of a capture made by a belligerent. He also pointed out that the Courts of the United States had adopted almost unequivocally the doctrine that a public ship of war of a foreign Sovereign at peace with the United States, coming into her ports and demeaning herself in a friendly manner, was exempt from the jurisdiction of the country and remained a part of the territory of her Sovereign. The ship in the present case, therefore, must be regarded as a part of the territory of the Sovereign into whose possession she had passed; and as this was threatened with invasion by the local Courts, it was not only lawful, but highly

discreet, in the captain to depart, and thus avoid unprofitable controversy.

This case is cited as illustrative of the rule that in the case of a public vessel not only is the vessel herself exempt from the local jurisdiction when within the Courts of another State, but that no process emanating from the local Courts can be served on board her, in relation either to her officers or the members of her crew or other persons on board. It is true that in the present case the vessel was only a prize, which is not strictly entitled to the privileges of a public vessel, and which, moreover, is in certain circumstances, as where it has been captured in violation of the local neutrality, admittedly subject to the local jurisdiction (*oo*). Nevertheless, even a prize, if permitted to enter foreign ports or harbours, will in other respects share the privileges of a public vessel, as being the public property and under the control of the captor State. And the opinion is given, as will be seen, on the basis of the "Sitka" constituting a part of the territory of the State to which she belonged, in the same way as if she had been a public vessel. Hence the principle enunciated may be taken to apply to public vessels generally. In certain earlier cases, indeed, both in 1794 and 1799, a different view appears to have been entertained by the legal advisers of the United States Government (*p*). But this was before the decision of the Supreme Court in the case of *The Exchange* v. *McFaddon* (*supra*), and also before the general usage on this subject had taken on its present shape. At any rate, the opinion given in the case of *The Sitka* appears to represent the modern and true view of the matter; although it needs to be taken subject to certain qualifications which attach in time of war, and which will be more fully considered hereafter (*q*).

GENERAL NOTES.—*What constitutes a "Public Vessel."*—A public vessel is one owned and commissioned by the Government of a Sovereign State; or even, it seems, by the Government of a semi-Sovereign State, so long as the latter is recognised externally as a separate international person (*r*). In the category of public vessels are included not only ships of war, but also unarmed Government vessels, store ships, and transports. The view adopted by the English Courts that a subordinate or partial use of a public vessel for trading purposes, so long as she remains under the control of the State to which she belongs and in charge of its officers, will not disentitle her to the privileges of a public vessel (*s*), would probably be followed by the Courts of other States. It is also necessary to bear in mind that the public property of one

(*oo*) *Infra*, vol. ii.

(*p*) See Wharton, Dig. i. 138; Opn. U.S. A.-G. i. 47, 87 *et seq.*; and for modern opinions seemingly based on these earlier conclusions, Kent (Abdy), 371; and Phillimore, i. 482.

(*q*) *Infra*, p. 274; and vol. ii. *sub nom.* Neutrality.

(*r*) See *The Charkieh* (L. R. 4 A. & E. at 77).

(*s*) *Supra*, p. 268.

State, whatever its character, is, when within the territorial limits of another State, regarded as exempt from local jurisdiction, irrespective of its constituting an instrumentality of the State (*t*).

Proof of Character.—The public character of a vessel is primarily evidenced by her flag and pendant; or, in cases of doubt, and as a matter of courtesy, by the word of honour of the commander. But the ultimate proof is to be found in the commission issued by the Government of the State to which she belongs (*u*); and *a fortiori* in the direct declaration or attestation of that Government itself (*x*). If, however, the question should not be one of privilege or exemption from the local jurisdiction, but one of international responsibility for the acts of such a vessel, then it seems that a denial by a State of the public character of a vessel whose conduct is in question will not always be conclusive, and that responsibility may be inferred from facts showing continued control for State purposes (*y*). At the same time, in cases where the question of the public character of a foreign vessel is raised before a municipal Court it is usual to accept a certificate from the political or executive department as conclusive, in the same way as on the question of the status of a foreign Sovereign (*z*).

The Legal Position of a Public Vessel whilst in Foreign Ports or Territorial Waters.—A public vessel whilst merely passing through the territorial waters of a foreign State in time of peace is altogether exempt from territorial jurisdiction. When stationary or hovering in such waters her position will be the same as when in a foreign port (*a*). Even when in a foreign port she is, for the most part, exempt from local control and from the local jurisdiction; this being, as was pointed out by Marshall, J., in the case of *The Exchange*, a condition implicitly annexed to her reception or admission. Nevertheless, she is subject to certain obligations binding in comity; any neglect on her part may afford ground for remonstrance, or for the expulsion of the vessel, or for a demand of satisfaction urged diplomatically, as occasion may require. In time of war, moreover, the public vessels of a belligerent are subject to certain exceptional limitations and restrictions, which are referred to below (*b*). The more particular applications of the general principle of exemption are as follows: A public vessel is not liable for local dues, such as harbour or light dues, or to inspection by customs officers (*c*). The vessel herself is not subject to the local law, or to legal process issuing out of the local Courts—at any rate beyond the point at which her claim to the public character is duly attested. Hence she cannot be seized for debt or damage (*d*); nor can salvage be enforced against her; and a similar exemption attaches to her boats and

(*t*) *Supra*, p. 92; see also *Briggs* v. *Light Boats* (11 Allen, 157; Scott, 225); Hall, 211.

(*u*) *The Santissima Trinidad* (7 Wheat. 283; Scott, at p. 702).

(*x*) *The Parlement Belge*.

(*y*) For illustrations of this, see Hall, 173.

(*z*) See *Mighell* v. *Johore* (*supra*, p. 94).

(*a*) *Supra*, p. 153.

(*b*) *Infra*, p. 263.

(*c*) Although Great Britain apparently still claims to exact an account of goods on board and to search if necessary; see Customs Consolidation Act, 1876, s. 52.

(*d*) *The Constitution* (1879), 4 P. D. 39.

tenders. The same privilege extends to her officers and the members of her crew whilst they remain on board. She may not strictly land armed forces without the consent of the territorial Power (*e*). But the members of her crew, if unarmed, are commonly allowed to visit the shore freely for all ordinary purposes, or to act as pickets in aid of the local police, or even to encamp on shore there during the docking of the ship. If, however, the members of her crew offend on shore, and are there arrested by the local authorities, they are strictly liable to detention and punishment, although in such a case notice should be given to the commander (*f*). If they offend on shore, but escape to the ship, then they cannot be forcibly seized, although their surrender or punishment may be asked for; and if, in the case of a grave offence, this were refused, the territorial Power might exclude the vessel from her ports At the same time, a public vessel is expected to show all due respect to the laws and government of the State in whose waters she is. She must not take advantage of her position to make local surveys of the coast or fortifications; sanitary and harbour regulations ought to be observed as a matter of comity; and, although not strictly subject to the local revenue laws, the vessel must not be made a medium for smuggling, or a centre of political intrigue. Any failure to comply with these obligations will, according to its degree of gravity, afford ground either for complaint, or for expulsion and exclusion, for or a demand of satisfaction from the State to which she belongs (*g*). If the vessel should cause damage, as by collision, the local Court may sit as a Court of Inquiry, and any claim so established may be urged diplomatically (*h*). In such cases, moreover, the local Court is sometimes requested by the Government to which the vessel belongs to arbitrate in the matter, and the award voluntarily complied with. Finally, in cases of exceptional gravity, involving some act of hostility or some act in subversion of the local authority, recourse might be had to force or reprisals (*i*).

The Question of "Asylum" on Public Vessels.—Although a public vessel is admittedly exempt from the territorial jurisdiction, it does not appear to be true, in principle, that persons taking refuge on board a public vessel are entitled to the same treatment as if they had taken refuge in the territory of the State to which the vessel belongs. Foreign territory, indeed, does carry a right of asylum, which can only be broken in certain cases and subject to the observance of certain recognised conditions. But a public vessel can scarcely be said to rank as foreign territory for this purpose; for the reason that she enjoys only that immunity from the local law and jurisdiction which is necessary to her due employment as an organ of the State and for

(*e*) Some States enforce the observance of this rule more rigidly than others; but permission is usually given in the case of naval or military funerals and for the purpose of firing salutes.

(*f*) Some writers, however, contend that they are not liable to arrest whilst engaged in the performance of official duties; see Oppenheim, i. 616; Hall, 208.

(*g*) Westlake, i. 257.

(*h*) In at least one case the British Admiralty has paid compensation for damage found by a local Court to have been caused by British ships of war in a foreign port; see Hall, 207.

(*i*) See Hall, 204; and on the subject generally, Hall, 196; Taylor, 302; and Westlake, i. 254.

national purposes; and this cannot well be said to include the protection of fugitives from the local law, or the enforcement with respect to them of her own law within the territory of another State. It is true that refugees, whether political offenders, or ordinary criminals, or fugitive slaves, cannot be forcibly seized; nor can the process of the local Courts be used in aid of their recovery. But if, as is submitted, there be no right to receive such persons, then their surrender may be required, irrespective of the existence of any extradition treaty, and without the observance of those conditions which usually attend the surrender of offenders who have taken refuge in foreign territory. And a refusal to surrender, in such a case, will, strictly, not only involve the State to which she belongs in the commission of an international delinquency, but will also expose the vessel herself to expulsion. At the same time the alleged right of asylum has the support of a considerable body of usage; although it would seem that this is not sufficiently uniform to form the basis of any international rule. So, with respect to political offenders, it is sometimes said that their reception on board a public vessel is justified by custom, so long as they are kept innoxious whilst on board (*k*). And, in the case of civil war or popular insurrection, where the local sovereignty is temporarily in abeyance, such a practice would, no doubt, have the sanction both of custom and humanity. Hence, under the instructions issued by the British Admiralty to officers in command of public vessels, it is stated that during political disturbances or popular tumults refuge may be afforded to persons flying from personal danger; and the same practice would probably be followed by other States. But the right claimed for public vessels appears to go beyond this. Thus, in 1849, Lord Palmerston, in an official communication to the Admiralty, expressed the opinion that "although the commander of a ship of war ought not to invite political refugees, yet he ought not to turn away or give up any who may reach his ship. . . . Such officer must, of course, take care that such refugees shall not carry on from on board his ship any political correspondence with their partisans on shore, and he ought to avail himself of the earliest opportunity to send them to some place of safety elsewhere" (*l*). But if this opinion were now acted upon openly by a foreign public vessel, whilst in the territorial waters of a powerful State, it is probable that such conduct would speedily lead to her expulsion. In fact, however, the right of giving shelter to political offenders on board public vessels would appear to be confined to the cases previously indicated, or to countries which are either inferior in civilisation or defective in their methods of government (*m*). With respect to persons charged with offences of a non-political character, it would seem, both on principle and in view of current usage, that such persons ought to be surrendered, except, perhaps, where there is reasonable ground for believing that the charge is merely colourable (*n*). With respect to

(*k*) Hall, 201; Westlake, i. 258.

(*l*) Report of Royal Commission on Fugitive Slaves, p. 155.

(*m*) This question would really seem to be governed by considerations similar to those applicable to the alleged right of asylum in legations; as to which see p. 319, *infra*.

(*n*) And then only within the limits previously indicated with respect to political refugees.

fugitive slaves, the matter has, since the abandonment of slavery by all civilised States (*o*), ceased to possess any great importance. The British practice on this subject was, and is still, regulated by the Fugitive Slave Circular of 1876; the general purport of which is that whilst the reception of slaves in the territorial waters of a State in which slavery still exists is a question of discretion on the part of the commander, in the exercise of which he is to be guided at once by considerations of humanity, comity, and regard for treaties, yet when once received, whether on the high seas or in territorial waters, no demand for surrender based solely on the ground of slavery is to be entertained. These instructions appear to be a compromise between law and humanity (*p*).

Limitations on Immunity in Time of War.—In time of war, however, the public vessels of a belligerent, whilst in the ports and harbours of a neutral State, are subject to a variety of restrictions. These, in so far as they affect the ordinary privileges and immunities of a public vessel, fall into two groups. (1) Some of them are designed to prevent any abuse of neutral hospitality by one belligerent and the incurring by the neutral Government of a possible liability towards the other. So, the entry, the stay, and even the departure, of belligerent public vessels, as well as the taking of coal and other supplies, are subject to regulation by the territorial Power; and the violation of these regulations may under some circumstances lead to the permanent detention or even the dismantlement of the vessel. Convention XIII. respecting the Rights and Duties of Neutral Powers in Maritime War of 1907, represents an attempt to codify certain widely accepted rules on this subject; and will be considered hereafter, in connection with the subject of neutrality. (2) In the second place, it is sometimes contended that the fact of a vessel having been fitted out in violation of neutrality will, notwithstanding the issue of a commission, justify both a denial to her of the ordinary immunities of a public vessel and a consequent exercise of jurisdiction over her. So, in the award of the Geneva Tribunal, 1872, it is declared that "the privilege of exterritoriality accorded to vessels of war has been admitted into the law of nations not as an absolute right, but solely as a proceeding founded on the principle of comity and mutual deference between different nations, and can never, therefore, be appealed to for the protection of acts done in violation of the law of nations"; and also that "the effects of a violation of neutrality by the construction . . . of a vessel are not done away with by any commission which . . . the belligerent benefited by the violation of neutrality may have afterwards granted to that vessel" (*q*); although this alleged exception is far from being universally admitted (*r*). Prizes captured in violation of neutral territory or neutral rights are also commonly recognised as being subject to the jurisdiction of the neutral Power.

The Position of Military Forces when in the Territory of a Foreign State.—Akin to the position of public vessels in the waters of a foreign

(*o*) Slavery was abolished in Turkey in 1883, in Cuba in 1886, and in Brazil in 1888; see p. 304, *infra*.

(*p*) Phillimore, i. 437; Stephen, Hist. of Crim. Law, ii. 55 *et seq.*; and *Forbes* v. *Cochrane* (2 B. & C. 448).

(*q*) *Infra*, vol. ii.; Taylor, 305, 665.

(*r*) *Hall*, 172, 666.

State is the position of the military forces of one State whilst in the territory of another State with which it is in amity. This may occur either on a grant of passage to the troops of a friendly State (*s*); or in the course of military co-operation as between allies in time of war; or in the case where a conquerer continues in occupation of what was previously hostile territory, as security for the observance of conditions of peace or the payment of an indemnity. In any such case, unless otherwise agreed, jurisdiction is understood to be reserved to the State to which such military forces belong; although in the case of offences committed outside the line of march or away from the main body the punishment of the offender may, and perhaps should, be left to the local authorities (*t*). But where the forces of one belligerent are received into neutral territory in time of war, the neutral Power is required to disarm and intern them until the conclusion of peace, and may exercise all consequent jurisdiction over them (*u*).

RIGHTS AND DUTIES OF PUBLIC ARMED VESSELS ON THE HIGH SEAS.

THE "MARIANNA FLORA."

[1826; 11 Wheaton, 1.]

Case.] ON the 5th of November, 1821, the United States armed schooner "Alligator," whilst on a cruise against pirates and slave-traders, came across the Portuguese ship "Marianna Flora," then on a voyage from Bahia to Lisbon. The fact of the "Marianna Flora" having shortened sail, and having a vane or flag on her mast somewhat below the head, together with her other manœuvres, induced Lieutenant Stockton, the commander of the "Alligator," to suppose that she was in distress or wished for information. He accordingly approached her, whereupon the "Marianna Flora" fired on the "Alligator." The firing was repeated, and mutual hostilities took place, which resulted in the surrender of the Portuguese vessel. The Portuguese officers stated that they took the "Alligator" to be a piratical cruiser. Ultimately the "Marianna Flora" was sent into Boston and charged with piratical aggression. Upon the hearing, the ship

(*s*) For an example of this, see p. 114, *supra*.
(*t*) Hall, 208.
(*u*) Hague Convention, V., Art. 11, 1907.

was restored by the District Court, and damages were awarded for the act of sending her in. On appeal to the Circuit Court the decree for damages was reversed, the ship being restored by consent. An appeal on the question of damages was then taken to the Supreme Court, which affirmed the decree of the Circuit Court.

Judgment.] Story, J., in delivering the judgment of the Court, held that the case was not one of piratical aggression on the part of the Portuguese ship. If it had been, it would have justified her capture, notwithstanding that she was a foreign vessel. It was true that a hostile attack, even though falling short of piracy, made by one vessel on another might assume the character of private unauthorised war, in which case it might be punished by all those penalties which the law of nations could properly administer. But even this ingredient was wanting in the present case, for the reason that the aggression was due to mistake, although a very imprudent mistake, on the part of the master. This being so, the original libellants had now become defendants to a claim for damages on the part of the "Marianna Flora"; this claim being based on the ground that the conduct of Lieutenant Stockton in approaching and seizing the vessel, and, in any case, in sending her in for adjudication, was unjustifiable. This rendered it necessary to ascertain what were the rights and duties of armed vessels navigating the ocean in time of peace. They had no right of visit and search, for that was a war right; and although under the United States laws both national ships and foreign ships offending within the jurisdiction might be pursued and seized on the ocean, yet this was not a right of visit and search, but an act done only on condition of proof of its being justifiable, and under pain of indemnity if it were not. The ocean was the common highway of all, appropriated to the use of all; and every ship sailed there with the unquestionable right of pursuing her own lawful business without interruption. But at the same time she was bound to pursue it without violating the rights of others. With respect to ships of war sailing, as in the present case, under the authority of their Government, to arrest pirates and other public offenders, there was no reason why they should not approach any vessels at sea for the purpose of ascer-

taining their true character. Such a right was indispensable for the proper exercise of their authority. On the other hand, no ship in time of peace was bound to lie by and await the approach of any other ship; she was entitled to pursue her voyage in her own way, and to use all necessary precautions to avoid any suspected sinister enterprise or hostile attack; she might consider her own safety, but she must take care not to violate the rights of others. She might use any precautions dictated by the prudence or the fears of her officers, either as to the delay or progress or course of her voyage; but she was not at liberty to inflict injuries upon other innocent parties simply because of conjectural dangers. After reviewing the facts of the case, the learned Judge came to the conclusion that the conduct of the commander of the "Alligator" in approaching and ultimately taking possession of the "Marianna Flora" was entirely justifiable. With regard to the question of damages, it was laid down that if damages were given it would be going a great way towards declaring that an exercise of honest discretion ought to draw after it the penalty of damages. Moreover, no decision had been cited in which the capture itself having been justifiable, the subsequent detention for adjudication had ever been punished by the award of damages.

It is especially the duty of public armed vessels to keep the police of the seas, and to put down pirates. For this purpose every such vessel has a right of approach, and, in cases of suspicion, a right to compel the suspected vessel to show her flag, together with a right of further investigation. But to warrant this the case must be one of reasonable suspicion; and any abuse of this right will be a good ground on which to found a claim for reparation and damages. At the same time, a public vessel cannot be rendered liable for the consequences of the exercise of an honest discretion.

General Notes.—*Public Armed Vessels on the High Seas.*—Both in time of peace and of war it is the duty of public armed vessels, whilst on the high seas, to keep the police of the seas, to put down pirates, and to observe the rules of comity. Every such vessel has a right of approach for the purpose of ascertaining the character of any other vessel. In time of war, moreover, the public vessels of each belligerent are invested with a right of visit and search over neutral private vessels; and with a consequent right of arrest and detention in cases

where there is reasonable ground for suspecting that a vessel has been guilty of any act which a belligerent is entitled to restrain. Even in time of peace the public armed vessels of one State possess a right of detention or arrest, as regards vessels belonging, or purporting to belong, to other States: (1) in cases of suspected piracy (*x*); (2) in cases where there is reasonable ground for believing that the vessel is engaged in some enterprise against the sovereignty or safety of the State to which the public vessel belongs (*y*); (3) in cases where a foreign vessel has been pursued on to the high seas after committing an offence in territorial waters (*z*); and (4) in cases where such a right is conceded by treaty between the Powers to which the vessels respectively belong (*a*). Public armed vessels are also commonly invested, by municipal law, with a right to supervise the use of their own national flag, and the conduct of vessels flying that flag.

Abuse of Flag.—A vessel using the flag of another State than that to which she belongs, without authority, may be seized and sent in for punishment by any public vessel of the State whose rights are thereby infringed. The use, moreover, even of a national flag to which a vessel is not entitled is usually prohibited by municipal law. So, under the British law the unauthorised use of the British flag by a foreign vessel, save for the purpose of avoiding capture by an enemy; or the use of the public flag by a private vessel, is forbidden, under severe penalties (*b*). In the case of *R.* v. *Benson* (3 Hagg. 96) proceedings were taken against the master of a merchantman for hoisting the King's colours in or near the Douro, with the result that the defendant was ordered to pay the statutory penalty; the Court pointing out that going into the Douro under colours usually hoisted by the King's ships, at the time in question, might have cast doubt on the neutrality and have affected the honour of Great Britain.

Maritime Ceremonials.—In addition to her right of approach, a public armed vessel is, both by the rules of comity and by maritime usage, entitled to the salute of private vessels on the high seas. The salute may take the form of firing a cannon (*salut du canon*), or of striking the flag (*salut du pavillon*), or of lowering the sails (*salut des voiles*) (*c*). It is also the custom for ships of war to salute other ships of war under the command of an officer of superior rank; for a single ship of whatever rank to salute a fleet or squadron; and for an auxiliary squadron to salute the principal fleet (*d*). So, under the British Admiralty Regulations, a British warship meeting on the sea a foreign warship, bearing the flag of a flag officer or the broad pendant of a commodore commanding a station or squadron, and superior in rank to the commander of the British ship, is required to salute the latter with the same number of guns to which a British officer of corresponding rank would be entitled, upon being assured of receiving a similar salute in return, gun for gun; and in a foreign port similar

(*x*) *Infra*, p. 298.
(*y*) *Supra*, p. 174.
(*z*) *Supra*, p. 175.
(*a*) *Supra*, p. 167; *infra*, p. 304.
(*b*) See the Merchant Shipping Act, 1894, ss. 69, 73; and as to the penalty for concealment of the British or assumption of the foreign character, s. 70.
(*c*) See Ortolan, ii. c. 15.
(*d*) See Phillimore, ii. 54.

complimentary salutes are also required to be given, if the regulations of the place admit of this being done. A British merchantman is, in strictness, under an obligation to salute a British warship, and a failure to observe this obligation may entail the punishment of the master by the Court of Admiralty. Thus, in 1829 the Court of Admiralty issued a warrant of arrest against the schooner "Native" for contempt in passing H.M.S. "Semiramis" without striking or lowering her royal, this being the uppermost sail which she was then carrying (*e*). British vessels, other than certain classes of fishing-boats, are also required to show their colours, on signal from a British warship, or on entering or leaving a foreign port, or, if over fifty tons burden, on entering or leaving a British port (*f*).

PRIVATE VESSELS ON THE HIGH SEAS.

THE CASE OF THE "COSTA RICA PACKET."

[British and Foreign State Papers, vol. 87 (1894-95), vol. 89 (1896-97); and Moore, International Arbitrations, v. 4948.]

Case.] The "Costa Rica Packet" was a British ship registered at the port of Sydney, New South Wales. In January, 1888, whilst engaged on a whaling voyage, the vessel being then to the north of the island of Boeroe, a waterlogged derelict prauw was sighted, and its contents, consisting of thirteen cases of spirits and a tin of kerosene, were taken on board, the prauw being left adrift. According to the British case, the master, J. B. Carpenter, who was a naturalised British subject, found it necessary, owing to the drunkenness of the crew, to order the spirits to be thrown overboard; but it was alleged by the Netherlands Government that the master, on his subsequent arrival at Batjan, sold a part for his own benefit. In November, 1891, the "Costa Rica Packet," whilst on another voyage under the same master, put into the port of Ternate, in the Netherlands Indies. On going ashore, Carpenter was arrested and imprisoned, on a charge of having maliciously appropriated in 1888 the contents of the prauw when at a distance of not more than three miles from Boeroe. Carpenter, who appears to have been

(*e*) See Phillimore, ii. 57.

(*f*) See the Merchant Shipping Act, 1894, s. 74.

treated with great indignity, was detained in prison from the 2nd to the 28th of November, when he was released, owing to the representations made on his behalf by the Governor of the Straits Settlements. In view of what had occurred, Great Britain subsequently made a claim against the Government of the Netherlands; claiming compensation for the losses incurred by the owners, master, and crew, in consequence of the voyage having been broken up, and also compensation for the imprisonment of the master and its attendant indignities (*g*).

The claim was based on the grounds that the acts, to which the local proceedings referred, had really taken place on the high seas and outside the territorial waters of the Netherlands Indies, and were thus manifestly beyond the jurisdiction of the Netherlands authorities; and also that there was no reasonable ground for the arrest. The Netherlands Government, on the other hand, maintained that the presumptions upon which the Court acted were sufficient to authorise the preliminary investigations for the purpose of which accused was arrested; and that the fact that the presumptions subsequently proved to be unfounded, or even that they were not sufficient to warrant the arrest, afforded no ground for any claim to indemnity. It was also contended that the Court had jurisdiction, because the goods were stolen on board a Netherlands Indies vessel (*h*), and because they were sold within its territory; that there was evidence that the prauw had been seized within three miles of the shore; and that even if the seizure took place outside three miles, it might still be considered as having occurred within territorial waters, since the three-mile limit applied only where established by a law or by an international convention. Great Britain, in reply, maintained that a derelict boat could not under any circumstances be brought within the principle that a vessel sailing under a national flag carried with her upon the high seas the municipal law of the flag. Ultimately, by a convention of the 16th of May, 1895, it was agreed to submit the matter in dispute to the determination of a sole arbitrator

(*g*) The amount claimed on behalf of the owners was £16,094 18s. 10d.; on behalf of the master, £7,500; and on behalf of the crew, £8,000.

(*h*) The prauw.

nominated by Russia; with the result that Professor de Martens, the eminent jurist, was appointed by the Czar to act on that behalf.

The Arbitration. In the award, which was pronounced on the 13th/25th of February, 1897, the principle was laid down that merchant vessels, whilst on the high seas, must be regarded as detached portions of the territory of the State whose flag they bear; and are, in consequence, amenable only to their respective national authorities for acts done on the high seas. It was found as a fact that the prauw when seized was undoubtedly beyond territorial waters; that the appropriation of the cargo was therefore cognisable only by English tribunals; that even the identity of the prauw had not been proved; that the Netherlands Indies authorities, by dropping the prosecution, had irrefutably established the impropriety of the detention; that the evidence proved lack of reasonable cause for the arrest; and that the master had been improperly treated during his incarceration. The arbitrator fixed the indemnity payable by the Netherlands at £8,550, with interest at 5 per cent. from the 2nd of November, 1891; and, in accordance with the authority vested in him by the convention, charged the Netherlands with the payment of the costs of the arbitration. The sum awarded, amounting in all to £11,082 7s. 6d., was paid by the Netherlands on the 3rd of March, 1897.

The decision in this case serves to illustrate the application of the principle that a private vessel on the high seas is, save in certain exceptional cases (*i*), subject only to the jurisdiction and control of the State to which she belongs. The same State is also entitled to protect the vessel and those on board against any interference on the part of other States which is not warranted by the law of nations; whilst it is answerable for any acts in the nature of international delinquencies committed by her (*k*). Incidentally, several other points are touched on in the decision. Thus, it was contended in the Netherlands case that a Government is not liable for the arrest of a foreign subject merely because it eventually turns out that he is innocent; and this is no doubt true, provided the proceedings are regular under the local law, and are based on reasonable grounds; but, as the arbitrator held, it will not warrant the arrest of a foreign subject in pursuance of a

(*i*) *Supra*, p. 136.

(*k*) Although as regards other wrongs the obligation of the State is limited to the affording of all reasonable means of redress through its Courts; see p. 287, *infra*.

jurisdiction which is altogether irregular and unrecognised by the law of nations. "Sovereignty," it was said, "cannot be exercised in derogation of that legal security which ought to be afforded in the territory of every civilised State." The contention that the derelict prauw, having once been Dutch property, still remained subject to the law of that flag, was probably founded on an opinion very commonly entertained, that derelict vessels and cargoes cannot be appropriated even on the high seas, and are still entitled to the protection of the flag (*l*). But it was held by the arbitrator, not only that the identity of the prauw had not been proved; but also that even if there had been a wrongful appropriation, this, having taken place on the high seas, was cognisable only by the English Courts, as the Courts of the State to which the vessel making the appropriation belonged. Finally, it will be noticed that the Netherlands Government denied, generally, that the territorial waters were necessarily confined within the limits of three miles from the shore. This contention was met by a finding in fact that the appropriation had actually been made outside Netherlands waters; and also by a ruling in law that the right of sovereignty over territorial waters was determined by the range of cannon-shot. The doctrine that a private vessel constitutes a part of the national territory, although accepted by some writers in its literal sense and as an independent source of right, would only appear to be true to the extent that such a vessel, when on the high seas, is subject to the national law.

REG. v. LESLEY.

[1860; Bell, C. C. 220; 29 L. J. M. C. 97.]

Case.] THE defendant, who was master of the British ship "Louisa Braginton," had entered into a compact with the Chilian Government to carry from Valparaiso to Liverpool some political prisoners who had been banished from Chile. These prisoners were brought on board the ship at Valparaiso in official custody; and were delivered into the charge of the defendant and carried by him to England against their consent. On arriving at Liverpool the prisoners preferred an indictment for assault and false imprisonment against the defendant. At the trial evidence was given of the terms of the contract made between the Chilian authorities and the defendant under which the prisoners had been carried, of their protest, and the constraint put on them. At the trial a verdict of guilty was found by direction of the judge,

(*l*) Oppenheim, i. 432; although it would seem in fact that if there is once an intention to abandon, the derelict becomes *res nullius*. By the Brussels Convention of 1910, the right to salvage is recognised. See the Maritime Conventions Act, 1 & 2 Geo. 5, c. 57.

the question of law being reserved for the opinion of the Court of King's Bench. On a case stated, it was held by that Court that the defendant was liable in respect of what had been done outside Chilian waters.

Judgment.] In delivering judgment, Erle, C.J., after stating the facts, asked, first, whether a conviction could be sustained for what had been done in Chilian waters. This question was answered in the negative. It was to be assumed that in Chile the act of the Government towards its subjects was lawful; and although an English ship in some respects remained subject to English law in territorial waters of a foreign State, yet in other respects she was subject to the laws of that State, more especially as to acts done to the subjects thereof. It followed, therefore, that within Chilian waters the defendant could justify what he did there as agent for the Government and under its authority. Nor could such acts done by the authority of the State in whose territory they occurred be made the subject of proceedings in England: *Dobree* v. *Napier* (2 Bing. N. C. 781). In the second place, it was asked whether the conviction could be sustained by reason of what had been done outside Chilian waters. This question was answered in the affirmative. It was clear that an English ship on the high seas, out of any foreign territory, was subject to the laws of England; and persons, whether foreign or English, on board such ship were as much amenable to English law as they would be on English soil. In *Reg.* v. *Sattler* (Dears. & Bell, C. C. 525) this principle had been acted on in such a way as to make the prisoner, a foreigner, responsible for murder on board an English ship at sea. The same principle was also laid down by foreign writers on international law, among whom it was enough to cite Ortolan, "Sur la Diplomatie de la Mer" (liv. ii. c. 13). And a similar liability also existed under the Merchant Shipping Act of 1854. Such being the law, the detention of the prosecutors by the defendant ceased to be justifiable after he had passed the line of Chilian jurisdiction, and after that became a wrong which amounted in law to a false imprisonment. For these reasons the conviction was affirmed. Incidentally the learned judge observed that transportation to England might be lawful by the law of Chile, and in that case a Chilian ship might law-

fully transport Chilian subjects; but that for an English ship the laws of Chile out of that State were powerless, and the lawfulness of the acts could be tried only by English law. In the subsequent case of *A.-G. for Canada* v. *Cain* [1906] (A. C. 652), it was held, in effect, by the Privy Council, that the deportation of a person, under the local Alien Labour Act, 1897, was legalised in its consequences, even on the high seas; but this was on the ground that such an extra-territorial effect has been impliedly conferred by the British North America Act, 1867. See also *Robtelmes* v. *Brenan* (4 C. L. R. 395).

Private vessels on the high seas are regarded, although only for certain purposes, as a part of the country to which they belong. Hence, both in English law and in other systems, the law of the country to which the vessel belongs, and under the flag of which she sails is deemed to apply both to the vessel herself and to those on board; and this whether the latter are subjects of the State of the flag or not. With respect to crimes committed on board British vessels, the nature and limits of the original jurisdiction of the Admiralty, and its regulation by statute and gradual transfer to the ordinary Courts, have already been described (*m*). In addition to other statutes (*n*), the Merchant Shipping Act, 1894, now confers on British Courts a jurisdiction over offences committed not only on British ships on the high seas, whether by British subjects or others, but also over offences committed in any place, either ashore or afloat, outside the British dominions by any master, seaman, or apprentice, who at the time or within three months previously was employed in any British ship (*o*). But British Courts will not take cognisance of an offence committed outside British territory, by a foreigner on board a foreign vessel, although by 9 Geo. 4, c. 31, if the offence be committed by a British subject and the person injured dies in England, the British Courts have jurisdiction, as if the offence had been committed in the place where he dies (*p*); nor will they take cognisance of an offence committed by a foreigner on a ship that had been unlawfully seized by the British and placed in charge of British officers (*q*). And in certain States of the United States, by statute, an offence by whomsoever committed on the high seas whereby death ensues in any county may be prosecuted in such county (*r*). And the law of the flag is equally applicable to civil incidents and transactions that

(*m*) *Supra*, pp. 136, 224.

(*n*) See 12 & 13 Vict. c. 96; and 24 & 25 Vict. c. 100, ss. 9, 57.

(*o*) See ss. 686 and 687. As to the difficulties incident to s. 686, see Piggott, Nationality, ii. 142, 145.

(*p*) *Reg.* v. *Lewis* (7 Cox C. C. 277).

(*q*) *Reg.* v. *Serva* (1 Den. C. C. 104).

(*r*) *Commonwealth* v. *Macloose* (101 Mass. 1); *Tyler* v. *The People* (8 Mich. 826). See also *In re Award of Wellington Cooks and Stewards Union* (26 N.Z. L. R. 394).

may occur on board; such as births, deaths, marriages, and civil wrongs, as well as wills, conveyances, and contracts (*s*). Where, as in the case of the British Empire, the State of the flag comprises several countries, governed by different laws, then it would seem that the law of the country where the vessel is registered should apply, except in so far as the matter may be controlled by imperial or federal law (*t*). And very similar principles appear to obtain under the law of the United States. So, with respect to criminal jurisdiction, in the case of the *Atalanta*, an American merchant vessel, whilst proceeding from Marseilles to New York, had been compelled, owing to acts of insubordination and violence on the part of the crew, to return to Marseilles. There a number of the crew were arrested, but six were returned to the vessel to be taken to the United States for trial. The latter were subsequently rearrested by the local authorities and detained in prison, together with seven others, notwithstanding the protests of the United States consul, who desired to remit them to the United States for trial. On the matter being referred to the United States Attorney-General for his opinion, he expressed the view that the fact of the crew having committed crimes on board the vessel outside the local jurisdiction did not give the local authorities any right to intervene; the doctrine of the public law on this point was well stated by Riquelme, to the effect that crimes committed on the high seas were to be regarded as having been committed in the territory of the State to which the ship belonged; and if the ship arrived in port, the jurisdictional right of the territory to which the ship belonged did not on that account cease (*u*). The same rule would also seem to apply to matters of civil jurisdiction (*x*).

GENERAL NOTES.—*Private Vessels belonging* (*y*) *to a State.*—These are vessels which, although owned by private persons, are yet, by virtue of their title to the national character and their lawful use of the maritime flag of some State, deemed to belong to that State. Such vessels, even though outside the national territory, are entitled to the protection of their State, and are also subject to its authority and jurisdiction. Every private vessel is expected to fly some maritime flag. Hence, if the owner is a citizen or subject of a State which does not possess a maritime flag, such as Switzerland, it will be incumbent on him to get permission to use the flag of some other State. Nor may any vessel, except in time of war, and for the purpose of evading capture, fly the flag of a State to which she is not entitled. This flag in the case of merchant vessels is of course the mercantile flag; but private yachts

(*s*) Save in so far as, in cases of contract, it may be excluded by a contrary intention. See *Lloyd* v. *Guibert* (L. R. 1 Q. B. 115); and *Bree* v. *Marescaux* (L. R. 7 Q. B. D. 434), where an action for slander uttered on board a British merchant ship at sea was held to be maintainable.

(*t*) See Dicey, Conflict of Laws, 2nd ed. pp. 575 and 620, note 4; *Crapo* v. *Kelly* (16 Wall. 610; and J. S. C. L. No. 20, p. 202.

(*u*) Opn. of U.S. A.-G. viii. 73.

(*x*) See *Wilson* v. *McNamee* (120 U.S. 572); *Crapo* v. *Kelly* (16 Wall. 610); and cases referred to in Scott, p. 331 *et seq.*

(*y*) See p. 108, *supra.*

are often allowed to carry the special flag of the squadron to which they belong, and are in other respects accorded exceptional treatment. Each State determines for itself the conditions under which it will recognise vessels as entitled to its national character and to carry its mercantile flag. Some States extend this right, subject to certain conditions, to vessels owned by foreigners; others require a vessel to be at least partly owned by subjects or citizens; others require the vessel to be exclusively owned by subjects or citizens; whilst others, again, require that the vessel shall have been constructed within the territory and that she shall be manned in whole or part by citizens or subjects (*z*). The municipal laws of nearly every State also provide for the keeping of an official register, in which the names of all national vessels, and other particulars necessary for their identification, are enrolled.

British Vessels.—By British law no ship is entitled to registration as a British vessel unless she belongs either to natural-born subjects, or to persons naturalised in British dominions or made denizens by proper authority, or to corporate bodies established under the laws of, and having their principal place of business in, the United Kingdom or some British possession. Every British ship is required to be registered; and full provision is also made with respect to the registration of title to, and the transfer of interests in, British vessels. As has already been pointed out, the unauthorised use of the British flag by a foreign vessel, and unauthorised use of the foreign flag by a British vessel, save in certain eventualities, are both prohibited under pain of forfeiture (*a*).

Proof of National Character.—In time of peace the proof of the national character is found primarily in the flag. This, however, is not conclusive; and in cases of doubt regard may be had to the official certificate of registration which a private vessel is required to carry, and which usually specifies the owner, the name of the ship, and other particulars necessary for verifying her nationality and identity. This should, if authentic, be treated as conclusive (*b*). But if its authenticity is doubtful, then regard may be had to other ship's papers, such as the passport or sea-letter, the muster-roll of the crew, the log book, the charterparty, the bills of lading, and the manifest of cargo (*c*). By the municipal regulations of most States, moreover, a private vessel is required to have its name and place of registry inscribed on the hull of the ship. In time of war the liability of a vessel depends on her possessing an enemy character, a question which is governed by special considerations which will be considered hereafter; and in such cases neither the flag nor proof of registration will avail, if it can be shown otherwise that the vessel is really affected with a hostile character (*d*).

The Legal Position of Private Vessels on the High Seas.—A private vessel whilst on the high seas is subject only to the sovereignty of the State to which she belongs, save in cases of piracy, and in certain exceptional cases, the nature of which, whether in time of war or peace,

(*z*) See Oppenheim, i. 422.

(*a*) *Supra*, p. 278; and the Merchant Shipping Act, 1894, Part I., and especially ss. 68 *et seq.*

(*b*) But see *The Chartered Mercantile Bank of India* v. *The Netherlands Steam Navigation Co.* (10 Q. B. D. at p. 535).

(*c*) Hall, 799.

(*d*) *Infra*, vol. ii., "Enemy Character in Time of War"; *The Vigilantia* (1 C. Rob. 1); and *The Benito Estenger* (176 U. S. 568).

has already been indicated (*e*). Outside these cases she is exempt from interference, and subject only to the jurisdiction of her own State. This comprises: (1) The exercise of an administrative jurisdiction in respect of all matters occurring on board, whether affecting subjects or foreigners. (2) With respect to crimes, all authorities, as we have seen, combine in declaring such offences to be subject to the jurisdiction of the State to which the vessel belongs. Nor, if she subsequently enters a foreign port, can, the local Power forcibly intervene, even though its own subjects may be involved; although it may exercise jurisdiction by consent, or subordinately to the jurisdiction of the State to which the vessel belongs, if that State has not already acted, and if such proceedings are warranted by its own municipal law (*f*). (3) In civil cases, also, the State to which the vessel belongs has complete jurisdiction over its subjects on board, and the same jurisdiction over foreigners as it would have if they were within its territory, subject to any exemption that may exist by municipal law. (4) The same State is also entitled to exercise a protective jurisdiction over its national vessels on the high seas, except in cases where such a vessel has been guilty of some act of hostility, or some act which a belligerent is entitled to restrain, or, possibly, unless she has escaped to the high seas after violating the laws of another State within its waters (*g*). On the other hand, a State is responsible for the acts of its national vessels on the high seas so far as relates to wrongs constituting an international delinquency; whilst, as regards other wrongs, it is bound to afford proper redress through the medium of its Courts. But this does not apply to acts which are mere violations of belligerent rights, the vindication of which is left to the belligerent; or to acts of piracy, which are subject to the jurisdiction of any State (*h*). An exception to this exclusive jurisdiction of the State of the flag, however, is found in the fact that, by common maritime usage, a vessel coming into collision with another vessel on the high seas and subsequently putting into a foreign port is liable to be proceeded against in the local Courts, even though both ships are foreign and the matter is one in which only foreigners are concerned; and such Courts may, if they deem it expedient, exercise jurisdiction in the matter, for the reason that such cases are governed by the general maritime law. A similar exceptional jurisdiction may also be exercised in cases of salvage (*i*). Now, by the Brussels Conventions, 1910, uniform rules relating to collisions and salvage have been adopted. Mail-boats when on the high seas are not entitled to exceptional treatment, save by special convention. By the Hague Convention XI. of 1907, such vessels are, in time of war, only to be searched when absolutely necessary, and then with all possible consideration and expedition, whilst all postal correspondence is declared to be inviolable.

(*e*) *Supra*, p. 136.

(*f*) As to *Anderson's Case*, in which a question of this nature arose between Great Britain and the United States, see Hall, 265 *n*; and Wharton, Digest, i. 123.

(*g*) *Supra*, p. 175.

(*h*) On the subject generally, see Hall, 263.

(*i*) *The Johann Friederich* (1 W. Rob. 35); *The Leon* (L. R. 6 P. D. 148); *The Two Friends* (1 C. Rob. 271); *The Belgenland* (114 U. S. 355; Scott, p. 338); *The Reliance* (Abbott, Adm. R. 317; Scott, p. 230).

The Doctrine of the Territoriality of Vessels.—In the case of the *Costa Rica Packet* the arbitrator based his decision on the ground, amongst others, that a merchant vessel, whilst on the high seas, constitutes a detached portion of the territory of the State whose flag she bears. A similar position is taken up in many of the English and American decisions (*k*). As used in these cases, the doctrine commonly means no more than that the State to which the vessel belongs has a jurisdiction over the vessel and those on board similar to that which it would possess over them if they were within the national territory. It is, in fact, used only as a metaphor, and without any implication that a national vessel is to be regarded as enjoying the same integrity as the national territory. But by many publicists, as well as by many European Governments, and even by the United States of America (*l*), the doctrine that a vessel, whether public or private, is a floating part or a prolongation of the State territory appears to be put forward, not as a metaphor, but as a principle which is in itself a source of legal right (*m*). In this character it has always been strongly opposed by Great Britain. The doctrine can scarcely be said to have the sanction of a uniform, or even a greatly preponderant, body of usage; whilst, looked at from the point of view of principle, it appears to be altogether unsound, whether as applied to private or to public vessels. (1) As applied to private vessels, it appears to be quite unnecessary as a foundation or explanation of the jurisdiction conceded to the State of the flag. This really has its origin in the necessity of guarding against what would otherwise be a condition of lawlessness on the high seas, and also in the convenience of conceding jurisdiction to that State which is best able to enforce it. The analogy upon which the doctrine rests is also fallacious, for the reason that if such a vessel were once a part of the national territory, then it would always remain so; whereas in practice a private vessel on entering a foreign port is universally conceded to be subject to the local jurisdiction, although to a degree which varies somewhat according to the practice of different States. It is also misleading because by accepted usage a private vessel, even whilst on the high seas, is subject at certain points to an external interference and control, which would certainly not be tolerated as regards the territory of the State (*n*). (2) As applied to public vessels, the doctrine of territoriality is equally needless, for the reason that the privileges of a public vessel really rest on a foundation of mutual comity and convenience, their limits being ascertained by custom; whilst it is in some measure also

(*k*) *Reg.* v. *Anderson* (L. R. 1 C. C. R. 161); and *Wilson* v. *McNamee* (102 U. S. 572; Scott, at p. 330).

(*l*) Hall, 204 and 261 *n*.

(*m*) As to the history of this theory, see Hall, 258.

(*n*) The reasons given by Lindley, J., in *Reg.* v. *Keyn* (2 Ex. D., at p. 93) against the territoriality of merchant vessels are, shortly, that such a vessel on entering an English port is admittedly subject to English law; that she is subject to revenue and navigation law within territorial waters; that she is in time of war, if belligerent, not subject to invasion or capture, if within neutral waters; that she is in time of war, if neutral, liable to visit and capture for acts in derogation of belligerent rights; and that prior to 1856, and apart from conventions, a neutral vessel did not protect enemy goods.

inconsistent with facts, although less so perhaps than in the case of private vessels (*o*).

PRIVATE VESSELS IN FOREIGN PORTS AND TERRITORIAL WATERS.

WILDENHUS' CASE.

[1886; 120 U. S. 1.]

Case.] In this case it appeared that Wildenhus, a Belgian subject, and one of the crew of the Belgian ship "Noordland," had, during an affray which took place on board that vessel, whilst in dock in the port of Jersey City, in the State of New Jersey (U.S.A.), stabbed and killed another member of the crew. It also appeared that by a convention entered into in 1880 between the United States and Belgium it was provided, in effect, that the Belgian consul should have cognisance of all differences occurring on board Belgian vessels when in the ports of the United States; and that the local authorities should not interfere "except when a disorder arose of such a nature as to disturb the tranquillity or public order on shore or in the port." Wildenhus having been arrested by the local authorities, the Belgian consul applied to the Circuit Court to discharge the prisoner on a writ of *habeas corpus*. On behalf of the application it was contended that both by virtue of the general rules of international law, and more especially by virtue of the treaty of 1880, Belgium alone had jurisdiction in the matter. The Circuit Court refused to discharge the prisoner; whereupon an appeal was taken to the Supreme Court. In the result, it was held by the Supreme Court that both by the general rules of international law and under the provisions of the treaty the United States Courts had jurisdiction to try the offence; and that the exception set up by the treaty did not apply to a case of felonious homicide committed on board a Belgian vessel within a port of the United States.

Judgment.] Waite, C.J., in delivering the judgment of the Court, observed that it was a part of the law of civilised nations

(*o*) *Supra*, pp. 272-3. On the subject generally, see Hall, 261.

that when a merchant vessel of one country entered the ports of another for the purpose of trade it became subject to the local law, unless it had been otherwise agreed by treaty. For, as had been pointed out by Marshall, C.J., in *The Exchange* (7 Cranch, 116, 144), it would be a source of manifest inconvenience and danger if such merchantmen did not owe a temporary allegiance to the law and were not amenable to the local jurisdiction in return for the protection to which they were for the time being entitled. The English judges, moreover, had uniformly recognised the right of the Courts of the country in which the port was situated to punish crimes, even when committed by one foreigner against another on a foreign merchant ship: *Reg.* v. *Cunningham* (Bell, C. C. 72); *Reg.* v. *Anderson* (11 Cox, C. C. 198); *Reg.* v. *Keyn* (2 Ex. D. 6). Experience, however, had shown that it was convenient for the local Government to abstain from interfering with the internal discipline of the ship and the relations of officers and crew amongst themselves. And so, in comity, it had come to be generally recognised amongst civilised nations that "all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and which did not involve the peace or dignity of the country or the tranquillity of the port, should be left to be dealt with by the authorities of the nation to which the vessel belonged," as its laws or the interests of its commerce might require. But if crimes were committed on board of such a character as to disturb the peace and tranquillity of the country, then neither by comity nor by usage had the offender any exemption from the local jurisdiction if the local tribunals thought fit to exert it.

Such being the general public law on this subject, various treaties and conventions had been entered into for the purpose of defining more exactly the rights and duties of the parties with respect to this matter. Amongst others, such a treaty had been entered into between the United States and Belgium; and now constituted a part of the law of the land. If it could be shown to confer on the consul an exclusive jurisdiction over the offence alleged to have been committed, then there was no reason why he should not enforce his rights under the treaty by writ of *habeas corpus*. But the exclusion of the local jurisdiction was not to

apply when a disorder arose on board of such a nature as to disturb the tranquillity or public order on shore or in the port. The question, therefore, was whether what had been done on board was of a nature to disturb the public peace or repose of those who looked to the State for their protection. If it was of such a character as to affect those on shore or in the port when it became known, then the fact that it was witnessed only by those on board was of no moment. But if the crime was of such gravity as to arouse the public interest when it became known, and especially if it was one which any civilised nation felt bound to visit with severe punishment if committed within its jurisdiction, then it constituted a disorder the nature of which affected the community at large and warranted the interference of the local Government. The principle which governed the matter was this: Disorders which disturbed only the peace of the ship or those on board were to be dealt with by the Sovereign of the country to which the ship belonged; but those which disturbed the public peace might be suppressed, and, if need be, punished, by the proper authorities of the local jurisdiction. It might not always be easy to decide to which of these categories an offence belonged. Much would depend on the special circumstances of each case. But all would concede that felonious homicide was a subject for the local jurisdiction; and that if the local authorities proceeded to deal with the case in a regular way, then the consul of the country to which ship belonged had no right to interfere.

The judgment in this case contains an admirable statement of the course and present position of international usage with respect to the exercise of jurisdiction over private vessels when in foreign ports. The municipal law of different States, on this subject, varies somewhat. For international purposes, however, it would seem that the primary rule, and that which best accords with the fundamental principle of territorial sovereignty, is that such vessels are at all points subject to the local law and local jurisdiction. But, as a matter of comity and convenience, it is usual for the territorial Power to refrain from interference in matters that affect merely the internal order and discipline of the ship; which are therefore left to the regulation of the law of the flag, save in cases where help is expressly sought. By conventions made between partcular States, moreover, this exemption from the local jurisdiction is often carried further; and a limited jurisdiction is conferred on the consul of the State to which the vessel belongs, except in cases where the public order or the peace of the port are

disturbed, or strangers are affected. The judgment in *Wildenhus' Case* decides that such an exception must not be taken in a purely material sense, but must be deemed to include offences which, even though committed wholly on board and primarily affecting only members of the crew, are yet of so grave a character as to shock the moral sense of the community and to impose on the territorial Power a duty to take steps for their punishment.

GENERAL NOTES.—*Private Vessels in Foreign Ports and Territorial Waters.*—Although there is some difference both of opinion and of practice as to the precise position occupied by private vessels whilst in foreign ports with respect to jurisdiction (*p*), yet on certain points both opinion and practice appear to concur. On the one hand, such vessels are undoubtedly subject to local dues; they are subject to all local revenue, harbour, and quarantine regulations; and they are amenable to the local law and the process of the local Courts in respect of all matters relating to the title to the vessel, liability for debt, damage, salvage, or the infringement of local regulations (*q*). Members of the crew are also liable for offences committed on shore, or even on board if the subjects or interests of the territorial Power are affected; and process against them may be served, and arrests effected, on board, to the same extent as on vessels belonging to the territorial Power. Nor is there any right of asylum, either as regards political offenders or other fugitives from justice (*r*). On the other hand, it is, as we shall see, not usual for the local authorities to intervene in minor matters relating to the internal discipline and order of the ship; the regulation of these matters being left to the ship's officers, subject to the supervision of the consul, and in accordance with the law of the country to which the ship belongs. The law of the flag also continues to govern civil rights and obligations arising out of matters occurring on board, either as between persons on board or in relation to the ship, except in so far as, in cases of contract, some other law may be contemplated by the parties (*s*).

Practice of States with respect to Jurisdiction.—It it mainly with respect to the exercise of criminal and police jurisdiction that the practice of States differs. (1) Some States follow primarily the rule that both the vessel and those on board are subject to the law of the port. So Great Britain, with respect to foreign vessels in British ports, assumes the territorial law to be applicable; but does not ordinarily interfere in matters of internal discipline and administration unless help is asked (*t*). With respect to British ships in foreign ports,

(*p*) Hall, 211; Oppenheim, i. 339; Charteris, British Year Book of International Law, 1920-21, 45.

(*q*) But as to mail ships, see p. 294, *infra*.

(*r*) As to the right of arrest on board foreign merchant vessels, see Scott, 273 *n*; and Taylor, 314.

(*s*) Hall, Foreign Jurisdiction, 80; and as to contracts, *Lloyd* v. *Guibert* (L. R. 1 Q. B., at p. 128).

(*t*) *Reg.* v. *Keyn* (L. R. 2 Ex. D., at pp. 82, 83, 93, 202). But in any case where an appeal is made to the Courts the local law must be applied; see Piggott, Nationality, ii. 21. The present tendency, moreover, is to apply to foreign vessels all such local regulations as may be essential to safety; see the Merchant Shipping Act, 1906.

Great Britain recognises the primary claim of the territorial law; but asserts a concurrent right of jurisdiction over offences committed on board, whether by British subjects or other persons (*u*); and British consuls are empowered by statute to take the necessary steps for giving effect to this jurisdiction (*x*). The practice of the United States appears to be similar, except where otherwise provided by treaty or convention (*y*). (2) Other States, by their municipal law, and apart from convention, disclaim jurisdiction not only in matters of internal discipline, but also over crimes and lesser offences committed by the crew against each other; reserving, however, a right to intervene in cases where help is asked or the peace of the port is disturbed, or strangers are affected. Such States also claim a like jurisdiction over their own vessels whilst in foreign ports, in so far as this is compatible with the territorial law. The French practice, although not always consistent, appears in the main to coincide with this view (*z*). (3) Finally, as between some States it has been sought to obviate the inconvenience which might otherwise arise from a conflict of jurisdiction, by means of consular conventions. The general effect of these, as between the parties, is to bestow on the consul of the State to which the vessel belongs an exclusive control over all matters relating to the internal order of the vessel, together with a limited right of jurisdiction both in civil and criminal cases, and a right to revoke the assistance of the local authorities in its exercise; but to reserve the jurisdiction of the territorial Power in cases where the public order or the peace of the port or strangers are affected (*a*). But although such a waiver of the local jurisdiction is in itself reasonable and convenient, it cannot, so far, be regarded as obligatory apart from convention (*b*). Nor is it always easy to determine the precise scope of these exceptions to the territorial jurisdiction, even when established by convention. Hence, until the question of jurisdiction is settled by general international agreement, it would seem that, in all cases of doubt or conflict, the only safe and true rule is that the law of the flag must be deemed to operate in subordination of the law of the port (*c*).

Private Vessels passing through Foreign Territorial Waters.—Private vessels whilst passing through foreign territorial waters are theoretically in the same legal position; but in practice the territorial Power does not exercise its jurisdictional rights except in cases where its revenue,

(*u*) And this applies equally where the vessel is lying in foreign territorial waters other than ports; see *Reg.* v. *Carr* (10 Q. B. D. 76); *Reg.* v. *Anderson* (L. R. 1 C. C. R. 161); 24 & 25 Vict. c. 94, s. 7; c. 96, s. 115; c. 97, s. 72; the Merchant Shipping Act, 1894, ss. 686, 687; and 5 Edw. 7, c. 10, s. 1.

(*x*) See the Merchant Shipping Act, 1894, s. 689, although the exercise in foreign countries of some of the powers conferred, as well as the exercise of the jurisdiction conferred by ss. 480-486 on Naval Courts, would appear to be of questionable validity; Piggott, Nationality, ii. 30 and 31.

(*y*) See Wharton, Dig. i. 131; Taylor, 311 *et seq.*; and *In re Ross* (140 U. S. 453; Scott, 238).

(*z*) See Ortolan, Diplomatie de la Mer. i. 271, and Annexe J. p. 445; Hall, 212; Taylor, 312.

(*a*) See p. 290, *supra*. In this way the jurisdiction of the consul, which is otherwise only voluntary, is greatly enlarged.

(*b*) Hall, 214.

(*c*) Piggott, Nationality, ii. 17, 21.

fishery, or quarantine laws are infringed, or where the act of the vessel or those on board involves some injury to persons or property outside the vessel herself (*d*).

Mail Ships.—As between particular countries, moreover, certain exemptions from the local jurisdiction, varying in extent, are sometimes conceded to mail ships (*e*). So, in the United Kingdom the Mail Ships Act, 1891, enables certain privileges to be granted by convention to ships engaged in the postal service; and an "exempted mail ship" (*f*) may be freed from liability to arrest or detention, whilst the arrest even of persons on board can only be effected subject to the observance of certain conditions (*g*). And a convention on these terms had in fact been entered into between Great Britain and France in 1890 (*h*).

Vessels putting into a Foreign Port under Constraint.—It is sometimes asserted that private vessels putting into a foreign port in consequence of duress or under stress of weather are by that fact alone exempted from the local law and local jurisdiction. Such a contention was put forward by the United States Government in the case of the *Creole*. The latter was an American vessel, carrying a cargo of slaves, and bound for New Orleans. In the course of the voyage the slaves rose in revolt, murdered a passenger, and wounded the captain and several of the crew, and then forced the latter to put into the British port of Nassau. The British authorities, whilst imprisoning those concerned in the murder, refused to interfere with the freedom of the others, on the ground that the moment they came into British territory they became free. On appeal by the owners to their Government, the Attorney-General of the United States gave an opinion to the effect that "if a vessel were driven by stress of weather, or forced by *vis major*, or, in short, compelled by any overruling necessity, to take refuge in the ports of another nation, she was not to be considered as subject to the municipal law of the latter, so far as related to any penalty, prohibition, tax, or incapacity that would otherwise be incurred by entering such port, provided she did nothing to violate the municipal law during her stay"; and this principle, it was contended, was not only a principle of the law of nations, but had also been recognised by English law (*i*). In the result the matter was submitted to arbitration, and an award given against the British Government (*k*). In the case of the *Industria* the British law officers also expressed the view that a foreign vessel carrying slaves which had put into a British port in distress was exempt from seizure by the local authorities; even though she might

(*d*) See Hall, 214; and as to the British practice under the Territorial Waters Jurisdiction Act, 1878, ss. 2 and 3, and p. 141, *supra*.

(*e*) For an example of the concession of the full privilege of public vessels to mail ships by the local municipal law, see Piggott, Nationality, ii. 15 *n*.

(*f*) This being a ship subsidised for the execution of the postal service by a foreign State, which has given security to meet local claims.

(*g*) The Act may also be applied to British colonies; see 54 & 55 Vict. c. 31, ss. 4 and 5.

(*h*) The Act has a retrospective operation; see Piggott, Nationality, ii. 16; Ferguson, i. 448.

(*i*) The reference being to certain provisions of the Navigation Acts previously in force; see Opns. of U.S. A.-G. iv. 98.

(*k*) Parl. Papers, 1843, vol. lxi.; and for a criticism of the award, Scott, pp. 252, 255 *n*.

have been seized by a British cruiser on the sea, under the treaty with Spain (*l*). But despite these opinions, and notwithstanding that this principle is frequently cited with approval, it would seem that such an immunity is not well founded, or in any sense obligatory; and that whilst putting into port under constraint might be a good ground in comity for excusing such infringements of local regulations as were due to the exigencies of her position (*m*), it would certainly not carry any legal right to exemption from the local law or local jurisdiction. Nor would such an excuse, in any case, serve to exempt a vessel from the consequences of offences previously committed in violation of the law of nations (*n*).

PIRACY, AND ACTS ANALOGOUS THERETO

THE UNITED STATES v. SMITH.

[1820; 5 Wheat. 153.]

Case.] The prisoner, Thomas Smith, had formed one of the crew of a private armed vessel commissioned by the Government of Buenos Ayres, a colony then at war with Spain. Smith and others of the crew, when in the port of Margaritta, mutinied and left the vessel. Thereafter, having seized by violence another private armed vessel lying in the same port, they proceeded to sea without any document or commission, and in the course of their cruise plundered and robbed a Spanish vessel. For this Smith was subsequently indicted for piracy before the Circuit Court of Virginia. The proceedings were taken under an Act of Congress of the 3rd of March, 1819, which provided that if any person should commit on the high seas the crime of piracy, *as defined by the law of nations*, and should afterwards be brought into or found in the United States, he should, on conviction, be punished with death. A special verdict was returned by the jury, and the Circuit Court being divided in opinion as to whether the facts as found amounted to piracy by the law of nations, the question was reserved for the decision of

(*l*) Forsyth, Const. Cases, p. 399: see also *The Fortuna* (5 C. Rob. 27); *The Jonge Jacobus Baumann* (1 C. Rob. 243).

(*m*) Such as harbour or quarantine rules.

(*n*) *The Carlo Alberto* (Sirey, Recueil, 32, pt. i. 578).

the Supreme Court. In the result it was held that such facts amounted to piracy by the law of nations, and that such offence was therefore punishable under the Act of Congress.

Judgment.] In the judgment of the Court, which was delivered by Story, J. (Livingstone, J., diss.), the first question considered was whether an Act of Congress which merely referred to the law of nations for a definition of piracy was a constitutional exercise of the powers of Congress to define and punish piracy. As to this it was held that Congress might equally well define an offence by using a term of known and definite meaning, as by an express examination of all the particulars included in that term. The next point considered was, whether the crime of piracy was defined by the law of nations with reasonable certainty. As to this it was held that the law of nations must be ascertained by consulting the works of jurists writing professedly on public law; or from the general usage and practice of nations; or from judicial decisions recognising and enforcing that law. There was scarcely a writer on the law of nations who did not allude to piracy as a crime of a settled and determinate nature; and whatever might be the diversity of definitions in other respects, all writers concurred in holding that robbery or forcible depredation upon the sea, *animo furandi*, amounted to piracy. The same doctrine was held by all the great writers on maritime law; as well as by those on the common law. Amongst others, Sir Leoline Jenkins observed that "a robbery, when committed on the sea, is what we call piracy." And the general practice of all nations in punishing all persons, whether natives or foreigners, who had committed this offence against any persons with whom they were in amity was a conclusive proof that the offence was supposed to depend, not upon the particular provisions of any municipal code, but upon the law of nations, both for its definition and punishment. With respect to a final objection as to the sufficiency of the special verdict, it was laid down that inasmuch as the jury had found that the prisoner was guilty of the plunder and robbery charged in the indictment, together with certain additional facts from which it was manifest that he and his associates were at the time freebooters on the sea, not under the acknowledged

authority or deriving protection from the flag or commission of any Government, it was difficult to conceive what facts could more completely fit in with the definition of piracy.

It will be observed that this decision, although proceeding from a municipal Court, is nevertheless expressly directed to the question of what constitutes piracy under the law of nations. As to this it was held that whatever else piracy might include, there was no doubt that robbery or forcible depredation on the high seas, *animo furandi*, constituted piracy. That the acts complained of were acts of robbery and not of war was also clear from the fact that the acts were not done under any acknowledged authority. In the case of *Serhassan Pirates* (2 W. Rob. 354) it was held by the English Court of Admiralty that the commission of piratical acts was sufficient to clothe men with a piratical character, apart from the avowed following of a piratical occupation; and also that piracy might be committed either on the sea, or by descent from the sea, or by descent from the land. In the case of *The Magellan Pirates* (1 Spinks, 81) it was also held that the fact that persons were rebels against their own Government did not preclude liability for what were virtually piratical acts, including robbery and murder on the sea, against other persons. Piracy is also invariably an offence in municipal law. Thus, in English law, piracy at common law consisted in the commission of acts of robbery or depredation upon the high seas or in other places where the Admiralty had jurisdiction, which if committed on land would have amounted to felony there (*o*). But by statute other offences have now been made piracy; such as the committing of acts of hostility by a natural-born subject or denizen against other British subjects, on the sea, under colour of a commission from any foreign Power (*p*); the act of a master in running away with a ship, in betrayal of his trust (*q*); or an adhering on the sea to the King's enemies on the part of a natural-born subject or denizen (*r*); or even trading with and conspiring with pirates (*s*); as well as certain acts of slave-trading (*t*). But in so far as piracy is extended by municipal law beyond the limits of piracy *jure gentium*, it will not be justiciable except in the State to which the offender belongs, or against which the offence was committed (*u*). So, in *Re Tivnan* (5 B. & S. 645) it was held that an extradition treaty between Great Britain and the United States for the delivering up by one State to the other of persons charged (*inter alia*) with piracy committed within the jurisdiction of the latter, did not extend to piracy *jure gentium* committed on an American vessel on the high seas, for the reason that this was justiciable everywhere; but only to acts that were

(*o*) St. Com. iv. 178.
(*p*) 11 Will. 3, c. 7, s. 8.
(*q*) *Ibid.* s. 9.
(*r*) *R.* v. *Vaughan* (13 St. Tr. 525 (1696); 11 & 12 Will. 3; 8 Geo. 1, c. 24; 2 Geo. 2, c. 28; 18 Geo. 2, c. 30; 7 Will. 4, and 1 Vict. c. 88.
(*s*) 8 Geo. 1, c. 24.
(*t*) 5 Geo. 4, c. 113, s. 9; for a complete list, see Stephen, Digest of the Criminal Law, Art. 105 *et seq.*
(*u*) *Le Louis* (2 Dods. 210).

piracy by municipal law, which were only justiciable in the territory of the State seeking extradition.

GENERAL NOTES.—*Piracy Jure Gentium.*—Piracy in the law of nations may be defined as the offence of depredating on the high seas without lawful authority (*x*). In its usual signification piracy includes both any organisation for the purpose of plunder, whether on the sea or by descent from the sea; and also robbery or murder on the high seas accompanied by mutiny. The term has, as we shall see, also been extended to other cases which do not appear to involve either of these conditions. But such acts, even though they may share the common attribute of piracy, in being done under conditions which make it impossible to hold any State responsible for their commission, are really distinguishable from piracy proper, both in the matter of jurisdiction and punishment. At the same time, if persons, even though animated by other motives, commit robbery and murder on the sea, they will be guilty of piracy (*y*). Piracy being an offence *jure gentium*, the pirate is deemed to lose his nationality and the pirate vessel her right to the protection of her national flag, if any; with the result of becoming liable to seizure and punishment at the hands of any State. So, in *The Attorney-General of Hongkong* v. *Kwok-a-Sing* (L. R. 5 P. C., at p. 199) it was held that where a number of Chinese coolies, who were being carried on a French ship, killed the captain and several of the crew, and took the ship to China, they were guilty of piracy *jure gentium*. It is especially the right and the duty of public vessels to suppress pirates; but it would seem that this right may also be exercised by a private vessel. Pirates may be captured on the sea or in territorial waters, or in territory unappropriated by any State. But although a pirate may be tried in any Court and is within the criminal jurisdiction of any State, he is still entitled to regular trial; and cannot, as was formerly the custom, be summarily executed. The stigma of piracy attaches to the vessel and warrants her confiscation; but not, it seems, to the cargo where this belongs to innocent persons (*z*). Nor will the taint of piracy attach to the vessel if she has, before condemnation, passed into the hands of a *bona fide* and innocent purchaser (*a*). Nevertheless, a pirate cannot strictly confer title, and, on recapture, vessels or property seized by pirates will revert to their former owners, if the real ownership can be ascertained, subject to the payment of salvage to the receptor. The subject of piracy has in recent times become of comparatively minor importance, for the reason that piracy proper is now virtually confined to certain Eastern waters; but the rules for its ascertainment still require to be studied in relation to acts bordering on piracy which are considered below.

Acts sometimes classed with Piracy.—Besides piracy proper, there are also other acts which are sometimes classed with piracy. Thus, the

(*x*) But see Hall, 267.

(*y*) *The Magellan Pirates* (1 Spinks, 81); *U.S.* v. *Smith* (5 Wheaton, 153).

(*z*) *Malek Adhel* v. *The United States* (2 How. 210).

(*a*) *Reg.* v. *McCleverty* (L. R. 3 P. C. 673).

acceptance of a commission by a vessel from two belligerents is sometimes stigmatised as piracy. But although such conduct would undoubtedly amount to piracy if such commissions were accepted from two hostile States, yet if the belligerents were allied and hostile action were taken only against a common foe, it would only be irregular, and not piratical. There has also been some disposition to regard as a pirate a subject of a neutral State who accepts a commission from one of two belligerents. But although this is often prohibited by treaty or municipal law, it can scarcely be regarded as piracy under the law of nations. At the same time, if prohibited by treaty it might conceivably be punished as a war-crime, whilst if forbidden by municipal law the offender might be handed over to his own State for punishment (*b*). But in view of the virtual abolition of privateering, these cases now possess but little importance. Persons engaged even on the high seas in aiding rebels have on some occasions been treated as pirates; but although there is, as we have seen, a remedy available in such cases to the Power whose security is threatened, the claim to treat such acts as piracy would seem to be altogether unwarrantable (*c*). Finally, unrecognised insurgents carrying on war by sea have sometimes been pronounced pirates, a conclusion equally unwarrantable in so far as it is based on the character alone, although justifiable if based on conduct which is in fact piratical (*d*).

INSURGENTS CARRYING ON WAR BY SEA.

THE "HUASCAR."

[1877; Parliamentary Papers, 1877, vols. lii. and lxxxiii.]

Case.] In 1877 a revolutionary outbreak took place in Peru, in the course of which the ironclad "Huascar" was seized at Callao by her crew and by some of her officers, in the interest of the insurgent leaders. She then cruised off the coast; and, amongst other things, stopped several British vessels, seized despatches for the Peruvian Government, abstracted two passengers who were officials of the Peruvian Government, and in one case also took a quantity of coal which was not paid for. It appeared also that a British subject was detained on board and compelled to act as engineer. Meanwhile the Peruvian Government had

(*b*) On the question generally, see Ortolan, i. 219, 430; and Hall, 271; Wharton Dig. iii. 327.

(*c*) *Supra*, p. 174.

(*d*) *Infra*, p. 301. See also *The Republic of Bolivia* v. *Indemnity M. M. Assurance Co.* [1909] (1 K. B. 785).

issued a proclamation to the effect that it would not be responsible for the acts of any one on board the "Huascar." The British Admiral, De Horsey, under these circumstances, summoned the "Huascar" to surrender, and, failing this, an action was fought, in which the "Huascar" sustained considerable damage, but succeeded in escaping under cover of the night. On the following day she surrendered to the Peruvian national squadron. A claim for compensation was subsequently made by the Peruvian Government against Great Britain, in respect of the damage done to the "Huascar."

Opinion.] The matter having been submitted to the Law Officers of the Crown, the latter advised that, inasmuch as the vessel had been taken out of the hands of the proper authorities, and the Peruvian Government had disavowed liability for her acts, she was sailing under no flag, and no redress could be obtained for any acts which she might commit; and that in view of what had occurred the proceedings resorted to by Admiral De Horsey were justifiable. The Peruvian Government also submitted the matter to its Law Officers, and the latter having advised that the acts of the "Huascar" were piratical, the matter was allowed to drop.

The opinion in this case, although justified by the facts, and although a good precedent in the like circumstances, must not be taken as deciding that the acts of unrecognised insurgents will under all circumstances be regarded as piratical. In the case of the "Huascar" the insurgents had apparently no organised Government even of a provisional kind; the national Government had officially disclaimed any responsibility for her acts; whilst those on board her had, in the forcible seizure of coal and in the abstraction of passengers and despatches from British vessels, as well as in detaining by force a British subject who was seemingly under no obligation of service to the revolutionary leaders, exceeded even those rights of interference with neutral commerce which are accorded to a recognised belligerent.

GENERAL NOTES.—*The Position of Unrecognised Insurgents.*—The position and rights of an insurgent community whose belligerency has been recognised have already been described (*e*). The case of unrecognised insurgents is one of greater difficulty. According to one

(*e*) *Supra*, p. 68.

view, the mere fact of purporting to carry on war by sea, without a commission from some recognised Government, will in itself constitute a technical act of piracy, which will justify interference on the part of States not immediately affected, and will also warrant the condemnation of any vessel so employed (*f*). But according to another view, which appears at once more correct in principle and more consistent with the usual practice, acts done by insurgents, even though unrecognised, which were done for political ends, are not liable to be regarded as piratical so long as they do not involve acts of spoliation or violence towards other persons than the adherents of the Government against which the insurrection is directed. Nor, in such a case, is there either a right or duty of interference on the part of other States. So, in 1887, in the case of the *Montezuma*, a Spanish vessel which had been seized by the Cuban insurgents and which the Brazilian Government was asked by Spain to treat as a pirate, it was held that ships belonging to insurgents who confined their operations to the State against which they were in revolt could not be treated as pirates by foreign Powers (*g*). So, again, in 1905, in the case of the *Kniaz Potemkin*, where a Russian warship had been seized by her crew, in connection with a revolutionary movement then proceeding in Russia, and subsequently put into Constanza, a Roumanian port, the Roumanian authorities, whilst refusing supplies, yet did not treat the insurgents as pirates. It was, however, intimated that if the crew surrendered the ship and came on shore they would be treated as deserters and allowed their liberty, subject to being disarmed; and, this course having been adopted, the ship was taken possession of by the Roumanian Government and subsequently handed over to Russia.

Moreover, although violence and spoliation on the sea may rightly be punished, yet an insurgent community of considerable size, possessing a Government capable of controlling or being made answerable for any irregular action on the part of its adherents, is not debarred, merely because it is as yet unrecognised, from adopting and enforcing, otherwise perhaps than by the seizure of foreign persons or their property, such belligerent measures against its adversary as it may deem necessary, even though such measures may hamper or limit the commercial operations of other States; for the reason that it is only by proof of its competency to carry out such measures that it can hope to command a recognition of its belligerency (*h*). It is true that recognition in such a case would not, probably, be long withheld; but recognition, it must be remembered, is largely a question of policy, whilst recognition by one State is not necessarily binding on another. Outside these limits, however, there can be no doubt that States are justified in protecting their subjects again spoliation or interference on the part of unrecognised insurgents. So, in 1873, on the occasion of the

(*f*) This, at any rate, appears to be the deduction from the case of *The United States* v. *The Ambrose Light* (1885) (25 Fed. 408; Scott, 346). The fact that other insurgents in the same interest had attacked Colon, and thereby caused damage to American interests, does not appear to be material. At the same time, this decision has provoked much adverse criticism even in the United States; see Wharton, iii. pp. 465-469.

(*g*) Scott, 351 *n*; Westlake, i. 180.

(*h*) Hall, 268.

seizure by Spanish insurgents of a Spanish squadron at Carthagena, the British Government issued instructions that if the insurgents were guilty of acts of interference with British subjects or affecting British interests, then they should be treated as pirates, but that otherwise they were not to be interfered with; and a similar attitude was also taken up by other States. So, again, in 1902, in the case of the "Crête à Pierrot," a vessel belonging to insurgents against the Government of Hayti, which was sunk by a German cruiser on the ground of piratical conduct in having carried off from a German vessel in Haytian waters some munitions of war destined for the Haytian Government. Much less can the fact that persons are acting for ostensibly political ends be allowed to serve as a cloak for the commission of acts, which are in fact acts of robbery and murder, against the subjects of other States (*i*).

THE SLAVE TRADE.

"LE LOUIS."

[1817; 2 Dods. 210.]

Case.] IN 1816 "Le Louis," a French ship, was captured by an English colonial armed vessel, on suspicion of being engaged in the slave trade, and for resisting a demand for visit and search. She was taken to Sierra Leone, and there condemned by a Court of Vice-Admiralty, for having been concerned in the slave trade, contrary to French law. Against the order of condemnation an appeal was made to the High Court of Admiralty; by which the decision of the Vice-Admiralty Court was reversed.

Judgment.] Sir William Scott, in giving judgment, after adverting to the fact that the commander of the English vessel had been authorised to seize and detain all vessels offending against the slave trade, observed that no British statute, or commission founded on it, could affect the rights or interests of foreigners, unless it was founded upon principles and imposed regulations consistent with the law of nations. The first matter for inquiry therefore was, whether there was, in the present circumstances and by the law of nations, any such right of

(*i*) See the case of *The Magellan Pirates* (1 Spinks, 81) *supra*, p. 297.

vistitation and search. If there were no such right, and if it was only in the course of an illegal exercise of this right that it was ascertained that "Le Louis" was a French ship trading in slaves, then this fact having been made known to the captor by his own unwarranted acts, he could not avail himself of discoveries so produced. At present no nation could exercise a right of visitation and search upon the common unappropriated parts of the sea, save only on the belligerent claim. There being no such belligerent claim, the right of visit, in the present case, could only be legalised upon the ground that the captured vessel was to be regarded legally as a pirate. But slave traffic was not piracy, or even a crime, by the law of nations. A nation had a right to enforce its own municipal rules and navigation laws, so far as such enforcement did not interfere with the rights of others; but it had no right under cover of its municipal regulations to visit and search all the apparent vessels of other countries on the high seas, in order to institute an inquiry whether they were not its own vessels violating its own laws.

This case decides that the right of visit and search on the high seas is primarily a war right, and cannot, in time of peace, be exercised by the public vessels of one State over vessels of another State except in cases of piracy. To this exception must now be added cases where such a right is conferred by treaty; cases where a State acts in a proper case of self-defence; and probably also cases where a vessel offending in territorial waters has been immediately pursued and captured on the high seas (*k*). Sir W. Scott also laid down that the slave trade, even though treated as piracy in municipal law, could not, for such a purpose, be treated as piracy by the law of nations (*l*). A similar rule was laid down by the Supreme Court of the United States in the case of the *Antelope* (10 Wheat. 66), in which the earlier doctrine, that a right of visit and capture could be exercised on proof that the State to which the vessel belonged had prohibited the slave trade, was repudiated (*m*).

General Notes. — *Slave Trading and Slavery in International Law.*—The slave trade, although at first regarded as a lawful traffic,

(*k*) *Supra*, pp. 179, 180.

(*l*) The view previously adopted had been otherwise; see *The Amedie* (1 Acton, 240); and *The Diana* (1 Dods. 95); but the decision in *Le Louis* was subsequently followed in *Madrazo* v. *Willes* (3 B. & A. 353).

(*m*) A full account of this doctrine and the earlier cases will be found in Taylor, 237.

was ultimately made illegal by most maritime States, notably by Great Britain in 1807 (*n*), and by the United States in 1808; although slavery was still tolerated in certain British possessions, and in some of the United States, as a domestic institution. The slave trade was declared illegal by the Congress of Vienna in 1815. Subsequently it was also made piracy under the municipal laws of the more important Powers; notably by the law of the United States in 1820, and by that of Great Britain in 1821. After the slave trade had thus been declared illegal the question arose as to the right of the public vessels of one State to interfere with this traffic when carried on by vessels belonging to another State. In spite of some earlier decisions to the contrary, it was, as we have seen, finally decided, both by the British and American Courts, that the slave trade could not be regarded as piracy *jure gentium*, and hence that no right of visit and capture could be exercised over foreign vessels engaged in the slave trade. Subsequently a controversy arose between Great Britain and the United States, as to whether a right of visit, as distinct from a right of visit and capture, could be exercised by the public ships of one State over private vessels flying the flag of another, in order to ascertain if the claim to the flag were genuine. Such a right was asserted by Great Britain, but repudiated by the United States (*o*). To meet this need, however, treaties were entered into between the principal maritime Powers, conceding, under certain conditions, and within certain geographical limits, a right of visit and search and a right of sending suspected vessels to the nearest port of their own country for adjudication (*p*). Meanwhile negro slavery, even as a domestic institution, was abolished in the British colonies in 1834, in the French colonies in 1848, and in the Dutch colonies in 1863. In 1865 slavery was prohibited in the United States of America by the thirteenth amendment of the Constitution. This example was subsequently followed by other States, including Egypt, in 1880, Turkey, in 1883, Cuba, in 1886, Brazil, in 1888, and even Zanzibar, in 1897. Hence the slave trade, now reprobated by all civilised States, has become confined to certain areas of Asia and Africa. With a view to its universal abolition, however, certain international arrangements for its suppression have now been adopted. Thus, by the General Act of the Berlin Conference, 1885, to which the Great Powers of Europe, and the United States of America, as well as many minor Powers, were parties, it was declared and agreed that trading in slaves was contrary to the law of nations as recognised by the signatory Powers; that operations which by sea or land furnished slaves for trade ought to be forbidden; that the Powers exercising sovereign rights over territories within the basin of the Congo should not allow those territories to be used as a market or means of transit for slaves; and that each Power should employ all means at its disposal for putting an end to the traffic, and for punishing those engaged in it. Moreover, by the General Act of the Anti-Slavery Conference held at Brussels

(*n*) Taking effect from the 1st of January, 1808.

(*o*) See Taylor, 238.

(*p*) The more important of these treaties were the Treaty of London, 1841, between Great Britain, France, Austria, and Russia; and the treaties of 1842 and 1862 between Great Britain and the United States.

in 1890, to which the leading Powers of Europe, and the United States of America, as well as many minor Powers, including Persia, Turkey, and Zanzibar, were parties, systematic measures for the suppression of the slave trade in Africa were adopted; including the grant of a right of visit and search within a limited zone to armed cruisers of the signatory Powers, over suspected vessels not exceeding five hundred tons (*q*). But by the Convention of St. Germain of September 10, 1919 (*r*), the General Act was abrogated, in so far as it was binding between the Powers which are parties to the new Convention. These Powers, the United States, Belgium, the British Empire, France, Italy, Japan, and Portugal, undertake to endeavour to secure the complete suppression of slavery and of the the slave trade by sea and land. In English law the earlier slave-trading Acts, under which the offence of trading in slaves is assimilated to piracy, have now been consolidated and amended by the Slave Trade Act of 1873 (*s*); which confers the necessary powers for carrying into effect any treaties that may be made for the more effectual suppression of the slave trade (*t*).

THE AGENTS OF STATES IN THEIR EXTERNAL RELATIONS.

GYLLENBORG'S CASE.

[1717; De Martens, Causes Célèbres, i. 97.]

Case.] In 1717 Count Gyllenborg, the Swedish Ambassador to England, was ascertained to be engaged in a plot against the Hanoverian dynasty. He was arrested by order of the English Government, his despatches seized, and his cabinet broken open. Instead of being immediately sent from the kingdom, he was detained there for a time; this detention being, however, partly due to the fact that similar measures had been adopted by the Swedish Government towards the English Minister in Sweden. Some dissatisfaction at the arrest was at first expressed by other ambassadors accredited to England, but these expressions were subsequently withdrawn, when the facts of the case were known; the Secretary of State having pointed out that what had been

(*q*) See the Slave Trade (East African Courts) Acts, 1873 and 1879.

(*r*) Treaty Ser. (1919), No. 18 [Cmd. 477].

(*s*) See 36 & 37 Vict. c. 88, s. 3; and as to jurisdiction, ss. 5-8.

(*t*) For a short summary of the law on this subject, see Encyclopædia of the Laws of England, xi. 561 *et seq.*

done was necessary for the peace of the kingdom. In consequence of the mediation of other Powers, both ambassadors were subsequently released.

This incident serves to illustrate that rare class of case in which an ambassador may be subjected to arrest or detention. In such cases the law of nations recognises that even established immunities must yield to the exigencies of self-defence and protection. With respect to the English law on the subject of ambassadorial privilege, the earlier view appears to have been that an ambassador, although otherwise privileged, might be made amenable to the local jurisdiction in respect of crimes against the *jus gentium*, such as treason or felony (*u*). And so it was held in England, in *Leslie's Case*, that an ambassador who raised rebellion against the prince to whom he was sent forfeited his privilege and was liable to punishment (*x*). But in the subsequent case of *Mendoza*, where the Spanish ambassador was arrested for taking part in a conspiracy to dethrone Queen Elizabeth, the opinion of Gentilis and Hotman—that an ambassador in such a case could not be put to death, but must be remanded to his own Sovereign for punishment—appears to have been acquiesced in (*y*); and this view has ever since been followed. Nevertheless, an ambassador who engages in acts dangerous to the safety of the State to which he is accredited may be arrested and detained, as a matter of self-preservation or precaution (*z*); a right which appears to have been recognised by the embassies of other States, in *Gyllenborg's Case* (*a*). But even in such a case the ambassador is not amenable to the jurisdiction of the local Courts, or liable to punishment. In English law it is also a misdemeanour for any person to violate by force or personal restraint any privilege belonging to an ambassador by the law of nations (*b*).

THE MAGDALENA STEAM NAVIGATION CO. v. MARTIN.

[1859; 28 L. J. Q. B. 310.]

Case.] IN this case the defendant, who was the envoy and Minister Plenipotentiary in Great Britain of the Republic of Guatemala and New Grenada, was sued for a sum of £600 alleged to be due from him as a contributory in respect of shares held by him in the plaintiff company. The defendant pleaded to the

(*u*) Coke, Inst. 4, 153; St. Com. ii. 491.

(*x*) Somers' Tracts (by Scott), i. 186.

(*y*) Camden, Imp. Hist. of England, ii. 497.

(*z*) Hall, 182.

(*a*) As to *Cellamare's Case*, see Taylor, 336.

(*b*) Stephen, Digest of Criminal Law, Art. 96. The United States law is very similar; see Rev. Stat. s. 4062; and Scott, 196 *n*.

jurisdiction, alleging his privilege as an ambassador. On demurrer, it was held that the public Minister of a foreign State accredited to the Sovereign, having no real property in this country, and having done nothing to disentitle him to the privileges usually belonging to such public Minister, could not be sued in an English Court for a debt while he remained a public Minister, even though neither his person nor his goods might be touched by the suit.

Judgment.] Lord Campbell, C.J., in delivering the judgment of the Court, after adverting to the facts, pointed out that the true principle was that stated by Grotius, in his work "De Jure Belli et Pacis"—*omnis coactio abesse a legato debet.* An ambassador was to be left at liberty to devote himself to the business of his embassy. He did not owe even temporary allegiance to the Sovereign to whom he was accredited. He was not even supposed to live within the territory of such Sovereign; and if he had done nothing to forfeit or waive his privilege he was for all purposes supposed to be still in his own country. For these reasons, the rule laid down by all jurists of authority was that an ambassador was exempt from the jurisdiction of the country in which he resided as ambassador. With respect to the statement of Sir Edward Coke that an ambassador was liable on contracts that were good *jure gentium*, Sir Edward Coke, who was so great an authority on municipal law, was entitled to little respect as a general jurist. With respect to the contention that the action could be prosecuted to judgment, for the purpose of ascertaining the amount of the debt, with a view to enable the plaintiffs to have execution when the defendant ceased to be a public Minister, this, although thrown out as a suggestion in *Taylor* v. *Best* (14 C. B. 487), was supported by no authority, and would vitiate the principle laid down by Grotius. It was difficult indeed to see how the writ could be served, for the reason that an ambassador's house was sacred and was considered to be part of the territory of his Sovereign. Nor could he be stopped in the street, for the reason that he might be proceeding on the business of the embassy. Moreover, to have to defend such an action would put serious constraint on the ambassador. Nor would it be of any material benefit to the plaintiffs, for the reason that even if

judgment were obtained against the ambassador, no execution could be had upon it whilst he remained ambassador, nor for a reasonable time after his recall. The first and third sections of the Act 7 Anne, c. 12, were only declaratory of the law of nations, and were in accordance with the principle just enunciated. The proceedings described in the third section were not confined to such as directly touched the person or goods of the ambassador, but extended to such as in their usual consequences would have this effect.

The inconveniences alleged to arise from the recognition of such an immunity were not likely to arise. A joint contractor could, in such circumstances, be sued alone. It was open to any one contracting with an ambassador to insist on a surety, who could be sued. Moreover, the resource was always open to a person aggrieved of making a complaint to the Government by which the ambassador was accredited. Although it had not previously been expressly decided that a public Minister duly accredited to the Crown was privileged from liability to be sued here in all civil actions, yet this appeared to follow from well-established principles.

With respect to an ambassador's liability in civil cases, it had been suggested by Coke that an ambassador might be held liable on "contracts that be good *jure gentium*," and for a long time this view appears to have been accepted as correct. At length, in 1708, the question was definitely raised in the case of *The Czar's Ambassador*, who was arrested in London for debt and forced to give bail. On his complaining of this indignity, those concerned in the arrest were brought up before the Privy Council, and subsequently prosecuted in the Court of Queen's Bench at the suit of the Attorney-General. At the trial the question of law was reserved for argument, but never finally determined. Meanwhile, in order to mitigate the incensement of the Czar, an Act, 7 Anne, c. 12, was passed prohibiting any such proceedings in future. This statute, after declaring the arrest of the Czar's ambassador to have been "contrary to the law of nations," and vacating all proceedings thereunder, provides that "all proceedings for the arrest or imprisonment of a foreign ambassador or minister, or the domestic servant of any such ambassador, or for the seizure of the goods and chattels of any such person, shall be null and void" (s. 3); it further inflicts penalties on any person who prosecutes any such process (s. 4); but at the same time declares that no merchant or trader within the meaning of the bankruptcy laws, in the service of an ambassador, shall have the benefit of the Act; and finally provides that no person shall be liable to any penalty for arresting the servant of an ambassador or Minister, unless

the name of such servant is registered in the office of one of the principal Secretaries of State (s. 5) (*c*). The general effect of this statute, which has been said to be declaratory at once of the common law (*d*) and of the law of natons (*e*), appears to be that no action or other proceeding will now lie either against the person or property of an ambassador or other diplomatic agent representing a foreign Sovereign and accredited to this country, during the continuance of his office or for a reasonable time afterwards. In *Taylor* v. *Best* (14 C. B. 487), however, it was held that if an ambassador attorned to the jurisdiction he could not afterwards set up his privilege; although it was at the same time stated that even if judgment were given against him no execution could issue against his person or property. Hence if an ambassador appears in a suit without protest, or if he himself institutes proceedings, he will be deemed to have waived his privilege (*f*). If, moreover, he himself initiates the proceedings, then he will lay himself open to any cross-claim arising out of the same transaction (*g*); although even in such a case he would still not be liable to execution. In *Taylor* v. *Best* a doubt had been expressed as to whether an ambassador who had engaged in commercial transactions could not be made a defendant for the purpose of ascertaining the amount of his liability, with a view to subsequent execution after his privilege had expired; but this doubt has now been set at rest by the decision in *Magdalena Steam Navigation Co.* v. *Martin*. The immunity of the property of an ambassador would not extend to real property owned by him in his personal capacity within the jurisdiction; whilst property in the hands of third persons would be liable to the same extent as in the case of a foreign Sovereign (*h*). But where the diplomatic privilege is waived by an ambassador with the consent of his Government at the initiation of proceedings brought for administration of an estate, it was held in *In re Suarez, Suarez* v. *Suarez* [1918] 1 Ch. 176 that such waiver extends to all subsequent proceedings, and an order could be made after his diplomatic privilege had ceased, granting leave for a writ of sequestration to issue against his property for his failure to obey order for payment into court.

MACARTNEY v. GARBUTT AND OTHERS.

[1890: L. R. 24 Q. B. D. 368.]

Case.] The plaintiff was a British subject, who had been appointed English secretary to the Chinese Embassy in London, and had been received in that capacity by the British Government. His name had been submitted to the Foreign Office in

(*c*) As to the interpretation of this section, see *Triquet* v. *Bath* (3 Burr. 1478).

(*d*) *Viveash* v. *Becker* (3 M. & S., at p. 292).

(*e*) *Magdalena Co.* v. *Martin* (*supra*, p. 306.

(*f*) Nor does it seem that any proof of his Sovereign's consent would be necessary for this purpose.

(*g*) But not to any counter-claim arising out of some separate transaction; see Dicey, Conflict of Laws, 213.

(*h*) *Supra*, pp. 93, 97.

the usual way, and his position as a member of the embassy recognised without reservation. The defendants had levied a distress on the furniture of his house under a claim for parochial rates; the plaintiff thereupon paid the claim under protest, and now sought to recover the amount so paid. It was conceded that if the plaintiff were a foreigner he would be entitled to exemption; but, being a British subject, it was argued that he remained subject to the laws of his own country, and did not come within the exemption clause of the Act under which the rates were claimed, as being "a person not liable by law to pay such rates." It was held that a British subject, accredited to Great Britain by a foreign Government as a member of its embassy, was, unless received on express condition that he should remain subject thereto, altogether exempt from the local jurisdiction; that inasmuch as no such condition had been imposed on the plaintiff at the time of his reception, his furniture was privileged from seizure; and that he was therefore entitled to judgment for the amount claimed, and costs.

Judgment.] In his judgment, Matthew, J., pointed out that the plaintiff had been received as a member of the Chinese Embassy without any reservation. In support of the contention that the plaintiff, as being a British subject, remained liable to the local law, reliance had been placed on certain passages from Bynkershoek, "De Foro Legatorum," which, it was said, showed that the Minister of a foreign State remained subject to the laws of the State to which he owed allegiance. But the true view of the learned author appeared to be that an envoy was entitled to exemption from the local jurisdiction in all that related to his public functions; and this seemed to be the view of later writers. If such were the rule, then the plaintiff would be protected from the seizure in question, which unquestionably interfered with the performance of his duties as a member of the embassy. But there was also another principle which appeared to afford the plaintiff the protection he claimed. Bynkershoek, whilst recognising the right of the State to impose such conditions as might be thought fit upon the reception of a member of a foreign embassy, yet stated that if he were received without reservation the condition was tacitly implied that he

was to enjoy the full *jus legationis*. This principle had, it seemed, and with much good sense, been extended by later writers to the case of an envoy accredited to his own Government; and this view was also borne out by the statements of Wheaton, Calvo, and Phillimore. As no such reservation was made in the present case, the plaintiff was clearly entitled to the exemption claimed.

This decision makes it clear that in the United Kingdom the privilege of embassy will extend even to a British subject, unless he has been received on the condition of remaining subject to the local law. It further serves to show that this privilege attaches not only to the ambassador himself, but to all other members of the embassy who have been received on this footing. Incidentally it also serves to show that, according to the British practice, the payment of rates and taxes in respect of any building occupied by a member of the embassy cannot be enforced by suit or distress (*i*). But both in this matter, and in the matter of the exemption of an ambassador who engages in trade, the English law appears to concede a wider privilege than that recognised by many other States. In *Musurus Bey* v. *Gadban* [1894] (2 Q. B. 352), it was held that the immunity of an ambassador from civil process extends to such reasonable period after his recall as may be necessary to enable him to wind up his business; although it was at the same time held that the Statute of Limitations would not run against a creditor during the period of such immunity. And the same privileges attach to such members of the embassy as are invested with the diplomatic status; such as secretaries of legation, councillors, and attachés (*k*). The exemption from civil proceedings, under the Act of 1708, also applies to persons who are merely in the service of an ambassador; provided that the service is genuine, and that such persons are not traders within the meaning of the bankruptcy laws (*l*). But with respect to criminal proceedings, the English law does not appear to recognise any exemption, save on the part of the ambassador himself and persons who are actually members of the embassy. So, in 1827, in a case where an assault had been committed outside the embassy by a coachman in the service of the United States Ambassador, the offender was arrested in the stable of the embassy. In the discussion which followed the Foreign Office appears to have denied that an ambassador's servants were exempt from arrest, and to have asserted a right of arrest, even within the precincts of the embassy; merely

(*i*) See also *Parkinson* v. *Potter* (16 Q. B. D. 152).

(*k*) See *Parkinson* v. *Potter* (16 Q. B. D. 152), and *Hopkins* v. *De Robeck* (3 T. R. 79). But this will not apply where the employment is merely colourable, as in the case mentioned in *Parkinson* v. *Potter*, where a Christian clergyman was supposed to be domestic chaplain to the ambassador of the Emperor of Morocco. See also *In re Cloete* (65 L. T. 102).

(*l*) See s. 5; *Triquet* v. *Bath* (3 Burr. 1478); and *Heathfield* v. *Chilton* (4 Burr. 2015); but see also *Novello* v. *Toogood* (1 B. & C. 554).

admitting that as a matter of courtesy notice should be given to the Minister, so that the offender might be voluntarily handed over, or arrested at a time convenient to the Minister (*m*).

GENERAL NOTES.—*The Agents of a State.*—The question of the plenary representation of States in their external relations has already been discussed (*n*). But over and above its titular head, its Government, or its department of Foreign Affairs, each State may also have a variety of surbordinate agents, who represent it only for a particular purpose, or in relation to some particular State. Amongst these we may include: (1) Diplomatic agents, who are publicly accredited to act as the official representatives of a State in foreign countries, and who are entitled to the privileges of inviolability and exterritoriality to the extent indicated below. (2) Commissioners appointed for special objects, such as the delimitation of boundaries, or the transaction of administrative business, whose position does not appear to be the subject of any definite usage; but who, from the nature of their office, would seem to be entitled merely to courteous treatment and to special protection where the nature of the business on which they are engaged requires this (*o*). (3) Officers in command of the armed forces of a State, who possess, according to their position, a certain authority to bind the State, as well as certain privileges and immunities which have already been described; and who, in so far as they act in their capacity as agents for their State, cannot be made amenable to the laws or jurisdiction of any other State (*p*). (4) Consuls, who are agents appointed to watch over the commercial interests of the State or its nationals in foreign parts, but who are not, save in exceptional cases, entitled to diplomatic privileges or immunities (*q*). (5) Finally, there may be agents, not publicly acknowledged, who, as between themselves and the Government to whom they are accredited, are entitled to the usual diplomatic immunities, but who cannot claim these as against private persons to whom their public character has not been made manifest (*r*). It would seem that agents appointed to represent a State within the territory of a *de facto* Government are in the same position (*s*).

Diplomatic Agents.—Diplomatic agents differ in character according to the nature of their mission, which may be either ordinary or extraordinary, general or special. Thus, a diplomatic agent may be accredited to a particular State for the purpose of representing his Government in some ceremonial function, or of making some formal notification, or of carrying out some particular negotiation or arrangement. Or, he may be accredited for the purpose of representing his Government at some congress or conference of States. Or, finally, he may be accredited to some particular State for the purpose of residing there, and representing there, generally, the interests of his own

(*m*) Wharton, Dig. i. 650; Taylor, 346.
(*n*) *Supra*, p. 83.
(*o*) Hall, 325; Taylor, 354; Wharton, Dig. i. 648; and *infra*, pp. 327, 329.
(*p*) Hall, 323; *supra*, p. 86.
(*q*) *Infra*, pp. 323, 326.
(*r*) Hall, 324.
(*s*) But see Westlake, i. 276.

Government. Such permanent embassies appear to have had their origin in the fifteenth century; they became general in the latter part of the seventeenth century; whilst at the present time they may be regarded as an essential part of the international system (*t*). Members of the permanent Court established by The Hague Peace Convention of 1907 are, when acting in the exercise of their judicial functions outside their own country, also entitled to diplomatic privileges and immunities (*u*). The right to send and receive diplomatic envoys belongs to every sovereign State; but a semi-sovereign State only possesses this right in so far as it is consistent with the relation in which it stands to the superior Power; whilst a deposed Sovereign, or a community recognised as belligerent, can only act through political agents, who are not entitled to diplomatic privileges (*x*). It is sometimes said that there is a right to diplomatic intercourse; but really this rests only on grounds of convenience and comity. The temporary suspension of diplomatic relations is, however, occasionally resorted to as a mode of indicating a sense of unfriendly or improper action on the part of another State (*y*).

Classes of Diplomatic Agents and Precedence.—In order to obviate disputes as to precedence, it was agreed by the parties to the Congress of Vienna, 1815, that three different grades or classes of diplomatic agents should be recognised; whilst another class was subsequently added by the Congress of Aix-la-Chapelle, 1818. There are now, therefore, four classes or grades of diplomatic agents: (1) Ambassadors proper, including Papal legates and nuncios, who are deemed to represent immediately the person and dignity of the Sovereign or head of their State, and who are entitled to personal communication with the head of the State to which they are accredited; (2) Ministers plenipotentiary and envoys extraordinary, including Papal internuncios, who are accredited to the head of the State, but who are not regarded as immediately representing the person and dignity of the Sovereign or head of their own State; (3) Ministers resident, who are also accredited to the head of the State, but who rank below the last class in point of official position and honours; and (4) *Chargés d'affaires*, who are accredited only to the Minister of Foreign Affairs (*z*). But the distinction between these classes is for the most part only a formal or ceremonial distinction; and all classes are equally entitled to the privileges of embassy (*a*). The term "ambassador" is in fact often used to designate all classes of diplomatic agents, and will be so used in the succeeding sections of this note. Each State sends such grade of representative as it may think fit; the only restriction being that the sending of diplomatic agents of the first class is usually limited to States that enjoy royal honour; although this class of States now

(*t*) See Oppenheim, i. 545; and Encyclopædia of the Laws of England, iv. 253.

(*u*) Convention for Pacific Settlement of International Disputes, Annexe No. 1 (Conference of 1907), Art. 46.

(*x*) Oppenheim, i. 544.

(*y*) *Supra*, p. 85.

(*z*) *Chargés d'affaires*, again, may be either *ad hoc*, where they are expressly accredited as such, or *ad interim*, where they are promoted temporarily to that position; see Taylor, 321.

(*a*) Hall, 310; Oppenheim, i. 546.

includes not only all empires and kingdoms, but also the republics of France, Switzerland, the United States, and other American republics (*b*). Ministers of the same grade take precedence according to the order of the notification of their arrival (*c*); but in Catholic States the precedence is commonly accorded to the Papal nuncio. The whole body of foreign Ministers accredited to any State constitute a "diplomatic corps," which is presided over by the senior member, and whose function it is to see that diplomatic privileges are duly observed.

The Appointment of Ambassadors.—Although the appointment of an ambassador necessarily rests with the accrediting State, yet this is subject to his acceptance by the accredited State; and the latter will be entitled to decline to receive him if for any just cause he is not regarded as acceptable (*d*). In practice this difficulty is commonly obviated by making confidential inquiry before an appointment is announced. But to decline to receive an envoy after informal acquiescence, or even to decline, except for just cause, to receive an envoy after he has been formally appointed, would constitute a breach of international courtesy which would probably warrant a formal suspension of diplomatic relations (*e*). A diplomatic agent, when accredited to a particular State, is ordinarily furnished with letters of credence, which specify his name and rank, bespeak credit for his communications, and imply an authority to transact all such business as falls legitimately within the scope of his mission. When he is charged with the conduct of some particular negotiation, he is furnished also with an additional full power, which defines the limits of his authority in relation to the matter in question. When he is accredited to some conference or congress of States, he is usually furnished with a limited full power, which confers authority to negotiate with each and all of the other States there represented (*f*). He is also provided with a passport, attesting his name and character; and with such instructions from his own Government as may be necessary. His privilege of inviolability attaches from his entry into the State to which he is accredited; but his right to exercise his functions as well as to diplomatic privilege accrues only from the time at which his credentials are formally presented; or, in the case of a congress or conference, from the time when the full powers of the respective envoys, or copies thereof, are duly exchanged (*g*). In cases

(*b*) Great Britain sends diplomatic agents of the first class only to ten countries, such officers being styled ambassadors extraordinary and plenipotentiary, and their residences being known as embassies. Envoys of the second class are sent to twenty countries, such officers being styled envoys extraordinary and Ministers plenipotentiary, and their residences being known as legations. Envoys of the third class having the same title, and other envoys, under the title of Ministers resident and consuls-general, are accredited to various minor Powers. *Chargés d'affaires* are accredited to small principalities such as Mexico. See Foreign Office List; and Encycl. of the Laws of England, iv. 255.

(*c*) This was also agreed to by the Congress of Vienna, Art. 4.

(*d*) For instances of such refusal, see Hall, 308; Taylor, 327.

(*e*) *Supra*, p. 312.

(*f*) A general full power, which is unlimited in its scope, is now rare, or even obsolete. As to the character of these instruments, see Taylor, 329; and Oppenheim, i. 550.

(*g*) Hall, 211; Taylor, 330.

where his character as diplomatic agent comes into question in a Court of law, an official communication from the Foreign Office or Minister of Foreign Affairs is usually accepted as sufficient proof of character (*h*).

Termination of Mission.—The mission of an ambassador may be terminated by his recall by his own Government; by the expiration of his authority or by the fulfilment of the object of the mission where that object is special; by his dismissal or expulsion by the State to which he is accredited; by the interruption of amicable relations between the sending and receiving States; or, in the case of monarchical States, by the death of either Sovereign. On a change of Government by revolution, the better opinion would appear to be that letters of credence on either side should be renewed (*i*).

The Functions and Duties of Resident Ambassadors.—The functions and duties of an ambassador deputed to reside in a foreign State are shortly these: (1) He constitutes the local medium of communication between his own State and that to which he is accredited, he negotiates treaties and conventions, and assists generally in maintaining friendly relations. (2) It is his duty to watch over the interests of his State, and to keep his Government informed as to the political, commercial, and industrial conditions of the country in which he resides; and more especially as to the position of its armed forces, the state of its finances, and the course of its policy both with respect to his own and other States. It is for this reason that an ambassador has been called "the eye and the ear" of his State. (3) It is also his duty to watch over the interests of his own countrymen within the limits of the State in which he resides, to see that they obtain justice and protection, and to act as a medium of communication between them and the local Power. This protective supervision may under certain circumstances, and with the assent of the Government, be extended to the nationals of another State. (4) Beyond this, an ambassador may grant passports, and administer oaths (*k*); he may legalise for use in his own State wills and other unilateral acts, as well as contracts made by or between members of his suite, or nationals of his own State (*l*); he may also legalise marriages between members of his suite, and, by the municipal law of some systems, marriages between parties both or one of whom are nationals of his own State (*m*). He must respect the laws and customs of the country in which he resides; and is debarred from receiving presents. He should not interfere in local politics; otherwise he may render himself liable to recall or dismissal. So, in 1848, Sir H. Bulwer, the British ambassador to Spain, who was believed by the Spanish Government to have lent his assistance to its disaffected subjects, was handed his passports and requested to leave Spanish territory; an act which led to the suspension of diplomatic relations between the two countries (*n*). A similar incident occurred in 1888,

(*h*) *Cf. In re Baiz* (135 U. S. 403; Scott, p. 197).

(*i*) Hall, 313; Taylor, 348; Oppenheim, i. 581.

(*k*) As to the English law on this point, see 52 Vict. c. 10, s. 6.

(*l*) Hall, 195; Taylor, 347.

(*m*) As to the English law on this subject, see the Foreign Marriages Act, 1892. But the Courts of other States are not bound to recognise such marriages when their own subjects are concerned; see Taylor, 348, and cases there cited.

(*n*) Wheaton (Boyd), p. 336.

when Lord Sackville, the British ambassador to the United States, was, on the eve of a Presdential election, tricked by means of a fictitious letter into offering suggestions as to how his correspondent should vote. He also had interviews with certain newspaper reporters on the subject, reports of which were made public. Thereupon the United States Government requested his recall, and almost immediately afterwards sent him his passports. In the course of the correspondence which took place between the two Governments, the United States Foreign Secretary intimated his view that a request for the withdrawal of an ambassador was sufficient, irrespective of the motives inspiring it; and that the retention as well as the reception of a Minister from another State was solely a matter for the Government to which he was accredited. Lord Salisbury, in reply, pointed out that although one Government was at liberty to demand the recall of or to dismiss the ambassador of another Government, it could scarcely expect the latter to concur in such a proceeding, unless it was satisfied of the justice of the demand (*o*). In view of the discourtesy of the United States Government, some time was allowed to elapse before a fresh ambassador was appointed (*p*).

The Ambassador's Staff and Suite.—The staff of an embassy or legation usually comprises, in addition to the ambassador, a secretary of legation, councillors, attachés, and often other officers (*q*). All members of the staff of an embassy or legation, even though not personally accredited, are entitled to diplomatic privileges; and their names are notified to the Foreign Office of the receiving State, whilst the more important members are also presented to the Foreign Minister. The ambassador's suite or retinue comprises members of his family personally resident with him; persons in the fixed service of either the ambassador himself or members of the embassy; and couriers or despatch bearers. But such persons, although commonly regarded as exempt from the local civil and criminal jurisdiction, possess no independent immunity, and can only claim privilege through, and in the right of, the ambassador himself, who may waive it if he thinks fit. A list of members of the suite is also usually furnished to the local authorities. With respect to the immunity of servants, however, the practice of States is not altogether uniform (*r*). Nor in principle does there seem any valid reason for this exemption, which if often waived in practice (*s*). But couriers and messengers, passing with despatches between the ambassador and his own Government or other legations, are clearly entitled to inviolability of person and freedom of passage, subject to their official character being duly attested (*t*).

(*o*) Parl. Papers, Nos. 3 and 4, 1888, U. S.

(*p*) Hall, 314.

(*q*) Calvo, i. 486; Oppenheim, i. 577. A short account of the British Diplomatic Regulations will be found in Encycl. of the Laws of England, iv. 256.

(*r*) Taylor, 346; Oppenheim, i. 579. Some countries refuse to recognise any immunity on the part of servants who are at the same time subjects of the local Power. As to the British practice, see p. 312, *supra*.

(*s*) Hall, 182. Such an exemption, if insisted on, might conceivably result in offences against the local law remaining unpunished.

(*t*) Hall, 325.

Privileges and Immunities.—Shortly, the privileges and immunities of an ambassador, in relation to the State to which he is accredited, are: (1) a right to inviolability of person; (2) a general exemption from the local criminal jurisdiction; (3) an exemption also from civil jurisdiction, the precise limits of which are not so well ascertained, but which includes a privilege of not being compellable to appear before the local Courts even as a witness; (4) exemption from taxation, which does not, however, ordinarily include exemption from rates levied on his residence in respect of municipal services (*u*), or exemption from tolls or postages, but which will generally include an exemption from customs duties as regards articles imported for his own personal use (*x*). And the same privileges attach to other members of the legation. An immunity from local jurisdiction is also enjoyed by members of the ambassador's family living with him; and by persons in his permanent service within the limits already indicated. His residence or hotel is also inviolable, although this right is not altogether unqualified (*y*). An ambassador retains his domicile in his own country; and children born to him in the country to which he is accredited are not deemed to be subjects thereof.

(1) *Inviolability of Person.*—The inviolability which attaches to the person of an ambassador confers a right, apart from any question of jurisdiction or judicial proceedings, to freedom from arrest or molestation, as against the receiving State or its officials; save, perhaps, in cases where arrest may be necessary to the safety of the State, or for the purpose of his expulsion. It also confers a right to immunity from molestation or personal indignity, as against private persons, save in cases where the ambassador is himself the aggressor. It is with a view to the safeguarding of this right that the municipal law of many countries makes special provision for the punishment of offences against ambassadors (*z*). Any infringement of this right will constitute an international delinquency of the gravest kind. Thus the assassination by the Chinese, in 1900, of the German Minister, Baron von Ketteler, and of the secretary of the Japanese Legation, led to the occupation of Pekin by the allied forces, and was only atoned for by the performance of a number of expiatory acts on the part of the Chinese Government; including the punishment of the offenders, the payment of an indemnity, the adoption of adequate safeguards to prevent the recurrence of like outrages in the future, and the despatch of a special mission to Berlin.

(2) *Exemption from the Local Jurisdiction.*—The immunity of an ambassador from the local criminal jurisdiction is now universally recognised; to the extent, at any rate, that he cannot be tried for a criminal offence by the Courts of the State to which he is accredited. At the same time he is, as a matter of comity, expected to observe the local administrative and police regulations; and in the case of grave offences he might, it seems, be made amenable to the laws of his own country. But, the only remedies available to the receiving State, in cases of default, would appear to be a request for the offender's recall; or an order for his immediate expulsion; or, in cases of extreme gravity,

(*u*) But as to the English practice, see p. 311, *supra*; and as to the United States practice, Taylor, 345.

(*x*) Taylor, 346.

(*y*) *Infra*, p. 319.

(*z*) *Supra*, pp. 306, 308.

the provisional arrest and detention of the offender pending a demand for satisfaction (*a*). With respect to civil jurisdiction, the matter is not so clear. On the one hand, it is admitted that such a jurisdiction cannot be exercised in any manner that would interfere, however remotely, with the ambassador's freedom of person, or with property that belongs to him in his official character. On the other hand, it seems equally clear that his immunity from the local jurisdiction would not extend to property, and especially to real property, held by him in a character unconnected with his position as ambassador, such as that of private landowner, trustee, or trader. Outside these limits there is some divergence of opinion; some authorities limiting the ambassador's privilege to such an immunity from the local jurisdiction as may be necessary to his official position and the due fulfilment of his official duties; others extending it to an immunity from all jurisdiction, except such as may be exercised with his own consent and that of his State (*b*). The reason of the thing would seem to favour the former view; but the practice of States, although far from uniform, seems rather to favour the latter (*c*). In view of this divergence of opinion, it would seem that in practice the immunity of an ambassador from local civil jurisdiction must be taken to depend on the law of the State to which he is accredited, always assuming that this does not curtail his immunity in such a way as to interfere with his official position (*d*).

(3) *The Ambassador's Residence.*—The building and grounds within which an ambassador resides and carries on his mission, by whomsoever owned, are also exempt from the local jurisdiction, to such an extent, at any rate, as may be necessary to secure the free exercise of his functions. The building, its appurtenances and contents, are also exempt from all forms of taxation, whether general or local; although service rates ought to be paid except where this obligation is waived by mutual arrangement (*e*). The ambassador's residence is also exempt from all ordinary forms of legal process (*f*); nor is there, in general, any right of entry on the part of the local authorities, without the ambassador's consent (*g*). At the same time this immunity cannot, save, perhaps, in the special cases mentioned below, be set up in derogation of the safety and public order of the territorial Power (*h*). Hence, if offenders, who would otherwise be subject to the local jurisdiction, either take refuge or are detained within the embassy, their surrender may be demanded, and, if necessary, enforced, by the local authorities; and this whether the offence was committed within the precincts of the embassy or not (*i*), and whether it is of a political or non-political character (*k*).

(*a*) *Supra*, p. 293; Hall, 182; Taylor, 336.

(*b*) Taylor, 340; Hall, 184.

(*c*) For a summary of the current usage on this subject, see Hall, 185

(*d*) Westlake, i. 267.

(*e*) Taylor, 345.

(*f*) For an interesting account of a dispute between Germany and the United States, in Mr. Wheaton's case, as to the right to enforce a tacit hypothec over goods found in the house on the expiration of an ambassador's tenancy, see Taylor, 341.

(*g*) Taylor, 344; *U.S.* v. *Jaffers* (4 Cranch, C. C. 704; Scott, 256).

(*h*) Taylor, 342.

(*i*) Hall, 190.

(*k*) As to the British practice with respect to arrests, see p. 299, *supra*; and on the subject generally, Hall, 190; Westlake, i. 271; Scott, 256 and 257 *n*.

Alleged Right of Asylum.—With respect to the right—which was often claimed in the past and is even now sometimes asserted—of granting asylum in legations to strangers or persons not forming part of the ambassador's suite, it is true that there is a right to afford shelter, either to subjects of the State to which the legation belongs or to other persons, as against mob violence or other unlawful outrage; but this right is not, of course, peculiar to legations, although their protection is more often sought, because more likely to prove effectual. But, in the sense of a right to afford protection to political or other offenders, as against the local Government or its legitimate agents, it would seem that such a pretension is altogether unwarrantable. It is bad in principle, for the reason that it constitutes an infringement of the fundamental rule of territorial sovereignty, unless, indeed, we accept the wholly inadmissible theory of the extra-territoriality of an ambassador's residence; whilst it is not now even generally recognised in practice (*l*). At the same time it would seem (1) that there is nothing, in principle, to forbid the exercise of such a right, in cases where, in consequence of a revolutionary outbreak or general upheaval, the local sovereignty may for the time being be said to be in abeyance; whilst (2) special custom and considerations of humanity may perhaps be said to warrant its exercise in Oriental States, and even in those States of Central and South America in which, owing to the notorious instability of governments, a condition of things prevails which is altogether abnormal, and therefore outside the range of established principles (*m*).

THE POSITION OF DIPLOMATIC AGENTS AS REGARDS OTHER STATES THAN THAT TO WHICH ACCREDITED.

WILSON v. BLANCO.

[1889; 56 N. Y. Sup. Court, 582; Scott, p. 206.]

Case.] The defendant in this case had been duly accredited as Minister by the Government of Venezuela to the French Republic, and was in that character recognised by the Government of the United States. Whilst passing through New York on his way to Paris he was served with process in the local Courts in connection with a civil claim against him, and in default of appearance judgment was entered against him. Subsequently an application was made to vacate the judgment, on the ground

(*l*) Westlake, i. 271; Hall, 192.

(*m*) See also a series of articles by J. B. Moore in the P. S. Q. 1892, vol. vi.

of diplomatic privilege, and this application was granted by O'Gorman, J. On appeal this order was affirmed, on the grounds and for the reasons assigned in the Court below.

Judgment.] O'Gorman, J., in delivering judgment, observed that it was conceded on the authority of *Holbrook* v. *Henderson* (4 Sand. S. C. 626) that the defendant could not have been lawfully arrested in New York; but the Court in that case had gone further and had expressed the opinion that the privileges of ambassador extended to immunity against all civil suits sought to be instituted against him, whether in the Courts of the country to which he was accredited, or in those of a friendly country, through which he was passing on his way to the scene of his mission; such privilege being conceded to the ambassador both as the representative of his Sovereign, and as being necessary to the free exercise of his diplomatic duties. This opinion was in accordance with the views of the writers on international law, and also with the fiction of exterritoriality, under which an ambassador was assumed to be outside the country to which he was accredited, and to be still resident in his own country. If he had contracted debts and had no real property in the country to which he was sent, then he should be asked to make payment, and in case of refusal application should be made to his Sovereign; in addition to which he might also be proceeded against in the Courts of his own country, in which he was considered to retain his original domicile.

The view adopted in this case, as to the privilege of an ambassador when in a State to which he is not accredited, would appear to be sound in principle; although it cannot be said, so far, that there is any settled usage on the subject (*n*). The English law, although less explicit on the question of technical right, is virtually the same in effect. In *The New Chile Gold Mining Co.* v. *Blanco* (4 T. L. R. 346) an action was commenced in the English Courts against the same defendant, who was then Minister of Venezuela and resident in Paris; and an order for the service of the writ outside the jurisdiction having been made, an application was made to the Queen's Bench Division to set this order aside. In the result, and although the general question of jurisdiction was not decided, the Court set aside the order, and held, that as a matter of discretion, it would not allow service of a writ out

(*n*) Wheaton (Dana), 323; but see Hall, 318; Westlake, i. 264.

of England on the Minister of a friendly Power accredited to a foreign State. Manisty, J., indeed, expressed the opinion that the immunity of an ambassador, as recognised by the Courts of this country, would be violated by compelling an ambassador accredited to a foreign country to appear and defend himself in Great Britain.

General Note.—*The Position of an Ambassador with respect to other Powers.*—Although the privileges of embassy do not strictly avail as against other Powers than that to which the ambassador is accredited, yet, in practice, it is usual in time of peace for third Powers, as a matter of comity, to concede to an ambassador a right of innocent passage (*o*). But in time of war, if an ambassador accredited by one belligerent, even to a neutral Power, is captured within the territory of the other belligerent, then it would seem that he may be lawfully detained (*p*); although it would not be lawful to capture him on a neutral vessel (*q*). In such a case, however, at the request of the neutral, and in the absence of grave reason to the contrary, a safe-conduct would probably be granted. In the case where a belligerent invader finds the ambassador of a neutral State accredited to the other belligerent within the territory of the latter, the privileges of the ambassador, and his right to communicate with his own Government, ought to be respected; subject only to such restrictions as may be dictated by military necessity (*r*).

CONSULS.

VIVEASH v. BECKER.

[1814; 3 M. & S. 284.]

Case.] The defendant, a merchant resident in London, was arrested for a debt of £548, and compelled to give a bail bond. A rule *nisi* for delivering up of the bond was obtained on his behalf, on the ground that he had been appointed consul to the Duke of Oldenburg, and was acting in this capacity; but a subsequent application to make the rule absolute was refused.

Judgment.] In delivering judgment, Lord Ellenborough expressed the opinion that a consul was entitled only to a limited

(*o*) Taylor, 330; and especially the case of Mr. Soulé.

(*p*) Hall, 321.

(*q*) See the case of the *Trent*, vol. ii., *infra*.

(*r*) As to a controversy on this subject between the United States and Prussia in 1870, see Hall, 321; Taylor, 333.

privilege, such as safe-conduct. If this was violated, his Sovereign had a right to complain; but it had been laid down that a consul was not a public Minister, and was not entitled to the *jus gentium*. The Act of Anne, which must be considered as declaratory not only of what the law of nations was, but also of the extent to which it should be carried, only referred to ambassadors and public Ministers, and made no mention of consuls. A different construction, moreover, would lead to enormous inconvenience, for consuls had the right of creating vice-consuls, and they, too, must have similar privileges. Thus a consul might appoint a vice-consul in every port, to be armed with the same immunities, and this might become the means of creating an exemption from arrest indirectly, which the Crown itself could not grant directly. Under these circumstances it was held that no privilege existed, that the defendant was liable to arrest, and that the application must be refused.

This case is cited as illustrating generally the difference between the status of a consul and that of a diplomatic agent; and also as containing a statement of the reasons on which the English Courts base their refusal to recognise any immunity on the part of consuls from the ordinary jurisdiction; reasons which, as we shall see, have exercised a considerable influence on English mercantile policy. A consul is strictly only a commercial agent; he has no diplomatic character, and is not entitled to immunity from the local civil or criminal jurisdiction (*s*). So, in *The Anne* (3 Wheat. 435) it was laid down that although a consul was in some sense a public agent, he was only clothed with authority for commercial purposes, and although he might interpose claims on behalf of subjects of the country for which he acted, yet he was not to be considered as the agent of his Sovereign, or as entrusted by virtue of his office with authority to represent him in his negotiations with foreign States (*t*). It needs to be noticed, however, that by special consular conventions concluded between many foreign States the privileges and powers of consuls, and especially of *consuls de carrière* or professional consuls, as distinct from local merchants who may be invested with consular functions, are greatly enlarged. Hitherto Great Britain has, for the reasons given in the judgment in *Viveash* v. *Becker*, and owing to a disinclination to establish any further exception to the rule that every inhabitant is amenable to the ordinary law and jurisdic-

(*s*) *Barbuit's Case* (Forrest, 281; Phill. ii., 329); *Clarke* v. *Cretico* (1 Taunt. 106).

(*t*) See also *The Indian Chief* (3 C. Rob. 12); *Coppell* v. *Hall* (7 Wall. 542); and *In re Baiz* (135 U. S. 403; Scott, 197).

tion (*u*), held aloof from these arrangements. Hence the legal position of foreign consuls in England, and of British consuls in foreign countries, does not, save for certain minor privileges and exemptions resting on comity and usage, and certain powers occasionally conceded by treaties of commerce, differ greatly from that of other resident aliens. Nor under the British system is any distinction drawn between professional consuls and mercantile consuls (*x*). Throughout the British dominions foreign consuls are therefore amenable to the local jurisdiction; have no claim to precedence; and have no right to approach the local Government except on matters relating to their countrymen as individuals.

General Notes.—*The Nature of the Consular Office.*—Consuls are agents appointed by a State to watch over its commercial interests, and also to protect the interests of its merchants, its seamen, and its subjects generally, in some foreign place or country. The duties of a consul are for the most part commercial and ministerial, rather than political; he does not represent his State internationally; and he is not, except where expressly invested with diplomatic functions, entitled to the diplomatic character or privileges. He is also commonly appointed to act only for a particular place or district, and for local purposes; although a consul-general often acts for a whole State. Hence he is not usually brought into direct relation with the central Government of the State in which he acts; and communicates either with the local authorities, or with the central Government through them or through the Minister of his own State (*y*). Nevertheless, a consul is in some sort a public agent of his State; he is officially recognised by the local Power; and, although at most points subject to the local civil and criminal jurisdiction, he enjoys certain minor privileges and immunities by custom and comity, whilst more extensive powers and privileges are frequently conferred on him by treaty or convention. Hence a consul comes, to a limited extent, under the protection of the law of nations (*z*).

The Appointment of Consuls.—A consular officer generally acts under a commission issued by the Government which he represents or under its authority; but before acting he must obtain an *exequatur*, or permit, from the Government of the country in which he is to reside. This is sometimes embodied in a formal instrument; but in the case of inferior consular officers a mere endorsement of the commission, or even a notification by the central Government to the authorities of the district in which he is to act, is regarded as sufficient (*a*). This *exequatur* may be refused, if the person appointed is not acceptable to the local Power; whilst it may be withdrawn if the consul is guilty of unfriendly or improper conduct (*b*). Consuls are not affected by

(*u*) Dicey, Constitution, 189.

(*x*) Except in the matter of personal income tax.

(*y*) Although a right of direct communication is sometimes conferred by treaty, and is commonly exercised as regards the government of dependencies; Hall, 327 *n*.

(*z*) Taylor, 356.

(*a*) Wharton, Dig. i. § 119.

(*b*) For illustrations, see Hall, 328; and generally, Hall, Foreign Jurisdiction, 72.

political changes; nor do their commissions require to be renewed on a change of Government; or even on a change in the form of government. Nor will the appointment of a consul to act in a country which is subject to a *de facto* Government be regarded as an international recognition of its sovereignty or independence (*c*).

Grades of Consular Authority.—Each State, of course, makes its own provision with respect to the grades and duties of its consular officers. The British consular service comprises: (1) consuls-general; (2) consuls salaried; (3) consuls unsalaried; (4) vice-consuls; and (5) consular agents and proconsuls. Proconsuls are not really consuls, but merely agents who are appointed to perform notarial acts during the absence of a consular officer. Officers of the higher grades are appointed under commissions issued by the Crown; whilst vice-consuls and consuls are appointed by commissioned officers under the authority of the Crown; but neither class may act until recognised by the Government of the country in which they are to reside (*d*). A consul-general commonly exercises his functions over a wide area, or an entire State; whilst vice-consuls and consular agents generally act in subordination to some higher officer. In other respects these distinctions of grade possess no significance for international purposes. Some States forbid their consuls to engage in trade, and employ only *consuls de carrière* or professional consuls. Others allow trading either generally or in particular cases; with the result that consuls are very commonly local merchants, and often not even the subjects of the State which they represent. Professional consuls are sometimes invested by treaty with wider powers and more extensive privileges than mercantile consuls (*e*).

The Functions and Duties of Consuls.—Although it rests with each State to prescribe the functions and duties of its consuls, in so far as these can be lawfully exercised in foreign countries, yet these are for the most part very similar, save in so far as they may be expressly extended by convention. In general, the functions of a consul are: (1) to watch over the commercial interests of his State, to see that commercial treaties are duly observed, and to collect and forward information to its Government on commercial and other matters; (2) to watch over the interests of its subjects within the range of his consulate, to see that the local laws are fairly administered in relation to them, and to render them such advice and assistance as may be proper, having regard to his instructions; (3) to perform certain ministerial and notarial (*f*) acts, such as the administration of oaths, the legalisation by his seal of local acts and instruments for use in his own country, the receiving of protests and reports from masters of vessels, the authentication of births, deaths, and marriages of subjects, and the administration of the estates of subjects dying intestate within his district; (4) to exercise a voluntary or non-contentious jurisdiction in disputes between the subjects of his State, especially in matters relating to trade, and to exercise also, in cases where this is warranted

(*c*) Hall, 331; Taylor, 359 *n.*

(*d*) Phill. ii. 289; Foreign Office List, 1920.

(*e*) Oppenheim, i. 601.

(*f*) As to British consular officers, see 52 Vict. c. 10, s. 6, and 54 & 55 Vict. c. 50, s. 2. At the same time, it is perhaps questionable whether the notarial acts of foreign consuls are legal in England; see 41 Geo. 3, c. 79.

by local law or by treaty, a disciplinary jurisdiction over the crews of vessels belonging to his State (*g*). As a rule a consul is empowered to grant passports to subjects of his State, but not to foreigners. These functions moreover, are often extended under instructions given him by his own Government; as well as by treaty and convention (*h*).

The Privileges and Immunities of Consuls.—Although consuls are not entitled to diplomatic immunities, and remain, for the most part, subject to the local civil and criminal jurisdiction, yet the fact of their being officially recognised as the agents of foreign States, and the manifest utility of the consular system in international life, has led to their being invested with certain privileges and immunities not enjoyed by private individuals. These no doubt had their origin in comity and convenience; but with the lapse of time some of the more important privileges of the consular office may be said to have acquired the sanction of general, although not perhaps universal, custom. In practice these privileges are often confirmed, and additional privileges, such as exemption from certain forms of taxation, and even a limited exemption from the local jurisdiction, conferred, by treaty or consular convention (*i*). Thus, by a treaty concluded between Russia and Germany, in 1874, consuls are exempt from arrest save for certain offences, are exempt in certain circumstances from attending as witnesses, and are free from direct taxation except where they hold real estate; they are also expressly empowered in certain circumstances to communicate with the Government of the State in which they reside; and are empowered to exercise notarial functions (*k*). Some treaties also concede to consuls the full control over personal property left by their countrymen dying within their consulate. But, apart from convention, a consul is, by virtue of his office, entitled to such reasonable facilities and immunities as may be necessary to the performance of his functions. Nor does it appear unreasonable to claim that, in default of counter-notice, the grant of an *exequatur* entitles him to all such privileges as were enjoyed by his predecessor, and as may be enjoyed by other consuls of the country, except where these rest on special convention (*l*). More particularly he is entitled to safe-conduct, and special protection in the performance of his duties. An insult or outrage on a consul is commonly regarded as of graver import than one inflicted on a private individual (*m*). His official papers and archives are exempt from seizure or detention. He is commonly permitted to place the arms of the State he represents, or even to hoist its national flag, over the consulate. He is exempt from such personal obligations accruing under the local law as would seriously impede him in the discharge of his duties; such as service on juries, or in the constabulary, or in the militia. Nor can soldiers be quartered in his residence. In time of

(*g*) On the subject generally, see Hall, 325; Westlake, i. 277.

(*h*) As regards the British consular system, see the General Instructions for H.M. Consular Officers; Phill. ii. 289 *et seq.*; and as to the solemnisation of marriages by British consuls, 55 & 56 Vict. c. 23, and Hall, 332 *n.*

(*i*) Hall, 332 *n.* As to a consul's jurisdiction over merchant vessels, see p 292, *supra.*

(*k*) A very similar treaty was concluded in 1874 between Russia and France.

(*l*) Halleck, i. 398.

(*m*) Wharton, Dig. i. 783.

war the consulate of a neutral Power ought to be spared in so far as this consists with military necessity. If a consul is accused of crime, he ought to be released on bail, or kept under surveillance, until his *exequatur* has been withdrawn and other provision made for the discharge of his duties (*n*).

The Civil Status of Consuls.—The civil status of a consul and his relation to the local law will depend on circumstances. If he is a professional consul, having no property in the country, and not engaged in trade there, then he will retain the domicile of his own country, and his civil status will continue to be governed by its law (*o*). If he is a commercial consul and engaged in trade in, but is not a national of, the country in which he acts, then his civil status will be that of a domiciled alien; and to that extent he will be subject to the local law (*p*), save for such exemptions as may attach to him in virtue of his consular office. If he is a national of the State in which he acts, then he will remain subject to all obligations attaching to him by the law of his State, save such as are waived by his recognition as consul (*q*). In both these cases, moreover, he will, in the event of the State in which he resides becoming involved in war with another State, be deemed, from the point of view of the British Courts, to have an enemy character (*r*).

Consuls occupying an Exceptional Position.—Consuls are occasionally invested with diplomatic functions, or accredited not merely as commercial, but also as political or diplomatic agents. In this case they are furnished with the credentials necessary to the diplomatic character; and will then enjoy diplomatic privileges, the office of consul being merged in that of diplomatic agent. There are also often commercial attachés. Beyond this, consuls representing States of European civilisation in non-Christian countries are also commonly invested by usage or treaty, not only with immunities similar to those enjoyed by diplomatic agents, but also with extensive magisterial and judicial powers. The nature and scope of this consular privilege and jurisdiction have already been described (*s*). A foreign jurisdiction in certain British protectorates is also exercised by officers styled consuls-general; but such officers would really seem to have no connection with consuls proper (*t*).

(*n*) Hall, 330; Taylor, 357.

(*o*) *Sharpe* v. *Crispin* (L. R. 1 P. & D. 611); *Niboyet* v. *Niboyet* (L. R. 4 P. D. 1).

(*p*) *Supra*, pp. 211, 218.

(*q*) Halleck, i. 403.

(*r*) *Sorensen* v. *The Queen* (11 Moo. P. C. 141). As to the practice of other States, see p. 218, *supra*.

(*s*) *Supra*, p. 260.

(*t*) Jenkyns, British Rule, p. 172.

TREATIES AND OTHER INTERNATIONAL AGREEMENTS.

AN ARBITRATION BETWEEN CHILE AND PERU, 1875, IN THE MATTER OF A TREATY OF 1865.

[British and Foreign State Papers, vol. 56 (1865-66); Moore, History and Digest of International Arbitrations, ii. 2085 *et seq.*]

The Treaty.] In 1865 Chile and Peru, being then at war with Spain, entered into a treaty of defensive and offensive alliance with each other. The treaty was originally concluded between the respective plenipotentiaries of the two States, and was signed at Lima on the 5th of December, 1865. It provides, in effect: (1) That the two republics shall form an alliance to repel the aggression of the Spanish Government (Art. 1); (2) That they shall unite the naval forces "which they have, or may hereafter have, disposable, in order to oppose with them such Spanish naval forces as are or may be found on the waters of the Pacific" (Art. 2); (3) That such naval forces shall obey the Government in whose waters they may be stationed, the supreme command of the united forces being in the senior officer, subject, however, to a right on the part of the two Governments to confer the command of the squadrons, when operating together, on such officer as may be thought most competent (Art. 3); (4) That each of the contracting parties in whose waters the combined naval forces may happen to be shall defray all kinds of expenses necessary for the maintenance of the squadron or of one or more of its ships; but that, on the termination of the war, both republics shall nominate two commissioners, one on each side, "who shall make a definite liquidation of the expenses incurred and duly vouched, and shall charge to each of the republics half of the total amount of those expenses"; and that in such liquidation such expenses as may have been incurred by each of the republics in the maintenance of its squadron or one or more of its ships are to be included (Art. 4); and (5) That the treaty shall be ratified by the Governments of both republics, and the ratifications exchanged within forty days (Art. 6). The treaty was subsequently duly ratified

by both Governments; and ratifications were formally exchanged at Lima, and the act of exchange duly attested, on the 14th of January, 1866. After the war had come to an end commissioners were appointed to settle the basis of the liquidation. On the 8th and 12th of April, 1869, certain agreements with respect to the basis of liquidation were come to; and on the 15th of September, 1870, a partial adjustment of the account was also effected. But disputes having subsequently arisen with respect to the proper basis of the liquidation and other matters incidental thereto, it was agreed, by a protocol signed at Lima on the 2nd of March, 1874, to submit the controversy to arbitration; and in the result Mr. Logan, the United States Minister at Santiago, was appointed arbitrator.

The Award.] The award, which was rendered on the 7th of April, 1875, after reciting the terms of the treaty and its ratifications, and the fact that it possessed all the elements and terms of a valid international agreement, proceeds to give a brief summary of the fundamental conditions which, in the opinion of the arbitrator, ought to govern the liquidation of the allied accounts. On the various points in issue between the parties the arbitrator found as follows:

1. As to the precise scope and intention of the treaty, it was held: (a) That inasmuch as the treaty was signed on the 5th of December, 1865, and the ratifications formally exchanged on the 14th of January, 1866, the treaty must be regarded as having become operative from the former date; this on the principle of international law that the exchange of ratifications has a retroactive effect (*u*); (b) That although certain arrangements—which had been made between the parties as preliminary to or in anticipation of the treaty, relating to the despatch of certain vessels by Peru in the common cause—might fairly be regarded as part thereof, yet inasmuch as all preliminary stipulations must be regarded as merged in the treaty, and governed by its provisions (*x*), it could not be held that the vessels so despatched had in fact become "disposable," or available for the common purpose, as required by the treaty, until a much later date; (c) That only such vessels could be regarded as placed at the common ex

(*u*) Wheaton (Lawrence), p. 326. (*x*) *Ibid.* p. 318.

pense as were "disposable" or available for united action and as formed part of the allied fleet; and that any expenditure on vessels not so "disposable," but reserved for the individual protection of each country, was not to be regarded as a common expense; this interpretation of the treaty being corroborated by the subsequent acts and communications of the parties; and (d) That it was intended that the "common expense clause" should apply to vessels which were subsequently added to the combined forces by either party, but that it was not intended that the treaty provisions should apply to vessels engaged in hostile operations elsewhere than in the waters of the Pacific bordering on the coasts of the signatory Powers.

2. As to the particular class of expenses which should be borne by the parties in their separate and in their allied capacity, it was held that all kinds of expenses, apart from those of original equipment which were necessary for keeping the allied vessels in a condition of effective service, including expenditure on pay, supplies, fuel, and ammunition, were expenses intended to be charged against the common account; but that this did not include expenses which were not required for maintenance, or the damage involved in losses sustained in the course of hostilities carried on with the enemy.

3. As to the character and powers of the "commissioners" appointed, it was held that, according to the ordinary meaning of the word, and according to established usage, these "commissioners" were agents appointed for a special purpose, and not diplomatic agents; and that the special duty which they were empowered to carry out was the ascertainment of what sums had properly been spent on the common account, and the charging of each party with one-half of the total amount of expenses. Beyond this they could not go; but within these limits and on these points their findings on the facts were to be considered as final. This view was supported both by the usual practice of nations with respect to the appointment of commissioners for special objects, and also by the fact that no express provision was made by the treaty for the appointment of an umpire, or for submitting their decision for the approval of their Governments.

4. As to the validity of certain agreements purporting to settle

the basis of the liquidation, which had been come to on the 8th and 12th of April, 1869, and the partial adjustment of the 15th of September, 1870, it was held that inasmuch as by a well-established principle of international law a treaty once concluded could only be altered or amended by the same authority and procedure as that by which it had originally been made, the arrangements arrived at between the commissioners with respect to the times at which the common expenditure on particular classes of vessels should be deemed to have commenced, even though they were arrived at in a spirit of mutual concession, could not, in view of the fact that they were arbitrary arrangements and not sanctioned by the terms of the treaty, be regarded as binding on the parties; and that the partial liquidation of the 15th of September was therefore only good in so far as it could be shown to conform to the interpretation of the treaty adopted by the arbitrator.

5. As to the period at which the common expenses relating to individual vessels must be regarded as having come to an end, it was held that this period terminated as to particular vessels when they were withdrawn by capture or by entire disability from further service; and as to other vessels remaining under service, on the 31st of October, 1867, the date fixed by a convention made between the parties after the withdrawal of the Spanish forces.

6. As regards the division of prize spoils, it was held, on a review of the facts, that there had been only one separate capture which could be said to have enured to the common benefit, and which should be credited to the common account.

7. A number of minor and incidental questions were also determined on general principles of law and equity.

This case, although somewhat complicated in its details, serves to illustrate at once the nature, the forms that attend the making, and the interpretation of international agreements which affects the special interests of the contracting parties. It resembles in some measure an agreement for a limited partnership, duly entered into and subsequently brought to an end; in the course of which disputes had arisen as to the scope of the agreement and the adjustment of accounts thereunder. The award, it will be seen, touches on such questions as the nature and the effect of ratification of treaties; the merger of preliminary stipulations in the substantive agreement; the character and powers of special commissioners; as well as certain rules of construction usually applicable

to treaties. Amongst these we may notice the rule that words are to be construed primarily in their ordinary sense; the rule that in construing a treaty regard must be had to its general tenor; the rule that reference may be made to established usage as a guide to interpretation; and the rule that reference may be made to the subsequent acts and communications of the parties as corroborative evidence of a particular construction of which the words of the treaty were capable; all of which will be referred to more particularly hereafter.

General Notes.—*Treaties as a Subject of International Law.*—A State may, of course, bind itself by compact with individuals or corporations; but here we are concerned only with compacts between independent States. From the latter category we may here exclude *concordats* or agreements made with the Pope; whilst it will also be convenient to exclude agreements made incidentally to the conduct of hostilities, for the reason that these are the subject of special rules founded on the laws and usages of war, and will claim separate notice hereafter (*y*). The extent to which treaties enter into the making of international law; and also their relation to the municipal law both under the British and American constitutions, have already been considered (*z*). Most treaties, indeed, deal with matters which relate to the special interests of the parties, and which do not in any way affect the general rules of law. At the same time, the forms of treaties, the general conditions of their validity, and their interpretation and effect, are all questions which are properly the subject of international law; although on many of these matters its rules, as we shall see, are both vague and unauthoritative.

Classes of International Agreements.—The distinctions which are commonly drawn between different classes of international compacts do not appear to possess any legal significance (*a*); nor is the nomenclature by any means uniform. In practice, however, the term "treaty" is commonly applied to agreements which deal with the larger political or commercial interests of States; the term "convention" to agreements of minor importance or more specific in their objects (*b*); the term "declaration" to announcements of common understandings; whilst the term "general Act" is commonly applied to agreements of still wider application, arrived at by some congress or conference of Powers on matters of general international concern. A "protocol" is a document setting forth the conclusions arrived at, or the reservations made, by the parties, at various stages, in the course of some prolonged negotiation or conference. Such an instrument, if signed by the parties, may, it seems, have the effect of annexing the reservations or interpretations which it embodies to the subsequent treaty (*c*).

(*y*) Taylor, 365; Hall, 335 *n*; *infra*, vol. ii.

(*z*) *Supra*, pp. 10, 22, 23.

(*a*) But as to the distinction between executory and executed conventions, see Taylor, 367; and as to dispositive treaties, Westlake, i. 283, and *infra*, p. 339.

(*b*) Hall, 338.

(*c*) Taylor, 393; Westlake, i. 280.

Conditions of Validity.—The conditions of validity attaching to international agreements are much the same as those which obtain in municipal law; including capacity to contract, reality of consent, legality of object, and a due manifestation of consent, although not necessarily in any particular form. Every Sovereign State is capable of entering into international agreements; but semi-Sovereign States, or members of a confederate union, only possess such capacity within the limits of the powers retained by or conceded to them (*d*). In the matter of freedom of consent, however, international law differs from municipal law; for the reason that duress resulting from the pressure which one party is able to bring to bear on the other, either by reason of war or threat of war, will not affect the validity of State compacts; otherwise treaties made to end wars would be commonly nugatory (*e*). But if duress or violence were applied to the person of the agent concerned in the making of such a treaty, this would undoubtedly vitiate it (*f*). The consent of the parties must also be attested by agents duly authorised; in addition to which most treaties concluded by agents are commonly regarded as subject to ratification by the supreme treaty-making power (*g*). Finally, it is commonly laid down that such agreements are not to be regarded as binding if they conflict with the fundamental principles of international law or public morality; although some writers, in view of the wide range of disputable topics in either category, would apparently limit this to cases in which the applicability of such principles cannot reasonably be disputed (*h*). But this statement, although sound in principle, and even unquestionable in some of its more obvious applications, is, in its unqualified form, scarcely explicit enough to be serviceable in that class of cases in which the question is most likely to arise; whilst, in its qualified form, it loses most of its significance owing to the wide range of the matters excepted.

Forms of International Agreement.—No special form is prescribed for international agreements, which may be either written or verbal. At the same time, agreements of any importance are invariably embodied in formal shape; although minor matters are often arranged either by verbal agreements, or by verbal agreements followed by the making of identical municipal regulations, or by declarations signed by the parties, or by correspondence, or by an exchange of diplomatic notes specially directed towards some particular object (*i*).

The Treaty-making Power in different States.—The question as to where the treaty-making power lies in each State is primarily a question of municipal law; although it possesses also a certain international importance, in so far as a treaty, to be binding on a State, must have been made by an authority competent to make it under the municipal law. In Great Britain the treaty-making power is formally

(*d*) Taylor, 385; but see Hall, 335.
(*e*) Taylor, 385; Hall, 336.
(*f*) As to fraud, see Westlake, i. 279.
(*g*) *Infra*, p. 334; Taylor, 386.
(*h*) Such as an agreement to assert dominion over the open sea; or to re-establish the slave trade. See Phill. i. 78; Taylor, 365; Oppenheim, i. 527; Hall, 338. Hall states this rule with greater precision; although the instance first cited by him and the qualification annexed, both afford some ground for reflection, having regard to current practice.
(*i*) Taylor, 393; Hall, 338; Westlake, i. 281.

vested in the Sovereign, who is required, however, to act in the matter on the advice of his Ministers; whilst the actual treaty-making power really resides in the Cabinet, subject to its responsibility to the majority in the Commons (*k*). Such treaties will also be binding on all British colonies and dependencies, if so intended; although in the case of treaties which may affect local interests it is usual, in the case of the major colonies, to confer on the local authorities a right of adhering to or rejecting the treaty, as may be thought fit; whilst in the case of treaties which specially affect the relations of any particular "possession" with a foreign State the practice is occasionally adopted of associating some representative of the possession with the British plenipotentiary in the conduct of the negotiations (*l*). At the same time, as has already been pointed out, treaties made by the Crown which derogate from the legal rights of private persons or corporations cannot be given effect to in the United Kingdom unless they have been authorised or ratified by Act of Parliament, or, in the case of the colonies, either by Act of Parliament or by Act of the colonial Legislature (*m*). In the United States the treaty-making power resides in the President, as head of the federal executive, subject to the approval of two-thirds of the Senate. Once approved, however, such treaties have the effect of a law of the land; although, like other laws, they are subject to the ordinary constitutional limitations, and are liable to be superseded by subsequent Acts of Congress inconsistent with them (*n*). In France the treaty-making power is vested nominally in the President, although really exercised by the Cabinet; but treaties of peace and commerce, and treaties pledging the State finances, or affecting the status of persons and the rights of property of Frenchmen abroad, are only binding after having been voted by the two Chambers (*o*). In cases where municipal legislation, dependent on some body other than the treaty-making power in a State, is necessary in order to give effect to a treaty, it is usual to stipulate that the treaty shall not become operative until such auxiliary measures have been duly passed. But where no such condition attaches either expressly or by necessary implication, then it would seem that the State in default may justly be held accountable for the non-fulfilment of its obligations, even though the default is due to the failure of some branch of Government over which the treaty-making power has no control (*p*).

The Ratification of Treaties.—In cases where, according to the fundamental laws of a State, its treaties require to be ratified by some body other than that by which they were negotiated, the condition of ratification is necessarily implied (*q*). In other cases, the earlier rule appears to have been that ratification was only necessary where there

(*k*) Anson, vol. ii. 53.

(*l*) Todd, Col. Govt. pp. 247, 257.

(*m*) See *Walker* v. *Baird* [1892] (A. C. 491); *The Parlement Belge* (4 P. D. 129; 5 P. D. 197).

(*n*) Art. II., s. 2, of the Constitution; see also Scott, 413, 422.

(*o*) Constitutional Law of 1875.

(*p*) The question of the obligation of the Legislature or other branch of Government in such cases is solely a question of municipal law; all that can be said is that in cases of default the State may be held accountable as for a breach of its compact: see Taylor, 390.

(*q*) *Supra*, p. 332.

was an express condition to that effect, or where the agent was manifestly acting in excess of his powers. But, except, perhaps, in the case where a treaty has been directly concluded by the supreme treaty-making power, the modern practice would appear to be that all treaties, even though made by agents expressed to be invested with full powers, are nevertheless subject to an implied condition of ratification by the supreme contracting authority. An express condition is in fact generally inserted either in the full power or in the treaty. And this is perhaps justified by the impossibility of duly safeguarding what are often very complicated and important interests, either by the employment of the most competent agents or by the most explicit preliminary instructions. Nor does it appear to be possible to impose any limit on the right of refusing ratification; for the reason that its very object is to secure to a State, not merely a power to guard against the betrayal of its interests or a transgression of authority by its agent, but also an opportunity of considering the entire arrangement in all its bearings, and of its effect as a whole on the interests of the State or of its constitutional law, before binding itself irrevocably. Some writers contend that ratification ought not to be refused except for solid reasons. At the same time, if one party refuses to ratify a treaty otherwise duly made, this will give the other a claim to indemnity or restitution as regards any acts properly done in anticipation of the completion of the arrangement (*r*). Ratification is effected by an exchange of instruments embodying the ratification between the supreme treaty-making powers of the respective States. But once a treaty has been duly ratified, then its provisions will, in default of agreement to the contrary, operate, at any rate on the public rights of either party, as from the date of the original signature; although in cases where a treaty requires ratification by the Legislature it will not, apparently, have any retroactive effect on private rights (*s*).

THE TERMINATION OF TREATIES.

CONTROVERSY BETWEEN GREAT BRITAIN AND RUSSIA WITH RESPECT TO THE REPUDIATION BY THE LATTER, IN 1870, OF CERTAIN PROVISIONS OF THE TREATY OF PARIS, 1856.

[British and Foreign State Papers, vols. 46 (1855-56); 61 (1870-71); Holland, European Concert on the Eastern Question, Texts, p. 241 *et seq.*]

Circumstances out of which the Controversy arose.] In 1856, on the termination of the Crimean War, an attempt was made

(*r*) On the subject generally, see Hall, 340; Taylor, 387, 390; Westlake, i. 279; Oppenheim, i. 671.

(*s*) *Haver* v. *Yaker* (9 Wall. 32; Scott, 420).

by the Great Powers to settle the affairs of South-Eastern Europe "in so far as possible in a permanent manner." With the object of securing Turkey against attack by Russia, the Black Sea was declared to be neutralised, and the maintenance of warships and the establishment of naval and military arsenals on its coasts were forbidden; whilst to secure Russia against attack by other Powers, in view of these restrictions, Turkey was put under obligation to close the Bosphorus and Dardanelles to all foreign vessels of war, except in the case of hostilities in which Turkey might be engaged. In pursuance of this object, on the 30th of March, 1856, the Treaty of Paris was concluded between Great Britain, France, Austria, Prussia, Sardinia, Russia, and Turkey. By this treaty it was provided, *inter alia:* (1) That the Black Sea should be neutralised; its waters and ports being declared open to the mercantile marine of every nation, but interdicted to ships of war both of the riparian States and of all other Powers (Art. 11); saving certain light vessels of war which Turkey and Russia were to be at liberty to maintain for the service of their coasts (*t*), and two light vessels which each of the signatory Powers was to be at liberty to station at the mouths of the Danube (Art. 19); and (2) That the Black Sea being thus neutralised, no mililtary or maritime arsenals should be established or maintained on the coasts by either Russia or Turkey (Art. 13). By a convention of the same date which was annexed to the treaty, and made between the same parties, it was provided that Turkey should maintain, and that the other Powers should respect, the ancient rule of the Ottoman Empire prohibiting ships of war from entering the Dardanelles and the Bosphorus so long as the Porte was at peace (Art. 1); subject, however, to a right on the part of the Porte to permit the entry of certain light vessels of war in the service of the missions of foreign Powers, as well as the vessels referred to in Art. 19 of the treaty (Arts. 2 and 3).

The Controversy.] In 1870, during the war between France and Germany, two of the principal parties to the original treaty, the Russian Government addressed a circular to the Powers

(*t*) Art. 14. A convention of the same date and to the same effect was also entered into between Russia and Turkey and incorporated in the treaty.

declaring itself to be no longer bound by those provisions of the Treaty of Paris which had reference to the Black Sea. In justification of this proceeding, it was stated generally that "the treaty had not escaped the modification to which most European transactions had been exposed, and that in the face of such changes it would be difficult to maintain that the written law founded on respect for treaties as the basis of public right retained that moral validity which it may have possessed at other times." More particularly it was alleged: (1) That the neutralisation of the Black Sea as contemplated by the treaty had, owing to the changes in naval warfare incident to the use of ironclads, become altogether illusory, for the reason that, whilst Russia was disarmed, Turkey retained the right of maintaining unlimited naval forces in the archipelago and straits, whilst France and England retained their power of concentrating squadrons in the Mediterranean, thus rendering Russia liable to sudden attack from enemies forcing a passage of the straits; (2) That the efficacy of the treaty had been impaired by the acquiescence of the Powers in certain revolutionary changes, such as the union of Moldavia and Wallachia, which were at variance both with the letter and spirit of the treaty; and (3) That under various protexts foreign men-of-war had been repeatedly suffered to enter the straits, and that whole squadrons, whose presence was an infraction of the character of absolute neutrality attributed to those waters, had been admitted to the Black Sea. Great Britain, in replying to the Russian circular, took the broad ground that no party to a treaty could be relieved from its obligations except with the consent of the other parties thereto; apparently taking it for granted that no such breach had occurred as would operate as a release. "The despatches of the Russian Government," it was said, "appear to assume that any one of the Powers who have signed the engagement may allege that occurrences have taken place which, in its opinion, are at variance with the provisions of the treaty, and, though their view is not shared or admitted by the co-signatory Powers, may found upon that allegation, not a request for a consideration of the case, but an announcement that it has emancipated itself, or holds itself emancipated, from

any stipulations of the treaty which it thinks fit to disapprove. Yet it is quite evident that the effect of such a doctrine, and of any proceeding which, with or without avowal, is founded on it, is to bring the entire authority and efficacy of treaties under the discretionary control of each of the Powers who may have signed them; the result of which would be the entire destruction of treaties in their essence." The other Powers also refused to admit the Russian contention. In these circumstances Russia deemed it politic to abandon formally the position she had taken up, subject to an understanding that a conference would be summoned to deal with the question.

The Settlement, and the Protocol to the Treaty of London, 1871.] A conference of such of the signatory Powers as could attend was accordingly summoned, and met in London in 1871. At the instance of Great Britain it was declared, "That the Powers recognise it as an essential principle of the law of nations that no Power can liberate itself from the engagements of a treaty nor modify the stipulations thereof, unless with the consent of the contracting parties by means of an amicable understanding." This principle was embodied in a protocol which was thereupon signed by the plenipotentiaries, that is to say, by North Germany, Austria, Great Britain, Italy, Russia, and Turkey; and which was subsequently also adopted by France (*u*). Subject to this declaration, an arrangement was come to between the parties for the revision of certain stipulations of the Treaty of Paris of 1856, and the abrogation of the attendant convention. By the Treaty of London, 1871, it was accordingly provided, in effect, that Articles 11, 13, and 14 of the Treaty of Paris, of the 30th of March, 1856, as well as the special convention concluded between Russia and Turkey, and annexed to Art. 14, should be abrogated and replaced by the following provisions: (1) "That the principle of the closing of the Dardanelles and Bosphorus as established by the separate convention of 1856 should be maintained; but with power to the Sultan to open the straits in time of peace to the vessels of war of friendly and allied Powers in case the Porte should judge it

(*u*) B. and F. S. P. vol. 61, p. 1198.

necessary in order to secure the execution of the stipulations of the Treaty of Paris"; and (2) That the Black Sea should remain open as heretofore to the mercantile marine of all nations (*x*).

It will be observed that Russia virtually based her proposed repudiation of the Black Sea provisions of the Treaty of Paris, 1856, on the grounds (1) that the conditions contemplated by the treaty had since undergone so material a change that the treaty could no longer be deemed to be binding; and (2) that the treaty having been in fact violated, she had thereby become released from her obligations thereunder. Although the principles involved in these contentions are at bottom, and subject to the restriction hereafter suggested (*y*), probably sound, yet the facts on which it was sought to make them applicable were, in each case, altogether insufficient. With respect to the effect of the alleged change in the conditions of naval warfare on the Russian position in the Black Sea, these conditions were not really new, but had existed at the time of the treaty; and even though the strategic effect of the original disability might have become more embarrassing to Russia, yet there had certainly not been such a change in fundamental conditions as could be said to have impaired the whole foundation of the treaty. With respect to the union of the Danubian provinces, although this involved a change in the conditions previously existing, yet it was not in itself a change which was either forbidden by or which derogated from the treaty; and its recognition as an accomplished fact was equally the act of Russia as of the other Powers. With respect to the infringement of the treaty by the passage of warships, in the course of fifteen years some nine vessels in all, including one Russian, one British, and one French, had been allowed to enter; but these isolated occurrences, although a technical infringement, and although they might have been a proper ground for protest at the time, were yet not breaches of such a character as showed an intention to repudiate on the part of the other parties to the treaty, or sufficiently material to enable it to be said that the main consideration for the treaty had been thereby impaired (*z*). The main provisions of the Treaty of London, 1871, in so far as they relate to the straits, have already been discussed (*a*). With respect to Article 2, however, it needs to be mentioned that at the Berlin Congress, 1878 (*b*), Great Britain by a protocol declared that her obligations, under that article, did not go further than an engagement with the Sultan "to respect in this matter his Majesty's independent determinations in conformity with the spirt of existing treaties"; whilst Russia inserted in the protocol a counter-declaration that "the closing of the straits was a European principle, and that the stipulations relating thereto, as embodied in the treaties of 1841, 1854, and 1871, and confirmed by the Treaty of Berlin, 1878, were binding on all the Powers, in accordance with the spirit and letter of existing

(*x*) See arts. 2 and 3; and as to the new provisions with respect to the navigation of the Danube, arts. 4-7; B. and F. S. P., vol. 61, p. 7.

(*y*) *Infra*, p. 340.

(*z*) *Infra*, p. 340.

(*a*) *Supra*, pp. 149, 154.

(*b*) *Supra*, p. 12.

treaties, not only as regards the Sultan, but also as regards all signatory Powers" (*c*). The principle enunciated, in 1871, as an essential principle of the law of nations—that "no Power can liberate itself from the engagements of a treaty, or modify the stipulations thereof, unless with the assent of the contracting Powers, by means of an amicable arrangement"—has been denounced, on the one hand, as too elementary to need any formal declaration; and, on the other hand, as well-meaning, but obviously useless and impracticable (*d*). It is conceived, however, that it must be read in the light of the peculiar circumstances which led to its enunciation; and that it really amounts to a declaration that a treaty cannot be annulled by one of the parties thereto, without the consent of the other or others, in circumstances such as there existed —in circumstances, that is, which involve no change in the fundamental conditions on which the treaty was based, and which show no violation of the treaty by the other parties in any vital or material part. Viewed in this light, the rule may probably be regarded as the primary rule from which the law of nations on this subject starts (*e*).

General Notes.—*How Treaties may come to an End.*—Treaties are of different kinds and are terminable in different ways. (1) Some treaties impose no continuing obligations, and once executed cease to have any further effect. This is also the case with treaties which define or transfer rights *in rem*, such as treaties ceding territory, or defining boundaries, or creating servitudes; for in all these matters treaties supply, as between States, the place of conveyances between individuals, and once the rights conferred have duly passed they no longer depend on treaty, but on the general law. (2) Other treaties carry their own provisions with respect to termination; as where they are made for a specified and limited purpose, or for a specified time, or are expressly made terminable by notice, or are mutually understood to be at the will of either party. (3) Other treaties, again, have no limit assigned to their operation, whether expressly or impliedly, and it is as to these that the difficulty for the most part arises. Treaties or declarations purporting to define legal rules, such as the Declaration of Paris, 1856, are supposed, unless expressly limited, to be perpetual; although in fact capable of being rescinded or modified by common assent, or by some new international act or declaration (*f*). Some treaties are put an end to by war, whilst others are only suspended (*g*). All treaties, moreover, may come to an end by mutual agreement of the parties; or by becoming impossible of fulfilment, although in this case it would seem only to the extent of such impossibility (*h*); or by becoming incompatible with the fundamental principles of law or with the general obligations of States, although seemingly only to the extent of such incompatibility (*i*). A treaty will also cease to be binding when one of

(*c*) Phill. i. 302 *et seq.*

(*d*) Wheaton, by Boyd, p. 106; Encycl. of the Laws of England, xii. 273.

(*e*) As to its qualifications, when taken literally, see p. 340, *infra*.

(*f*) The Declaration of Paris, 1856, contains no provision for denunciation.

(*g*) *Infra*, vol. ii., "Effect of War on Treaties"; and Hall, 398.

(*h*) Hall, 359.

(*i*) Treaties originally incompatible with established principles or established rights will be void *ab initio;* but see *supra*, p. 332.

the contracting Powers loses its independent existence, as when it is compulsorily or voluntarily absorbed into another State; subject, however, as regards certain kinds of obligations (*k*), to such reclamations against the absorbing State as may be warranted by the principles of State succession (*l*). But where the sovereignty and independence of one of the contracting States are not wholly extinguished, as where it becomes a member of a union of States, then the treaty will only be affected in so far as the fulfilment of its stipulations has become incompatible with the new relation (*m*).

The Right to annul a Treaty.—The right of one signatory Power to abrogate or annul the provisions of a treaty, without the consent of the other parties thereto, would seem to depend on the following considerations: (1) It is clearly an implied condition of every treaty that it shall be observed in all material points by the contracting Powers; and if one Power wilfully neglects or refuses to fulfil this obligation, then such neglect or refusal will confer on the other, either a right to resort to those measures of redress which attend the commission of an international wrong, or a right to annul the treaty and to regard itself as free from any further obligation in the matter. But to warrant this it would seem, on principle at least, that the breach must be such as to affect one of the main objects of the treaty, or such as to deprive the other contracting Power of some advantage which constituted a material inducement to the making of the treaty (*n*). (2) Having regard to the continuity of State life, moreover, it seems impossible to maintain that a treaty, even though on its face it purports to be of indefinite duration, continues binding for all time, and notwithstanding any change of conditions, however vital, unless discharged or modified by mutual consent. Both the changing conditions of national life, and the reason of the thing, therefore appear to suggest that it is an implied condition of a treaty, even though it purports to be indefinite, that it shall be regarded as terminable by any material change in the fundamental conditions which obtained at the time at which it was entered into. In many of the older treaties there was inserted the *clausula rebus sic stantibus*; by virtue of which the treaty might be construed as abrogated when the material circumstances on which it rested changed (*o*). But, even in default of express provision, the maxim *conventio omnis intelligitur rebus sic stantibus* may reasonably be held to apply. In order to have this effect, however, the change must be one which takes away the very foundation of the engagement. To the objection that such a principle is perilously lax one can only reply that some such rule would appear to be an inherent necessity; and that to pronounce any treaty binding for all time despite such change of conditions would strain the principle of the sanctity of treaties beyond the breaking-point, and probably imperil it in other cases. In answer to the objection of vagueness, it may be said that municipal law, with its rules as to "reasonable care" and "reasonable cause," is often in no better position; and that with the increased prevalence of inter-

(*k*) Such as those involving a money liability.

(*l*) *Supra*, p. 73 *et seq.*

(*m*) *Supra*, p. 76; Hall, 368; and *Terlinden* v. *Ames* (184 U. S. 270).

(*n*) Hall, 361.

(*o*) *Hooper* v. *U. S.* (22 Court of Claims, 408; Scott, at p. 434).

national arbitration an international tribunal will have no harder task in applying this principle than that which constantly devolves on municipal Courts (*p*). (3) Finally, it may be said to be an implied condition that a treaty "shall remain consistent with the right of self-preservation." This may perhaps be questionable as a legal principle (*q*), but would certainly be acted on in practice. For this reason a treaty will become voidable if and in so far as "it is dangerous to the life or incompatible with the independence of a State, provided its injurious effects were not intended by the two contracting parties at the time of its conclusion" (*r*).

THE INTERPRETATION OF TREATIES.

WHITNEY v. ROBERTSON.

[1887; 124 U. S. 190; Scott, p. 422.]

Case.] THIS was an action brought by the plaintiff, a merchant of New York, to recover a sum of $21,936, paid by him, under protest, to the defendant, the Collector of Customs of the port of New York, as duty on a large quantity of sugar, which had been imported by the plaintiff from San Domingo, and which the plaintiff claimed was exempt from duty by virtue of the provisions of a treaty existing between the United States and the Dominican Republic. By Article 9 of this treaty it had been agreed that "no higher or other duty shall be imposed on the importation into the United States of any article, the growth, produce, or manufacture of the Dominican Republic, and no higher or other duty shall be imposed on the importation into the Dominican Republic of any article, the growth, produce, or manufacture of the United States, than are or shall be payable on the like articles, the growth, produce, or manufacture of any other countries." Meanwhile, by another treaty subsisting between the United States and the King of the Hawaiian Islands, provision

(*p*) See Phill. ii. 114; and *Hooper* v. *U. S.* (*supra*); but for a criticism of this view, see Hall, 361; and an article by H. M. Adler, L. M. and R. 5 ser. xxvi., pp. 62, 164.

(*q*) For a criticism of "the alleged right of self-preservation," see Westlake, i. 296.

(*r*) Hall, 368, where the principle is applied to the case of a State, engaged in a struggle for its own existence, declining to fulfil its obligations under a treaty of alliance or guarantee. At the same time it seems that such an excuse would only avail during the continuance of the danger.

had been made for the importation into the United States, free of duty, of various articles, the produce and manufacture of those islands, in consideration, among other things, of a like exemption from duty on the importation into those islands of sundry specified articles, the produce and manufacture of the United States; this reciprocal engagement being recited to be in consideration of the rights and privileges, and as an equivalent therefor, conceded by one party to the other. On these facts it was contended by the plaintiff that, inasmuch as sugar from the Hawaiian Islands was admitted free of duty, sugar imported from San Domingo must, on a proper construction of the treaty, be entitled to a like exemption. The defendant demurred to the complaint; and the demurrer having been upheld, judgment was entered for the defendant. The matter was thereupon carried on appeal to the Supreme Court, by which the judgment of the Court below in favour of the defendant was finally affirmed.

Judgment.] Mr. Justice Field, in delivering the judgment of the Supreme Court, after adverting to the facts, pointed out that in the case of *Bartram* v. *Robertson* (122 U. S. 116) the Court had had to decide a question arising on a somewhat similar claim under a treaty made with Denmark. In that case the Court had come to the conclusion that the true intention of the contracting parties was, that in the imposition of duies by either party there should be no hostile discrimination against the other, but that it was not intended to interfere with any special arrangements that might be made with other countries, founded on the concession of special privileges. In the present case the terms of the treaty with the Dominican Republic were, in spite of some minor differences, substantially the same; and here, too, it seemed to the Court that Article 9 was intended as a pledge of the contracting parties that there should be no discriminating legislation against the importation of articles which were the growth, produce, or manufacture of the respective countries, in favour of articles of like character imported from any other country; but that it was never designed to prevent special concessions, upon sufficient consideration, touching the importation of specific articles. Indeed, it would require the clearest language to warrant the conclusion that the Govern-

ment of the United States intended to preclude itself from such engagements with other countries, which might in the future be of the highest importance to its interests.

But, apart from this consideration, there was another answer to the plaintiff's pretension, in that the Act of Congress authorising these duites was passed after the treaty with the Dominican Republic had been concluded, and if there was any conflict between the stipulations of the treaty and the requirements of law the latter must prevail. A treaty was primarily a contract between two independent nations. For any infraction of these provisions a remedy must be sought by the injured party through reclamations upon the other. If the stipulations of a treaty were not self-executing, and could only be enforced pursuant to legislation to carry them into effect, then such legislation was as much subject to repeal or modification by Congress as legislation on any other subject. If its stipulations were self-executing, and required no legislation to make them operative, then (under the Constitution of the United States) they had the force of a legislative enactment. But even then it was open to Congress to modify or supersede them by subsequent legislation. In such a case, although the Courts would try to construe the instruments in such a way as to give effect to both, yet, if they were inconsistent, the last one in date would prevail, provided that the stipulations of the treaty were self-executing. If the other party to the treaty were dissatisfied with the action of the legislative department, it could make its complaint to the executive head of the Government; but the Courts could give no redress, for such a matter was not one for judicial cognisance: *Taylor* v. *Morton* (2 Curtis, 454). If the law was clear, it could not be assailed in the Courts for want of conformity to the stipulations of a previous treaty not already executed: *Head Money Cases* (112 U. S. 580).

The judgment in this case embodies a decision on two distinct questions, one of which relates to the interpretation of treaties generally, and in particular to the interpretation of a clause frequently found in commercial treaties, known as the "most favoured nation clause"; whilst the other relates to the place occupied by treaties under the law and Constitution of the United States (*s*). The case also affords

(*s*) The latter question has already been considered: see p. 23, *supra*.

a convenient illustration of the conditions under which treaties may occasionally present themselves as subjects for judicial interpretation in municipal Courts. On the question of the interpretation of treaties, it seems that both international tribunals and municipal Courts will, in construing international compacts, adopt a more liberal construction than that which would ordinarily be applied, at any rate in the English and American Courts, to the construction of private instruments and agreements. This arises from the fact that the prime aim of all interpretation must be to get at the real intention of the parties; and that in determining this regard must be had at once to the nature and subject-matter of the compact, and the circumstances under which it was arrived at. Applying these considerations to treaties, we find that such compacts are usually made by diplomatists, and not by lawyers; that they commonly deal with large national interests; and that they are often concluded in circumstances which render it impossible to settle all minor points or to provide for every conceivable contingency. So in *Whitney* v. *Robertson* it will be seen that the intention of the parties to the treaty was considered in the light both of the practice ordinarily followed in the framing of commercial treaties, and the effect which a particular construction would have had on the national interests (*t*). Looked at in this light, it was held that the clause in the San Domingo treaty which stipulated, in effect, that no higher duties should be imposed on the imports from that State than were imposed on the imports from other States—with a similar stipulation, in favour of the United States, as regards San Domingo—was to be construed, not in its strict and literal sense, but merely as a pledge by each party that there should be no discrimination against the goods of the other, in favour of the goods of other States; and that such a stipulation did not, therefore, apply in a case where the imports of some other State were admitted on specially favourable terms in return for special concessions. And this interpretation of the "most favoured nation clause" appears to be at once correct in principle and generally accepted in practice.

GENERAL NOTES.—*The Language of Treaties.*—Up to the middle of the eighteenth century treaties were ordinarily expressed in Latin; but subsequently French appears to have taken its place. So, the Treaty of Vienna of 1815 was expressed in French, although each Power reserved the right in future conventions of adopting such language as it might think fit. Later, the custom arose of expressing treaties in the language of each of the contracting parties; although the difficulty of interpreting texts in two languages, both of which are binding, occasionally led to the adoption of a French version for common reference. But the conventions under which the "international unions" (*u*) have been constituted are entirely in French; and the same applies to the various conventions framed by The Hague Conferences. In the recent Peace Treaties, however, the French and English versions are of equal authority.

(*t*) See Westlake, i. 283. (*u*) *Supra*, p. 13.

Difficulties incident to Interpretation of Treaties.—In spite of the distinction which is sometimes drawn between "construction" and "interpretation," the latter term would really appear to cover the whole process by which the meaning of and obligations incident to some written instrument are ascertained or declared; whether that process consists in gathering the intention from a survey of the whole instrument and a comparison of its different parts, or in ascertaining the meaning of particular terms or provisions in which there is some ambiguity. With respect to the rules that should be applied to the interpretation of treaties, the judicial side of international law is too new, and its judicial applications have hitherto been too intermittent and disconnected, to have evolved any definite or coherent body of rules that can claim to be authoritative. It is true that many writers on international law from Grotius onward have essayed to lay down rules on this subject (*x*). Some of these rules are intrinsically reasonable and entitled to respect; but others appear to be either unsafe or of "doubtful applicability" (*y*); whilst there is also a considerable variance between rules suggested by different writers. Hence it is impossible to accept any one version as authoritative. The Permanent Court of Arbitration, or the Permanent Court of International Justice, may conceivably develop some such body of rules in the future. But in the meantime, and in view of the increasing frequency of arbitration, and the unanimous conclusion arrived at by The Hague Conference of 1907, that "certain disputes, and in particular those relating to the interpretation and application of international agreements, may be submitted to compulsory arbitration without any restriction," it is desirable that some general agreement should be come to on this subject. Otherwise it is probable that in future arbitrations each arbitrator, if a jurist, will incline to follow those rules with which he is most familiar in the working of his own system. This would operate unfairly; for the reason that although there is a fund of common principle, yet there are also radical differences between the methods of different systems. It is to be hoped, therefore, that an appropriate body of rules on the subject of the interpretation of treaties may be formulated. But until this is done recourse can only be had to such of the rules propounded by the various text-writers as appear to be intrinsically fair and reasonable. These rules are for the most part based on rules which the common experience of mankind has approved and developed in connection with the construction of private instruments and statutes; subject to such modifications as the essential differences between these and international instruments appear to require (*z*).

Some General Rules of Interpretation.—Without pretending to deal with the matter comprehensively or completely, it will be desirable to glance at some of the more important of these rules of interpretation; merely premising that they possess only a persuasive value, and are not authoritative. In view, moreover, of the fact that contingencies

(*x*) Grotius, Puffendorf, Vattel, Barbeyrac; and amongst modern writers, Heffter, Bluntschli, Calvo, Phillimore, and Hall.

(*y*) Hall, 344.

(*z*) See Taylor, 394; Hall, 335; Phillimore, ii. 94; Wharton, Dig. ii. 36; and an article on this subject by H. M. Adler, L. M. and R., 5 ser., xxvi. pp. 62, 164.

constantly arise that never came within the actual contemplation of the parties, the subject of interpretation will necessarily include some artificial rules and presumptions. Amongst those rules of interpretation which are at once intrinsically reasonable and appear to command a general assent we may notice the following: (1) In the interpretation of international agreements it is necessary, in view of the different character of the interests involved and the different conditions under which such agreements are commonly entered into, to adopt a more liberal method of construction than that which might fairly be applied in the case of private instruments. That is, a treaty must be construed throughout in the light of the larger national interests with which it deals, and in view of the effect which a particular construction, even though it may be a plain and literal construction, would have on them (*a*). (2) All international agreements must be construed in such a way as not to derogate from the fundamental principles of international law (*b*); or even from the fundamental rights of States, except in so far as a contrary intention is explicitly manifested (*c*). (3) In general the words used must be construed in their plain and ordinary sense, save where they possess some "customary" or "special" meaning within the knowledge and contemplation of the parties (*d*). (4) Where the words of a stipulation or provision, taken by themselves, fail to yield a plain and reasonable sense, recourse should be had either to the immediate context, or, if necessary, to the general purport and tenor of the agreement, including a consideration of its title and statement of objects and headings (*e*). (5) In the case of conflicting claims it is usual to read general clauses as being subject to qualification by special clauses, and prior clauses by later (*f*). (6) In cases where a doubt or a dual meaning cannot be dispelled by a consideration of the instrument as a whole, recourse may be had to such extrinsic evidence as may serve to throw light on the true intention of the parties; and hence regard may be had (*inter alia*) to preliminary stipulations, even though these are otherwise deemed to be merged in the substantive agreement, or to contemporaneous acts, or even to subsequent acts of the parties, as corroborative evidence of a particular construction (*g*). (7) In default of express provision, and failing any other evidence of intention, recourse may be had to the following presumptions, in so far as they may be appropriate: (a) The clear grant of a right or the clear imposition of an obligation will be deemed to carry all necessary incidents to its full enjoyment, or adequate discharge, as the case may be (*h*). (b) Subject to this, the grant of a right or imposition of an obligation will be presumed to carry no wider right and no obligation more onerous than is expressly stated, and the onus of proving anything beyond this must be deemed to rest on the party who alleges it (*i*). (c) If the terms

(*a*) See Westlake, i. 282; and *Whitney* v. *Robertson* (*supra*).

(*b*) But see *supra*, p. 332.

(*c*) Hall, 348; Taylor, 397. Logically this would appear to fall under (7), *infra*; but its importance appears to warrant its treatment as a substantive rule.

(*d*) Hall, 344; Taylor, 397.

(*e*) Hall, 347; Taylor, 397.

(*f*) Wharton, Dig. ii. p. 36; Hall, 349.

(*g*) *Supra*, pp. 107, 330 *et seq.*

(*h*) Hall, 349; Taylor, 397.

(*i*) Taylor, 398.

used have a different legal sense in different States, then there will be a presumption in favour of that sense which attaches in the State upon which the obligation is imposed (*k*).

Conflict of Treaties.—In cases where two treaties conflict, the rules commonly laid down are as follows: (1) Where the conflict is between two treaties made between the same Powers, at different times, then that which was last entered into will be preferred, it being presumed to have been made in substitution for the earlier; save, perhaps, in cases when the latter was made by inferior authority (*l*). (2) Where the conflict is between two treaties made at different times between different States, then it is said that the earlier will prevail, for the reason that it is not permissible to derogate from an earlier engagement made with one State by a subsequent engagement made with another, without the former's assent (*m*).

INTERNATIONAL DELINQUENCIES AND METHODS OF REDRESS SHORT OF WAR.

THE CASE OF THE SILESIAN LOAN.

[1752; De Martens, Causes Célèbres, ii. 97.]

Case.] In 1744 war broke out between Great Britain, on the one hand, and France and Spain, on the other. Towards the end of 1745 certain Prussian subjects commenced to load cargoes of merchandise on French account; whereupon several Prussian vessels laden with French goods were captured by British cruisers, and their cargoes condemned on the ground that they were enemy property or property embarked in the enemy trade. By the end of 1748 some eighteen Prussian vessels as well as thirty-three other neutral vessels, chartered in whole or part by Prussian subjects, had been thus captured and brought in for adjudication on similar grounds. In effecting these seizures Great Britain followed her usual maritime practice, which was based on the principles (1) that neutral property found on enemy ships, not being contraband, was exempt from capture; (2) that property belonging to the enemy or embarked in the enemy trade,

(*k*) Hall, 346. For a fuller discussion of this subject, see the references given in note (*z*), p. 345, *supra*.

(*l*) Hall, 350; Taylor, 399.

(*m*) *Ibid.* A list of English and American decisions which touch on the question of interpretation of treaties will be found in Phill. ii. 130 *n*; and Halleck, i. 318.

found on neutral vessels, was liable to capture; and (3) that property having a contraband character was liable wherever found. By way of reprisal the King of Prussia thereupon confiscated certain funds which had been hypothecated to British subjects in consideration of a loan of money which had been made by them on the security of the revenues of Silesia; a debt which he had bound himself to repay by certain treaties entered into in 1742.

Controversy.] In substance the two main questions in issue between the parties were: (1) as to the legality of the proceedings adopted by Great Britain with respect to the capture of the Prussian vessels and their cargoes; and (2) as to the legality of the proceedings adopted by Prussia in confiscating debts due to British subjects, by way of reprisal and indemnity. On these points the Prussian contention was, shortly: (1) That neither by the laws of nature nor by the law of nations had Great Britain any jurisdiction over property found in neutral vessels on the high seas, except in the case of contraband, whereas the goods in the present case were not of that character; and (2) That, in view of such captures having been illegal, the King of Prussia was entitled to utilise funds under his control, not so much by way of reprisal as by way of compensation, even though such funds might have been hypothecated to British subjects. In Great Britain these questions were referred for report to a commission, consisting of one of the judges, and the Attorney-General, the Solicitor-General, and the Judge-Advocate-General (*n*), who advised, in effect: (1) That, according to the recognised principles of international law, the British seizures were justifiable, on the grounds (a) that property belonging to the enemy was liable to seizure, even though found on neutral vessels, and (b) that contraband was also liable to seizure, even though belonging to neutrals; and (2) That the law of nations permitted reprisals in two cases only: (a) in cases of violent wrong directed and supported by the sovereign authority, and (b) in cases of a denial of justice by all tribunals and by the sovereign authority itself in matters not admitting of doubt. It was further pointed out that the practice

(*n*) De Martens uses foreign terms, but these appear to be the officials referred to.

of reprisals would not warrant the seizure of debts owing to private individuals; especially in a case where the Sovereign effecting such seizure had bound himself in honour to pay such debts, and in a case where, at the time of the seizure, the payment of the debt had already accrued due.

Settlement.] After much further discussion and negotiation the matter was finally settled by the Treaty of Westminster, 1756, whereby, in consideration of Prussia agreeing to pay off the loan according to the original contract, Great Britain undertook to pay a sum of £20,000 to Prussia in discharge of all claims (*o*).

The controversy in this case turned largely on the question of the liability of enemy property, not being contraband, found on neutral vessels. At the time of the dispute two rival principles prevailed with respect to the liability of property to maritime capture in time of war. According to one, which was generally followed by Great Britain, the liability of the property was determined by the nationality of its owner; with the result that enemy goods found on neutral vessels were liable, whilst neutral goods, not being contraband, found on enemy vessels went free. According to the other, which was generally followed by other European nations, the liability of the property was determined by the nationality of the vessel; with the result that enemy goods on neutral vessels went free, whilst neutral goods on enemy vessels, unless exempted by treaty, were held liable. This matter, however, is now regulated as between nearly all civilised States by the Declaration of Paris, 1856, the effect of which, in relation to the earlier law, will be considered later (*p*). The case is therefore cited mainly as illustrating an application, although in the circumstances seemingly an improper application, of a mode of redress falling short of war, known as "reprisals." This method of redress once filled an important place in all treatises on the law of nations; and even now claims some notice, although it has greatly decreased in importance. Reprisals are strictly acts of retaliation, and may be either "hostile reprisals," which belong to the subject of war (*q*), or "pacific reprisals." The latter are acts of retaliation which are unfriendly in their nature, but which are not in themselves intended to set up a state of war. Such reprisals are sometimes classed as "general" or "special." But of these, "general reprisals" (*r*) appear to involve the adoption of actual measures of hostility both against the offending State and its subjects, and to constitute really a preliminary to or concomitant of war. So, on the outbreak of war between Great Britain and Russia,

(*o*) See also Phillimore, ii. 33.

(*p*) *Infra*, vol. ii.

(*q*) Being in fact acts of retaliation generally on innocent parties, resorted to in order to punish some violation of the usages of war committed by the enemy; *infra*, vol. ii.

(*r*) This term is, however, sometimes identified with public reprisals; see Hall, 383 *n*.

in 1854, an Order in Council was isued authorising "general reprisals against the ships, vessels, and goods of the Emperor of All the Russias, his subjects, and other inhabitants of his dominions" (*s*). "Special reprisals," on the other hand, are acts of retaliation, limited in their nature or scope, resorted to by one State in order to extort satisfaction for some injury to itself or its subjects, for which justice has been denied or unreasonably delayed, but without embarking in open war. There was formerly a distinction between "public reprisals," in virtue of which an aggrieved State issued letters of marque and reprisal to its armed forces or agents; and "private reprisals," in virtue of which it issued letters of reprisal to particular individuals who had suffered injury at the hands of some other State or its subjects. But the practice of issuing letters of reprisal to private individuals has now been abandoned, and reprisals in so far as they are still resorted to are now carried out only by the State or its agents. With this much of the earlier learning on the subject of reprisals has fallen into abeyance. Measures of reprisal may be either "positive" or "negative" in their character. "Positive reprisals" consist in the seizure of any property belonging either to the offending State or its subjects. So, in 1834, President Jackson, in recommending to Congress the adoption of reprisals against France, urged that it was "a well-settled principle of international law that when one State owes another a liquidated debt which it refuses or neglects to pay, the aggrieved party may seize property belonging to the delinquent State or its subjects, sufficient to pay the debt, without giving just cause of war" (*t*). But the seizure by way of reprisal of the property of private individuals other than commercial property (*u*), would now probably be reprobated. "Negative reprisals," on the other hand, consist in the refusal to discharge some admitted obligation owing to the offending State, whether under treaty or otherwise. Of this form of reprisals the action of the King of Prussia in the case of the Silesian loan affords an example; although the reprisals, in this particular case, were, by general assent, regarded as unjustifiable (*x*). At the present time reprisals, in so far as they are still resorted to, are usually applied to minor Powers, and generally take the form of a temporary occupation of a port or some part of the territory of the offending State, or a seizure of customs duties, or the imposition of an embargo on vessels, or the institution of a pacific blockade. So, amongst recent instances, Great Britain, in 1895, seized the port of Corinto and levied the customs duties there, until Nicaragua agreed to make reparation for injuries inflicted on British subjects. France, in 1901, seized a port in the island of Mitylene, until Turkey agreed to satisfy certain contractual claims on the part of French citizens. The Netherlands, in 1908, blockaded the ports of Venezuela and seized two gunboats by way of reprisal for illegal interference with her trade and the expulsion of her Minister. Other forms of procedure by way of reprisal will be considered hereafter. Reprisals, whether of this or

(*s*) See Phill. iii. 20.

(*t*) Phill. iii. 41.

(*u*) And even this is not usually confiscated, at any rate in cases of embargo or pacific blockade; *infra*, p. 352.

(*x*) *Supra*, p. 347; Phill. iii. 34, n. (*e*).

the earlier kind, if they do not lead to war, have the advantage of being limited in their operation, of not involving any general disturbance of trade or treaties, and also of not affecting private interests outside the immediate scene of the operations (*y*). Somewhat different in their object are those summary measures, such as the shelling of a village or the bombardment of a town, which are occasionally resorted to by civilised States for the purpose of punishing or preventing the continuance of outrages or wrongs committed against their subjects by members of uncivilised communities (*z*).

THE "BOEDES LUST."

[1804; 5 C. Rob. 233.]

Case.] In 1803 various disputes arose between Great Britain and Holland, with the result that on the 16th of May in that year an embargo was imposed on all Dutch property found in British ports. By virtue of this embargo, the "Boedes Lust," a Dutch vessel, was seized on the 19th of May. In the following month war actually broke out between the two countries. On the captors proceeding to adjudication, the property was claimed on behalf of certain persons resident in Demerara, on the ground that they were not, either at the time of the seizure or at the time of the adjudication, in the position of enemies of Great Britain. It appeared that at the time of the seizure Demerara was a Dutch settlement; but it was urged on behalf of the claimants that even if this were so, yet, inasmuch as the property had been seized before any actual declaration of war, it could not be regarded as enemy property. It was also urged that inasmuch as in the course of the war Demerara had passed under British control, the property could not be deemed enemy property at the time of adjudication. Notwithstanding these contentions, a decree of condemnation was pronounced by the Court.

Judgment.] Sir William Scott, in giving judgment, stated, in effect, that a seizure under an "embargo" was at first equivocal. If the matter in dispute had been settled, the

(*y*) These differences are well stated in *Gray* v. *U. S.* (21 Court of Claims, 340; Scott, 452).

(*z*) See Wharton, Dig. i. 229, and ii. 595; and on the subject of "reprisals" generally, Hall, 379; Taylor, 435; Westlake, L. Q. R., April, 1909.

seizure would have been converted into a mere civil embargo (*a*), and the property would have been restored. But if, as actually happened in the present case, hostilities ensued, then the outbreak of war had a retroactive effect, and rendered all property previously seized liable as enemy property seized under a measure hostile *ab initio*. Such property was then liable to be used as the property of persons guilty of injuries which they had refused to redeem by any amicable alteration of their measures. As to the second contention, he must hold that the property at the time of the capture belonged to subjects of the Batavian Republic, and that the subsequent acquisition of Demerara by Great Britain would not preclude the consequence of their original hostile character.

An embargo consists in the provisional seizure or detention by a State of ships or property—generally, although not invariably—in its own ports. A civil embargo is not an international proceeding, and usually applies only to vessels of the State that imposes it; having for its object the protection of commerce or other interests (*b*). A hostile embargo, on the other hand, consists in the provisional arrest by one State, of ships or goods belonging to the subjects of another State, against which there is some cause of complaint; this either as a means of extorting redress short of war, or as a measure anticipatory to war. But in neither character does it now possess much importance. As a measure anticipatory of war it has now been virtually abandoned, in deference to a usage which has recently developed, and which is now embodied in the "Convention relative to the Status of Enemy Merchant Ships at the Outbreak of Hostilities," framed by The Hague Conference, 1907 (*c*). By virtue of this modern custom a belligerent not only waives his right of seizure in anticipation of war, but even concedes to enemy vessels which are, at the time of the outbreak of war, either in or on their way to his ports, liberty to depart or to enter and depart, as the case may be, together with a further immunity from seizure on the return voyage to their own country (*d*); although these provisions do not apply to merchant ships whose build shows that they are intended for conversion into warships (Art. 5), as to which the earlier right of seizure remains; but if the other belligerent refuses to accord reciprocity, the old right of seizure is revived (*The Marie Leonhart*, [1921] P. 1). As a measure of redress short of war a

(*a*) "Civil" only in the sense of not involving a confiscation of the property.

(*b*) As to civil embargo in English law, see Phill. iii. 44.

(*c*) Arts. 1 to 4; Whittuck, p. 152.

(*d*) As to the application of this rule, see *The Buena Ventura* (175 U. S. 384; and *infra*, vol. ii.).

hostile embargo might, indeed, still be resorted to; and in such a case the right of confiscation would seemingly still attach, if satisfaction were refused or if the embargo led to war. But such a measure would now scarcely be applied to vessels belonging to a major Power; whilst, as regards minor Powers, this form of embargo has been for the most part superseded by an embargo of a more efficient kind, which consists in the detention of the vessels of the offending State in its own ports, in which character it really appears to be an incident of "pacific blockade" (*e*).

AN ARBITRATION HELD IN 1903 BETWEEN GREAT BRITAIN, GERMANY, AND ITALY, AND VENEZUELA, WITH OTHER POWERS INTERVENING.

[Parl. Papers, 1902-4; British and Foreign State Papers, vols. 95, 96 (1901-2, 1902-3); Article by W. L. Penfield (Solicitor to Dept. of State, U.S.A.), N. A. Rev., July, 1903; Scott's Hague Reports, p. 55.]

Events leading to Arbitration.] For some time prior to 1902 the conduct of the Government of Venezuela and the action of the Venezuelan authorities towards foreign residents and in relation to foreign interests had provoked much dissatisfaction on the part of other Powers. Great Britain, in particular, had addressed a number of complaints to the Venezuelan Government, with reference to the seizure of British vessels, interferences with the person and property of British subjects, and the occasional violation of British territory. Germany also alleged certain grievances arising out of injuries sustained by German subjects during the civil wars of 1898 and 1900. Other Powers had reason to complain of the non-fulfilment of contractual obligations incurred by the Venezuelan Government toward their subjects. All attempts to obtain satisfaction having proved ineffectual, in December, 1902, the Governments of Great Britain and Germany, and, at a somewhat later stage, the Government of Italy, agreed to adopt joint measures of reprisal against Venezuela, for the purpose of enforcing a settlement of these claims. In pursuance of this arrangement, the Venezuelan warships were seized by the British and German squadrons, several

(*e*) As to the relation between the two, see p. 359, *infra*; and on the subject of embargo generally, Hall, 381; Taylor, 432.

of them being sunk in the process. In consequence of a further outrage on a British vessel at Puerto Caballo, certain adjacent forts were also atacked, and one of them demolished. A blockade of the Venezuelan ports was also decided on. Great Britain appears to have contemplated from the first a war blockade (*f*). But Germany, on the 12th of December appears to have proposed a pacific blockade, under which the vessels of other Powers would have been turned away but not otherwise penalised. The latter proposal, however, was resisted by the Government of the United States, which adhered to the position previously taken up on the occasion of the blockade of Crete in 1897, and refused to acquiesce in any extension of the doctrine of pacific blockade which might adversely affect the rights or commerce of States that were not parties to the controversy. In deference to this objection, the project of a pacific blockade was abandoned in favour of an ordinary war blockade. A blockade was thereupon proclaimed of various Venezuelan ports and the mouths of the Orinoco River, to take effect as from the 20th of December, and the requisite notifications to that effect were isued by the allied Powers (*g*). Meanwhile a proposal already made by the United States for a reference of the dispute to arbitration was considered, and ultimately accepted by the Powers; subject to the reservation of certain claims, as to which immediate payment was insisted on. In January, 1903, these terms were provisionally accepted by Venezuela. In the negotiations which followed an attempt was made to bring about an immediate settlement of all outstanding claims, including those of other Powers; but this project was defeated by the insistence on the part of the allied Powers that their claims should be settled in priority to those of other Powers. On the 13th of February, 1903, however, a definite arrangement was come to, and the blockade was thereupon raised. The protocols in which this arrangement was embodied were to the following effect: (1) Venezuela recognised in principle the justice of the claims preferred by each of the blockading Powers. (2) Venezuela also agreed to satisfy immediately certain claims,

(*f*) This seems evident from the instructions to Vice-Admiral Douglas on December 11, and the accompanying "Instructions for Naval Officers" (B. and F. S. P. 95, 1114-5).

(*g*) See B. and F. S. P., 95, 1126.

amounting to about £5,500, on the part of Great Britain, arising out of the seizure of British vessels and maltreatment of British subjects; to make an immediate payment of a similar amount to Germany, on account of a sum of 1,718,815 bolivares (francs), agreed to be due to German subjects; and also to make an immediate payment of a similar amount to Italy in satisfaction of a point of honour, as well as a subsequent payment of 2,810,255 bolivares in respect of other claims. (3) All other claims by the three Powers were to be referred to a mixed commission, subject, however, to an admission of liability by Venezuela, in cases where the claim was for injury to or wrongful seizure of property (*h*). (4) The mixed commission was to consist of one member nominated by the complainant Powers, and one by Venezuela, and in case of disagreement an umpire to be nominated by the President of the United States. (5) For the purpose of discharging the claims of the allied Powers, as well as similar claims on the part of other Powers, Venezuela agreed to pay over, as from the 1st of March, 1903, 30 per cent. of the customs revenue of the ports of La Guayra and Puerto Caballo to the Bank of England branch at Caracas; any further questions arising out of this arrangement being made referable to The Hague tribunal. (6) Venezuela also undertook to make new arrangements with respect to her external debt. (7) All Venezuelan vessels seized by the Powers were to be restored. (8) The blockade was to be raised immediately. (9) Express provision was also made for the renewal and confirmation of certain treaties between Venezuela and two of the Powers, that might otherwise have been regarded as having lapsed by reason of the war.

Similar arrangements were also entered into between Venezuela and various other Powers, including the United States, France, Spain, and Mexico, so far as related to the reference of their claims to a mixed commission and their right to share in the funds allocated for payment.

By a further protocol between Great Britain and Venezuela it was agreed that the question as to whether the blockading

(*h*) The only question in such cases, apparently, being whether the injury took place, and, if so, what compensatoin was due.

Powers were entitled to preferential or separate treatment in the matter of payment should be submitted to arbitration; it being left to the Emperor of Russia to name from amongst the members of the Permanent Court (*i*) three persons, not being subjects or citizens of any of the signatory or claimant Powers, to act as arbitrators; each claimant having, however, right to be represented at the arbitration. Protocols to the same effect were entered into with Germany and Italy; and also with other Powers having claims against Venezuela.

The Arbitration and Award.] In the result the Emperor of Russia appointed M. Mouravieff, Secretary of State; Professor Lammasch, of the University of Vienna; and M. de Martens, Privy Councillor, as a Court of Arbitration. By a unanimous award, delivered on the 22nd of February, 1904, the Court decided, in effect, that Germany, Great Britain, and Italy had a right to preferential treatment for the payment of their claims; and that they were further entitled to prior payment out of the funds which had been assigned by Venezuela for the discharge of such claims. This conclusion was based (*inter alia*) on the following grounds: (1) That Venezuela, in the protocols of the 13th of February, 1903, had recognised the principle of the justice of the claims preferred by Germany, Great Britain, and Italy, whilst in the protocols entered into with other Powers the justice of their claims was not recognised in principle; (2) That prior to the end of January, 1903, Venezuela had not protested against the pretension of the blockading Powers to special security for the satisfaction of their claims, and had, indeed, always drawn a formal distinction between "the allied Powers" and "the neutral or pacific Powers"; (3) That the neutral Powers had not protested against such preferential treatment, either at the moment the war came to an end or immediately afterwards; (4) That the undertaking on the part of Venezuela to offer special guarantees for the discharge of its engagements had been entered into only with the allied Powers; and, finally, (5) That inasmuch as the neutral Powers had taken no part in the warlike operations against Venezuela, they could not be deemed to acquire any direct rights

(*i*) See p. 36, *supra*.

thereunder, even though they might in some respects profit by their results.

Although the dispute in this case did eventuate in war, yet the war was in fact but a minor incident. The proceedings as a whole serve to illustrate the application, in cases of international wrongdoing, both of the older customary and the newer conventional methods of redress falling short of war. Incidentally also they touch on the disputed question of the legality of "pacific blockade"; and also serve to illustrate the introduction into the litigation of States of many of those incidents and principles which attend litigation as between private persons.

The facts disclosed are shortly these: A State is guilty of divers breaches of international duty towards other States. All attempts to procure satisfaction by other methods having proved ineffectual, three of the Powers aggrieved determine to have recourse to forcible measures of redress. These comprise various measures, which, in the wider sense, may be called measures of reprisal; done without declaration or intention of war. A pacific blockade is also proposed by one of the Powers, but relinquished owing to objections raised by another Power. Finally, a war blockade, attended by the ordinary incidents of war, is resorted to. At this stage, however, an amicable adjustment involving reference of the dispute to arbitration is suggested by a neutral Power, and ultimately agreed to by all parties, subject to certain admissions and to the giving of certain securities for the performance of the award. By the agreement of reference the offending State, as to certain claims, admits its liability both in fact and principle, and damages are assessed, and provision made for their payment; whilst as to other claims liability is provisionally admitted, but subject to proof of facts (*k*), and the assessment of damages by minor arbitral bodies. Meanwhile the question of preference which had arisen as between the active claimants, Great Britain, Germany, and Italy, on the one hand, and other claimants, such as France, Belgium, Spain, and Holland, on the other, is referred to the decision of a Court of Arbitration appointed under The Hague Convention of 1899; and in these proceedings the latter States appear as interveners.

In the arbitration which ensued, a preliminary question was raised as to the onus of proof. This question the Court decided, in accordance with the practice in previous arbitrations, in favour of a similar presentation of cases, to be followed by counter cases. On the main question it was argued on behalf of the interveners that to give preference to the blockading Powers would be to put a premium on aggression; whilst on behalf of the active claimants it was argued that to deny such preference, and to allow other creditors to participate in the security which they had succeeded in obtaining at their own risk and expense, would be to rob the diligent creditor of the fruits of his

(*k*) Including, apparently, the non-existence of circumstances amounting to a justification.

diligence, and put a premium on "standing by." In the result the preference was conceded, for the reasons set out in the award.

Incidentally, the controversy discloses several other interesting features. (1) It had been alleged by Venezuela, by way of counter-claim, that Great Britain was responsible for injuries arising out of the proceedings of the "Ban Righ," an insurgent gunboat, alleged to have been fitted out in British waters, in violation of the Foreign Enlistment Act. As to this it appears that this vessel had in fact been detained by the British authorities, but had been released on the assurance of the Minister for Colombia that she belonged to that Government, and on the ascertainment from Venezuela that no war existed between the two States. (2) On the question of "blockade," it appears to have been recognised by Great Britain that the establishment of a blockade of the Venezuelan ports created *ipso facto* a state of war between the two countries (*l*). (3) With respect to the effect of the war on treaties, by a protocol of the 13th of February, 1903, between Great Britain and Venezuela (Art. 7), it was agreed in effect, that inasmuch as it might be contended that the blockade had *ipso facto* created a state of war, and that any treaty existing between the two countries had been thereby abrogated, it should be recorded by an exchange of notes that the treaty of amity and commerce of the 29th of October, 1834, should be renewed and confirmed. (4) Finally, as regards the Monroe doctrine, in reply to an announcement by Great Britain of her intention to resort to forcible measures against Venezuela, Mr. Hay appears to have stated that whilst regretting the use of force by European Powers, against Central and South American countries, the United States Government could not object to such Powers taking steps to obtain redress for injuries suffered by their subjects, provided that no acquisition of territory was contemplated (*m*). In reply to a similar announcement on the part of Germany, Mr. Hay also quoted the declaration of President Roosevelt in his message of the 3rd of December, 1901, that "the Monroe doctrine is a declaration that there must be no territorial aggrandisement by any non-American Power on American soil"; but that "we do not guarantee any State against punishment, if it misconducts itself, provided that punishment does not take the form of acquisition of territory on the American continent or the islands adjacent" (*n*).

GENERAL NOTES.—*Methods of settling Disputes other than War.*—In the controversies of States war is only a last resource; and the experience of nations has devised various methods by which disputes may be adjusted, or a settlement enforced, without recourse to war. Some of these methods are wholy amicable; such are diplomatic

(*l*) Despatch, Lord Lansdowne to Sir M. Herbert, 13th of January, 1903 (96 B. & F. S. P., at p. 481; although treated as open to doubt by the protocol.

(*m*) Telegram, Sir M. Herbert to Lord Lansdowne, 16th of November, 1902 (95 B. and F. S. P., at p. 1084).

(*n*) As to the Monroe doctrine itself, see 11 B. and F. S. P., p. 4; Wharton, Dig. i. § 57; Taylor, part ii. ch. 6; and Wheaton (Dana), 97.

negotiation, the appointment of commissions of inquiry, and the acceptance of mediation or arbitration, all of which have been previously considered (*o*). Other methods, whilst not amicable, yet involve no threat of force; such are the withdrawal from diplomatic communication (*p*), and the adoption of measures of retorsion. Others, again, although begun without declaration or intention of war, yet involve the use of force to an extent calculated to bring the alleged wrongdoer to his bearings, and to constrain him either to agree to a peaceful settlement or to declare war; such are reprisals, and in particular that form of reprisals which takes the shape of embargo, or pacific blockade. Somewhat different, both as regards their occasion and their object, are those proceedings which are resorted to either by a combination of the leading Powers or under their direction, for the purpose of enforcing on some delinquent State measures deemed necessary in the interests of international peace or order. Such proceedings usually take the form of a military or naval demonstration, or a pacific blockade, or military intervention; and may perhaps be regarded as measures of international police.

Retorsion.—Retorsion is a form of retaliation; extending, however, only to measures which, whilst unfriendly, are yet strictly within the right of the Power adopting them, and which do not afford a cause of war. So, if one State imposes embarrassing restrictions on municipal intercourse, or taxes unduly the imports from another State, the latter may have recourse to analogous measures, or to other measures of an unfriendly but non-hostile character, for the purpose either of inducing a change of policy or by way of retaliation. So, prior to the war of 1904, when Saghalien belonged wholly to Russia, the latter Power issued regulations, which were quite within her territorial right, for the purpose of excluding Japanese fishermen from the waters of Saghalien; whereupon Japan, by way of retorsion, threatened to impose differential duties on Russian imports; with the result that the obnoxious regulations were rescinded (*q*).

Reprisals and Embargo.—The general nature of reprisals, and of an embargo levied by way of reprisal, have already been considered (*r*). Reprisals differ from retorsion in so far as they extend beyond the sphere of imperfect rights, and will generally afford a cause of war if the Power against which they are directed is willing and able so to resent them. But at the present time they are commonly resorted to only as against minor Powers; and then usually take the form of a temporary occupation of some port or area belonging to the offending State (*s*). Even the modern embargo usually takes the form of a provisional detention of vessels belonging to the offending State in its own ports; and in this character constitutes an incident of, although it is not otherwise identical with, "pacific blockade."

Pacific Blockade: (i) *Its General Character.*—A pacific blockade consists in the temporary suspension of the commerce of an offending or recalcitrant State, by the closing of access to its coasts, or some particular part of its coasts, but without recourse to other hostile

(*o*) See especially p. 35, *supra*.
(*p*) *Supra*, pp. 85, 313; Taylor, 432.
(*q*) On the subject generally, see Hall, 379; Taylor, 434.
(*r*) *Supra*, pp. 349, 352.
(*s*) *Supra*, p. 353.

measures. save in so far as may be necessary to enforce this restriction. In this character the practice is of comparatively recent growth. At bottom, however, it would appear to be merely a special application of the older system of embargo; with the difference that the embargo is now imposed on the vessels of the offending State in its own ports; although the use of the term "blockade" (*t*) and the false analogy thus set up has occasionally led to the claim to extend its effects to the vessels of other States. When confined to vessels of the offending State, and limited to mere sequestration, it has the sanction of a large body of theoretical opinion (*u*). Even apart from these limitations, it has the support of a certain measure of usage, although with much divergence as to its incidents (*x*). It is commonly resorted to in practice, either (1) by way of reprisals and as a method of redress short of war; or (2) as a measure of international police.

(ii) *As a Method of Redress Short of War.*—As a method of redress short of war, pacific blockade has been resorted to in the following instances (*inter alia*): In 1831 France, in reprisal for injuries alleged to have been inflicted on French subjects by Portugal, and without any declaration of war, forced the passage of the Tagus, seized a number of Portuguese vessels, and blockaded other ports, until Portugal had agreed to make reparation. In this case the blockade was only enforced against Portuguese vessels, and even these, with the exception of warships, were eventually restored. In 1838 France, again without any declaration of war, instituted a blockade of the ports of Mexico, and also enforced this against the vessels of other States; but in the result war was declared by Mexico, and all vessels previously sequestrated were condemned. From 1838 to 1840 Buenos Ayres was blockaded by France, and from 1845 to 1848 by France and Great Britain, in each case without any declaration of war, and without involving other hostilities than those incident to the enforcement of the blockade. In this case also the blockade was enforced against the vessels of other States. In 1850 Great Britain instituted a blockade of Greek ports and laid an embargo on Greek vessels, for the purpose of exacting redress for injuries alleged to have been inflicted on British subjects; but in this case the blockade was confined to Greek vessels. In 1862 Great Britain instituted a similar blockade of Rio de Janeiro and laid an embargo on Brazilian vessels, for the purpose of exacting redress for the plunder of a British ship that had been wrecked on the Brazilian coast. In 1884 France, whilst still purporting to be at peace with China, proclaimed a blockade of a portion of the coast of Formosa, which then belonged to China, proposing to treat British and other vessels as liable to capture and condemnation, whilst at the same time

(*t*) The term "pacific blockade" appears to have originated with Hautefeuille, about 1850.

(*u*) So, in 1887 it was declared by the Institute of International Law to be permitted by the law of nations, subject to certain conditions, including the exemption of neutral vessels, due notification and enforcement, and the ultimate restoration of vessels sequestrated. These rules will be found in Encycl. of the Laws of England, ii. 183.

(*x*) On the subject generally, see Hall, 383; Taylor, 444; and articles by Sir T. E. Holland, Fortnightly Review, July, 1897, and Westlake, L. Q. R., Jan., 1909.

claiming to exercise the privilege of coaling her fleet at Hongkong; but this pretension was resisted by Great Britain, with the result that France ultimately accepted a state of war. A similar pretension was put forward by France in 1893, when blockading Siam, and with a similar result. In 1902 Germany proposed a pacific blockade of the ports of Venezuela, under which the vessels of other Powers would have been debarred from access, although without incurring the penalty of condemnation (*y*); but, in deference to objections of the United States that such a proceeding would prejudice the interests and commerce of other States that were not parties to the controversy, this proposal was abandoned in favour of a war blockade (*z*).

(iii) *The Question of its Legality.*—With respect to the legality of pacific blockade, such a question can scarcely arise as between the two Powers at issue, for the reason that the imposition of such a blockade may be treated as an act of war by the State on which it is imposed; and international law has not yet assumed to determine what constitutes a just cause of war. Such a proceeding is, in fact, only resorted to as a method of redress against States greatly inferior in power to the State employing it. It does not, however, appear to be more open to abuse than other methods of redress; for weak States often presume upon their weakness, and the resort to it is now likely to be held in check by international opinion. At the same time, if the blockade should be brought to an end without resulting in war, then it seems that vessels and property seized ought to be restored; for the reason that the right to condemn is an incident peculiar to war (*a*). With respect to States that are not parties to the controversy, the legality of pacific blockade would seem to depend on its scope. Any direct interference with the commerce and commercial vessels of another State is prohibited, except to belligerents, and as an incident of actual war, which entails certain correlative obligations. If, therefore, under the guise of pacific blockade, and without the admission of a state of war and its attendant obligations, it is sought to impose restrictions on the commerce of other States, and more especially if it is sought to enforce such restrictions by capture and condemnation, then such proceeding would appear to be inadmissible (*b*). But if it be confined to the imposition of an embargo on the vessels of the offending State in its own ports, and more especially if vessels laden with foreign cargo before notification of the blockade are exempted from its operation, then it would seem, in principle at any rate, unobjectionable; for the reason that it involves no direct interference with the commerce of other States, and probably no greater interference, even of an indirect kind, than might be caused by many other acts which are admittedly legitimate. It has, moreover, as we have seen, the sanction of a certain measure of usage (*c*). Indeed, a recourse to this method of redress is in a proper case even commendable, as being at once more humane and more limited in its scope than actual war (*d*).

(*y*) *Supra*, p. 354.

(*z*) For a more detailed account of these instances, see Pacific Blockade, by A. E. Hogan, 1908.

(*a*) Taylor, 445.

(*b*) Hall, 386.

(*c*) Although this often transcends the limits which are here suggested as permissible: *supra*, p. 360.

(*d*) *Supra*, p. 350; Hall, 387.

(iv) *As a Measure of International Police.*—In some cases a pacific blockade has been resorted to by European Governments, acting in concert, for the purpose of enforcing on some recalcitrant State measures deemed necessary to international peace and order. Thus, in 1833 Great Britain and France blockaded the coast of the Netherlands, in order to compel that Power to acquiesce in a settlement which had been arrived at by the Great Powers of Europe in 1830, with respect to the independence and neutrality of Belgium. In 1886 a blockade of the coasts of Greece was undertaken by the Great Powers of Europe, other than France, for the purpose of preventing Greece from embarking in a war with Turkey, under circumstances which would have led to the reopening of the Eastern question, and the possible jeopardising of the peace of Europe. In this case the blockade and embargo were applied only to vessels under the Greek flag. In 1897 the Great Powers of Europe, with a similar object, instituted a pacific blockade of the coasts of Crete, which, aided by Greece, was then in a state of insurrection against Turkey, and desirous of union with the former country (*e*). In this case the vessels and commerce of other Powers were subjected to restriction, in so far as related to the supply of munitions of war and other articles destined for the Greek troops or insurgents. The legality of pacific blockade as a measure of international police would appear to be governed by the same considerations as those applicable in cases where it is resorted to by way of reprisal; although, inasmuch as it is in such cases the result of united action, and undertaken for a common international purpose, it is in fact less open to effectual challenge.

Naval and Military Demonstrations.—Another measure of international police, which is, however, not immediately coercive, takes the shape of a naval or military demonstration, involving such a display of force as is calculated to bring some recalcitrant State to its bearings. This mode of pressure may be resorted to either by several Powers in combination or by a single Power. In 1880 a demonstration of the former kind was resorted to as a means of inducing Turkey to carry out the provisions of the Treaty of Berlin, and subsequent conventions, and especially the cession of Dulcigno to Montenegro (*f*). In 1901, a demonstration of the latter kind was made by France against Turkey; and in 1908 by the Netherlands against Venezuela (*g*).

(*e*) In the result Crete was made an autonomous principality, under the suzerainty of Turkey, *supra*, p. 62.

(*f*) For other instances, see Taylor, 442.

(*g*) In both these instances, however, the demonstration was ultimately followed by other measures, see p. 350, *supra*.

APPENDIX.

FINAL ACT OF THE SECOND INTERNATIONAL PEACE CONFERENCE (*a*).

The Second International Peace Conference, proposed in the first instance by the President of the United States of America, having been convoked, on the invitation of his Majesty the Emperor of all the Russias, by her Majesty the Queen of the Netherlands, assembled on the 15th of June, 1907, at The Hague, in the Hall of the Knights, for the purpose of giving a fresh development to the humanitarian principles which served as a basis for the work of the First Conference of 1899.

The following Powers took part in the Conference: Germany, the United States of America, the Argentine Republic, Austria-Hungary, Belgium, Bolivia, Brazil, Bulgaria, Chili, China, Colombia, the Republic of Cuba, Denmark, the Dominican Republic, the Republic of the Ecuador, Spain, France, Great Britain, Greece, Guatemala, the Republic of Haiti, Italy, Japan, Luxemburg, Mexico, Montenegro, Nicaragua, Norway, Panama, Paraguay, the Netherlands, Peru, Persia, Portugal, Roumania, Russia, Salvador, Servia, Siam, Sweden, Switzerland, Turkey, Uruguay, and the United States of Venezuela.

At a series of meetings, held from the 15th of June to the 18th of October, 1907, in which the above delegates were throughout animated by the desire to realise, in the fullest possible measure, the generous views of the august initiator of the Conference and the intentions of their Governments, the Conference drew up for submission for signature by the Plenipotentiaries, the text of the Conventions and of the Declaration enumerated below, and annexed to the present Act:

(1) Convention for the pacific settlement of international disputes; (2) Convention respecting the limitation of the employment of force for the recovery of contract debts; (3) Convention relative to the opening of hostilities; (4) Convention respecting the laws and customs of war on land; (5) Convention respecting the rights and duties of neutral Powers and persons in case of war on land; (6) Convention relative to the status of enemy merchant ships at the outbreak of hostilities; (7) Convention relative to the conversion of merchant ships into war-ships; (8) Convention relative to the laying of automatic submarine contact mines; (9) Convention respecting bombardment by naval forces in time of war; (10) Convention for the adaptation to naval war of the

(*a*) The text of the Final Act and Conventions, included in this Appendix, is based for the most part on the translation contained in the Parliamentary Papers, Misc. No. 1, 1908; by the kind permission of the Controller of H.M. Stationery Office.

principles of the Geneva Convention; (11) Convention relative to certain restrictions with regard to the exercise of the right of capture in naval war; (12) Convention relative to the creation of an international prize court; (13) Convention concerning the rights and duties of neutral Powers in naval war; and (14) Declaration prohibiting the discharge of projectiles and explosives from balloons.

These Conventions and this Declaration shall form so many separate Acts. These Acts shall be dated this day, and may be signed up to the 30th of June, 1908, at The Hague, by the Plenipotentiaries of the Powers represented at the Second Peace Conference.

The Conference, actuated by the spirit of mutual agreement and concession characterising its deliberations, has agreed upon the following declaration, which, while reserving to each of the Powers represented full liberty of action as regards voting, enables them to affirm the principles which they regard as unanimously admitted:

It is unanimous (1) in admitting the principle of compulsory arbitration; (2) in declaring that certain disputes, and in particular those relating to the interpretation and application of the provisions of international agreements, may be submitted to compulsory arbitration, without any restriction.

Finally, it is unanimous in proclaiming that, even though it has not yet been found feasible to conclude a Convention in this sense, nevertheless, the divergences of opinion which have come to light have not exceeded the bounds of judicial controversy, and that, by working together here during the past four months, the collected Powers not only have learnt to understand one another and to draw closer together but have succeeded in the course of this long collaboration in evolving a very lofty conception of the common welfare of humanity.

The Conference has further unanimously adopted the following Resolution:

The Second Peace Conference confirms the Resolution adopted by the Conference of 1899 in regard to the limitation of military expenditure; and inasmuch as military expenditure has considerably increased in almost every country since that time, the Conference declares that it is eminently desirable that the Governments should resume the serious examination of this question.

It has besides expressed the following *vœux:*

(1) The Conference calls the attention of the signatory Powers to the advisability of adopting the annexed draft Convention for the creation of a Court of Arbitral Justice, and of bringing it into force as soon as an agreement has been reached respecting the selection of the Judges and the constitution of the Court.

(2) The Conference expresses the opinion that, in case of war, the responsible authorities, civil as well as military, should make it their special duty to ensure and safeguard the maintenance of pacific relations, more especially of the commercial and industrial relations, between the inhabitants of the belligerent States and neutral countries.

(3) The Conference expresses the opinion that the Powers should regulate, by special treaties, the position, as regards military charges, of foreigners residing within their territories.

(4) The Conference expresses the opinion that the preparation of

regulations relative to the laws and customs of naval war should figure in the programme of the next Conference, and that in any case the Powers may apply, as far as possible, to war by sea the principles of the Convention relative to the laws and customs of war on land.

Finally, the Conference recommends to the Powers the assembly of a Third Peace Conference, which might be held within a period corresponding to that which has elapsed since the preceding Conference, at a date to be fixed by common agreement between the Powers, and it calls their attention to the necessity of preparing the programme of this Third Conference a sufficient time in advance to ensure its deliberations being conducted with the necessary authority and expedition.

In order to attain this object, the Conference considers that it would be very desirable that, some two years before the probable date of the meeting, a preparatory Committee should be charged by the Governments with the task of collecting the various proposals to be submitted to the Conference, of ascertaining what subjects are ripe for embodiment in an international regulation, and of preparing a programme which the Governments should decide upon in sufficient time to enable it to be carefully examined by the countries interested. This Committee should further be entrusted with the task of proposing a system of organisation and procedure for the Conference itself.

In faith whereof the Plenipotentiaries have signed the present Act, and have affixed their seals thereto.

Done at The Hague, the 18th of October, 1907, in a single copy, which shall remain deposited in the archives of the Netherlands Government, and duly certified copies of which shall be sent to all the Powers represented at the Conference (*b*).

(*b*) This Act has been signed by all the Powers represented at The Hague Conference of 1907, with the exception of Paraguay; or by forty-three in all, although in one case with a reservation.

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BOOKS FOR LAW STUDENTS.

SUBJECT INDEX.

SWEET & MAXWELL, LIMITED, 3 Chancery Lane, London, W.C.2.

Suggested Course of Reading for the Bar Examinations.

ROMAN LAW.

Hunter's Introduction or Kelke's Primer or Epitome. Advisable also is Sandars' Justinian.

CONSTITUTIONAL LAW.

Chalmers & Asquith. Thomas's Leading Cases. Hammond's Legal History.

CRIMINAL LAW AND PROCEDURE.

Odgers' Common Law, or Harris's Criminal Law, and Wilshere's Leading Cases.

REAL PROPERTY.

Williams (with Wilshere's Analysis), or Edwards. For revision, Kelke's Epitome.

CONVEYANCING.

Deane & Spurling's Introduction, and Clark's Students' Precedents. Or Elphinstone's Introduction.

COMMON LAW.

Odgers' Common Law (with Wilshere's Analysis), or Indermaur's Common Law; or Carter on Contracts, and Fraser on Torts. Cockle's Leading Cases.

EVIDENCE AND PROCEDURE.

Odgers' Common Law, Phipson's Manual of Evidence, Cockle on Evidence, Wilshere's Procedure.

EQUITY.

Snell or Wilshere. For revision, Blyth's Analysis.

COMPANY LAW.

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